



REACHING THE PROMISED LAND:

**AN ALTERNATIVE TO THE REPORT OF THE PRESIDENTIAL
ADVISORY PANEL ON LAND REFORM AND AGRICULTURE**

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REACHING THE PROMISED LAND

Introduction

The ANC's determination to embark on expropriation without compensation (EWC) – nationalisation by another name – can be traced at least as far back as 1955, when the Freedom Charter called for the 're-division of the land among those who work it' and for 'the mineral wealth beneath the soil, the banks, and monopoly industry to be transferred to the ownership of the people as a whole'. EWC is thus not a new idea, and has little to do with rectifying land reform failures since 1994.

In the past 20 months, major progress has been made towards these Freedom Charter goals. Four developments are particularly important:

- the ANC's decision, made at its Nasrec policy conference in December 2017, to introduce EWC to speed up land reform;
- Parliament's December 2018 decision that the Constitution must be amended to allow EWC;
- the tabling for public comment of an Expropriation Bill providing for 'nil' compensation in wide-ranging circumstances unlikely to be limited to land;
- the work being done by an ad hoc parliamentary committee tasked with drawing up an EWC constitutional amendment bill; and
- the publication of the final report of the Presidential Advisory Panel on Land Reform and Agriculture.

The ANC's determination to embark on expropriation without compensation (EWC) – nationalisation by another name – can be traced at least as far back as 1955, when the Freedom Charter called for the 're-division of the land among those who work it' and for 'the mineral wealth beneath the soil, the banks, and monopoly industry to be transferred to the ownership of the people as a whole'. EWC is thus not a new idea, and has little to do with rectifying land reform failures since 1994.

These five developments are vital in understanding where we are on EWC. Both the constitutional amendment bill and the Expropriation Bill are being driven by propaganda and ideology, not practical assessments of how to fix land reform or overcome poverty. The adoption of these laws – now scheduled to take place after the May 2019 general election – will greatly damage the country's economy. A better way forward must thus be found. This should be done by calling a halt to all EWC proposals. Also needed are practical measures to shift rural land reform from failure to success, help address urgent housing needs in urban areas, and unleash the country's enormous growth potential.

EWC and the Constitutional Review Committee

Since 2005 the ANC and many land activists have repeatedly blamed the failures of land reform on the inflated prices the state has ostensibly been forced to pay in buying up land for restitution or redistribution. In 2007 the ANC's Polokwane national conference thus resolved to put an end to the 'willing-buyer, willing-seller' principle. It also pledged to enact new expropriation legislation to promote this change.¹

An initial expropriation bill was put forward in 2008, but withdrawn because of its obvious unconstitu-

tionality. It was followed by a second bill in 2013 (also abandoned), and a third one in 2015. Though this last measure was adopted by Parliament in 2016, President Jacob Zuma declined to sign it into law because the legislature had cut short the public consultation process required by the Constitution.² However, the ANC was arguably already planning to change the Constitution to allow EWC – and might have wanted to delay the enactment of the bill so as to include EWC provisions in it as well.

Soon after the ANC decided to introduce EWC at its Nasrec national conference in December 2017, the EFF put forward a motion urging Parliament to enact a constitutional amendment along these lines. In February 2018, this motion (somewhat modified by the ANC) was adopted by the National Assembly. It ‘instructed’ a parliamentary committee, the Joint Constitutional Review Committee, to ‘review Section 25 of the Constitution and other sections where necessary to make it possible for the state to expropriate land in the public interest without compensation’. It also instructed the committee to obtain the views of ordinary South Africans and other stakeholders regarding ‘the necessity of...expropriating land without compensation’.³

From June to August 2018, the committee held a total of 34 public hearings in all nine provisions on the EWC issue. At these hearings – attended by an estimated 34 000 people in total – most of the individuals given the opportunity to speak (generally for three minutes at most) favoured an EWC constitutional amendment. Relatively few of the people opposed to such a change were given the chance to talk. Those who did speak out against EWC were sometimes shouted down, while others were intimidated, bullied, and even attacked.⁴

The committee also invited the public to send in written submissions. At least 449 500 valid written submissions were sent in, 65% of which opposed an EWC amendment. Having looked at only 400 of these documents – and disregarded 99.9% of the written comments sent in – the committee recommended in November 2018 that the Constitution should indeed be amended to allow EWC.⁵ In December 2018 both the National Assembly and the National Council of Provinces endorsed this recommendation, so paving the way for a bill amending the Constitution to be drafted and put before the legislature for adoption.⁶

Having looked at only 400 of these documents – and disregarded 99.9% of the written comments sent in – the committee recommended in November 2018 that the Constitution should indeed be amended to allow EWC.

In accepting the committee’s defective recommendation, Parliament breached its constitutional obligation to facilitate proper public involvement in its legislative processes. AfriForum tried to have the legislature’s decision set aside on the basis of this procedural irregularity. However, its application was thrown out by the Western Cape high court. This was primarily because the Constitutional Court had ruled in 2008 that the judiciary cannot intervene in the passing of new laws until the legislative process has been completed. This indicates that no challenge to the committee’s procedural irregularities can be brought until after the constitutional amendment bill has been adopted.⁷

In December 2018 Parliament appointed an ad hoc committee to start drafting an EWC constitutional amendment bill. The committee began its work in February 2019, when former land minister Ms Thoko Didiza was appointed as its chair (see *Section 4*, below). In the interim, a fourth version of the Expropriation Bill was tabled for public comment in December 2018. This measure was supposed to be put before Parliament after the May election, but this has not yet been done.⁸

EWC and the Expropriation Bill of 2019

The Expropriation Bill of 2019 (the Bill) is the ‘law of general application’ that will be needed to give effect to the pending EWC amendment to the Constitution. The Bill deals with three key issues.

First, the Bill sets out some of the circumstances in which ‘nil’ compensation will be paid on a ‘direct’ expropriation: one in which the state takes ownership of the property in question. *Second*, it describes the

procedures to be followed by municipalities and other organs of state in carrying out direct expropriations, whether these are for nil compensation or more. Third, it includes a ‘definition’ of expropriation which has been carefully crafted to look harmless on the surface. However, this definition will also allow ‘nil’ compensation for a host of ‘indirect’ expropriations: ones in which the state does not take ownership, but people nevertheless suffer significant losses.⁹

Nil compensation for direct expropriations

According to the Bill, ‘it may be just and equitable for nil compensation to be paid’ for expropriated land which:¹⁰

- is occupied or used by a labour tenant;
- has been ‘abandoned’ by its owner;
- is held ‘for purely speculative purposes’;
- is worth less than the state subsidies from which it has benefited; or
- is owned by a state-owned entity which consents to the expropriation.

This list, with its five examples, is intended to reassure South Africans that EWC will be sparingly used and justifiably applied. However, the circumstances in which EWC may be deployed are expressly ‘not limited’ to those set out in this list. They may thus extend far beyond the five instances set out.

Much of the wording in this clause is unacceptably vague. The word ‘speculation’, for example, is defined (in the *New Shorter Oxford English Dictionary*) as ‘the action or practice of investing... in property in the hope of profit from a rise... in market value, but with the possibility of a loss’.

Virtually all properties will fall within this definition, for most owners hope their farms, homes, or other assets will go up in value over time and yield at least some profit on their sale. How then are officials from a host of different expropriating authorities to decide when property is held ‘purely’ for the purpose of making a profit from it over time? Inevitably, different officials will come to different conclusions in different factual situations, making for an arbitrary and uneven application of the Bill.¹¹

The Bill empowers a host of state entities – including all municipalities and other organs of state with expropriating powers under other laws – to expropriate land and other property by following a set of specified procedures. These are heavily skewed against the owner and in favour of the government.

Skewed procedural provisions

The Bill empowers a host of state entities – including all municipalities and other organs of state with expropriating powers under other laws – to expropriate land and other property by following a set of specified procedures. These are heavily skewed against the owner and in favour of the government.¹²

A municipality which wants to expropriate residential or other land – say, to reduce spatial apartheid by facilitating more RDP housing – must begin by investigating the property and negotiating for its purchase with the owner. If no agreement is reached, the municipality may issue a notice of its intention to expropriate. In this notice, it must invite representations regarding the proposed expropriation and the compensation offered. The municipality is obliged to consider any representations received, but it need not respond to them or give reasons for rejecting them.¹³

Once it has taken these simple preliminary steps, the municipality may issue a notice of expropriation. Under this notice, both ownership and the right to possess the property will automatically pass to it on the dates set out in the notice.¹⁴

The date for the transfer of ownership could be a mere week after the service of the notice (the only time limit in the Bill is that this date ‘must not be earlier than the date of service’ of the notice). The right to possess the property could pass to the municipality within another week.¹⁵

The owner may seek mediation or apply directly to the courts to challenge the validity of the expropria-

tion (whether it is really ‘in the public interest’) and/or the amount of compensation offered (if this is truly ‘just and equitable’).¹⁶ In cases falling outside the ‘nil’ compensation categories earlier described, this compensation is likely to be set – under a valuation formula governing all property targeted for ‘land reform’ – at around half of market value and sometimes at zero (see *Section 3* below). However, most people will lack the means for such legal challenges and will find them particularly difficult to mount if they have already lost ownership and possession of their homes or other vital assets.

Owners will also be able to seek relief in the courts if the compensation remains unpaid for months (or years) after ownership and possession have passed to the municipality. They will likewise be able to raise administrative justice objections if the time between the service of the expropriation notice and the passing of ownership and possession is unreasonably short. In practice, however, most people will again lack the means for such litigation.¹⁷

Under the Bill, law-abiding home owners will have fewer rights than criminals illegally using a warehouse they own to store heroin and other drugs. Though the warehouse may be seized by the state under asset forfeiture legislation, this can be done only after its use for criminal purposes has been proved and a court order for its confiscation has been obtained. But a home can be expropriated by a municipality by following the simple steps set out above – and without ever having to prove to a court that the expropriation is really in the public interest or that the compensation is truly just and equitable.

Perversely, the Bill acknowledges the need for a prior court order before a municipality can enter on to property it wants to investigate with a view to subsequently expropriating it. It also says that a temporary expropriation cannot generally be implemented – and certainly cannot be extended – without a prior court order. But when it comes to the far more serious matter of a permanent expropriation, the Bill excludes the need for a prior court order.¹⁸

The Bill says that a temporary expropriation cannot generally be implemented without a prior court order. But when it comes to the far more serious matter of a permanent expropriation, the Bill excludes the need for a prior court order, which is clearly unconstitutional.

Allowing organs of state to expropriate property in this way is clearly unconstitutional. By excluding the need for a prior court order confirming the constitutionality of a proposed permanent expropriation, the Bill contradicts:

- Section 25 of the Constitution, which lays down the criteria which all valid expropriations must fulfil;
- Section 34, which gives everyone a right of access to court; and
- Section 33, which guarantees the right to administrative justice.

Where the property to be expropriated includes a person’s home, any attempt to evict the former owner without a prior court order authorising this eviction is also inconsistent with Section 26 of the Constitution.

‘Nil’ compensation for indirect takings too

The ANC’s assurance that nil compensation will seldom apply overlooks the definition of ‘expropriation’ in the Bill. This has been carefully crafted to look innocuous on the surface. However, its effect will be to allow nil compensation for a host of other expropriations as well.¹⁹

To understand the significance of the Bill’s definition, the difference between ‘direct’ and ‘indirect’ expropriation needs to be unpacked. A ‘direct’ expropriation arises where the state takes ownership of property. An ‘indirect’ expropriation does not involve the acquisition of ownership by the state and could take the form of either a ‘custodial’ taking or a ‘regulatory’ expropriation.

A ‘custodial’ taking arises where the state takes custodianship of property – as it has already done as regards all mineral and water resources. A ‘regulatory’ expropriation arises when the state does not itself take ownership of property, but its regulations deprive existing owners of many of the normal powers and benefits of ownership. This happens, for instance, where the state imposes significant price controls on a

particular product, thereby preventing its owner from selling at market value. In this situation, the state does not acquire ownership of the product, but its regulations result in major losses to the owner.

Under customary international law, as well as most bilateral investment treaties (BITs), expropriation is defined in a broad way to include both 'direct' and 'indirect' expropriations. In South Africa, Section 25 of the Constitution (the property clause) does not define what 'expropriation' means. Under Section 39 of the Constitution, however, international law must be taken into account in interpreting the Bill of Rights. Under Section 232, moreover, customary international law forms part of South Africa's own body of law, unless a particular customary law rule is inconsistent with the Constitution or a statute. These provisions indicate that the term should be given its usual wide meaning.²⁰

However, the Constitutional Court's majority judgment in the *Agri SA* case in 2013 has arguably begun to narrow this accepted meaning. In this case, Chief Justice Mogoeng Mogoeng indicated that expropriation requires the acquisition of ownership by the state. This meant that the state's 'assumption of custodianship' over an unused mining right (the issue before him) did not qualify as an expropriation, or merit the payment of any compensation.²¹

On this reasoning, further custodial takings by the state would not qualify as expropriations or require the payment of any compensation. Regulatory expropriations would be treated the same way, as these also do not transfer the ownership of affected assets to the state.

The Bill's definition of 'expropriation' is clearly based on Chief Justice Mogoeng's ruling. According to the Bill, 'expropriation' means the 'compulsory acquisition' of property by the state.²² On this basis, neither custodial takings nor regulatory expropriations will qualify as 'expropriations' because they do not transfer ownership to the state. Where no expropriation has occurred, no compensation will need to be paid.

According to the Bill, 'expropriation' means the 'compulsory acquisition' of property by the state. On this basis, neither custodial takings nor regulatory expropriations will qualify as 'expropriations' because they do not transfer ownership to the state.

The likelihood of custodial land takings

If no compensation is payable for custodial takings, this will encourage the state to take custodianship of all rural land, as the Preservation and Development of Agricultural Land Framework Bill of 2014 earlier envisaged. The government could also take custodianship of all other land – whether residential, mining, commercial or industrial – as the 2017 state land audit proposed and as the EFF constantly demands.²³

That this is what the ANC plans to do was confirmed by a senior manager in the Department of Rural Development and Land Reform, Masiphulo Mbongwa, in January 2019. Answering questions on the proposed EWC constitutional amendment at the World Economic Forum's meeting in Davos (Switzerland), Mr Mbongwa said that the government intends to amend Section 25 of the Constitution so as to vest all land 'in the people of South Africa'. Thereafter, it will enact a National Land Act, which will be similar to the National Water Act of 1998 and the MPRDA.²⁴

The National Water Act vests all water resources in the state as 'public trustee'. The MPRDA vests all mineral resources in the state as 'custodian'. A National Land Act along similar lines is likely, thus, to vest all land in the custodianship of the state.

Once the state has custodianship of all land, says EFF leader Julius Malema, 'every title deed will be meaningless' – and anyone needing land will have to obtain a 'land-use licence' from the state. These licences will generally last for 25 years, but could be terminated earlier if the state decides that this is in the public interest. These rules will apply not only to individuals but also to 'private corporations', which will find it difficult to borrow or invest when they have so little security of tenure over the land needed for their businesses.²⁵

The risk of many regulatory expropriations

Under the Bill's definition, a host of regulatory expropriations will also be able to proceed without the risk of compensation having to be paid. These takings will extend way beyond land, for both the Expropriation Bill and Section 25 define 'property' as 'not limited to land'. (According to the Constitutional Court, the meaning of 'property' is thus wide enough to include a licence to sell wine, as the court has already ruled.)²⁶

On this basis, BEE ownership targets could be pushed up to 51% without any compensation having to be paid for resulting forced sales of equities at prices below market value. Similarly, foreign security (and other) companies operating in South Africa could be subjected to 51% 'indigenisation' requirements – again, without compensation being payable. In addition:²⁷

- export and price controls could be placed on coal and all other minerals identified by the government as 'strategic' or needed for local beneficiation;
- damaging price controls could be imposed on all medicines, medical devices, and other healthcare goods and services under the proposed National Health Insurance (NHI) system;
- medical schemes could be confined to providing a single package of health services in return for (inadequate) monthly contributions decided by the state; and
- 'prescribed assets' could be introduced for pension and other financial institutions, thereby compelling them to invest in Eskom and other failing state-owned enterprises unlikely to deliver an adequate return on these investments.

All these regulatory expropriations are already either in the policy pipeline or under investigation by the ANC. If they proceed, many companies and other owners will suffer major losses, but will receive 'nil' compensation under the Expropriation Bill.

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Moreover, once Section 25 has been amended to allow nil compensation in appropriate (but no doubt unspecified) circumstances, any legal challenge to the constitutionality of these uncompensated losses will be difficult to mount.

EWC and Parliament's ad hoc committee

As earlier noted, the ad hoc committee appointed by Parliament to draw up an EWC constitutional amendment bill began its work in February 2019, with Ms Didiza's appointment as its chair. In mid-March the ad hoc committee reluctantly recognised that this bill could not be put before Parliament before the 8th May general election. Hence, no draft has been published and it remains uncertain what the bill will say.

In July 2019, following the May election, the new Parliament revived this ad hoc committee. It will continue with its earlier work, but will need a new chair as Ms Didiza is now minister of agriculture, land reform, and rural development. The committee has been instructed to report back by the end of March 2020 with proposals for the wording of a constitutional amendment that explicitly sanctions EWC.²⁸ To help it decide what the bill should include, the committee may continue inviting a (narrow) group of experts to provide it with their recommendations. It is also likely to draw significantly on the final report of the Presidential Advisory Panel on Land Reform and Agriculture (the panel), which was publicly released on 28th July 2019.

Report of the Presidential Advisory Panel

Expropriation the main mechanism for land acquisition

The panel cautions that unconditional and 'wholesale' (sic) expropriation without compensation (EWC) would 'collapse the core underlying values of our Constitution'. But it nevertheless endorses EWC in supposedly limited circumstances, listing ten instances in which zero compensation would be appropriate: for

example, where land has been ‘abandoned’, or is held ‘purely for speculative purposes’, or is ‘hopelessly indebted’. However, it also makes it clear that the circumstances meriting ‘nil’ compensation are ‘not limited to’ the ones that it lists.²⁹

The panel further recommends that Section 25 of the Constitution should indeed be amended to ‘make it explicit’ that EWC is at times allowed, and to ‘move away’ from the mandatory compensation currently required. The panel also puts forward the relevant wording to be used, suggesting that the amendment authorise ‘Parliament to enact legislation determining instances that warrant expropriation without compensation for purposes of land reform’.³⁰

This proposed wording is inordinately dangerous, for it would authorise the adoption of virtually any land EWC bill. Moreover, once the panel’s proposed constitutional amendment is in place – and the constitutional settlement that now protects the property rights of all South Africans has been unravelled in this way – any subsequent EWC bill will need only a bare parliamentary majority to be enacted into law.

The panel also recommends that municipalities across the country, including those in urban areas, should use ‘the input of local residents’ to identify well-located and appropriately serviced land that is suitable for redistribution. ‘Individual owners of properties that meet the criteria of land required for redistribution...may [then] offer their land as donations, or enter into negotiations with the state, failing which the state may proceed to expropriate’, it states.³¹

This approach is fundamentally coercive. In practice, it will also guarantee that expropriation becomes the favoured means of land acquisition – and this despite the panel’s statement that it should be only one out of several mechanisms to be used. It will also make it difficult for banks to accept land as collateral for loans, as virtually any land could be identified for redistribution in this way and then expropriated at well below market value. This will make it hard for farmers to raise the significant working capital they need (R160bn in 2018, for example).³² It will also make it more difficult for families to borrow to buy homes, thereby undermining one of the most important foundations for upward mobility.

The panel further recommends that Section 25 of the Constitution should indeed be amended to ‘make it explicit’ that EWC is at times allowed, and to ‘move away’ from the mandatory compensation currently required.

The report further suggests that expropriation in support of redistribution will continue until land ownership has become demographically representative. As the panel puts it, redistribution is ‘a crucial policy lever’ which can help ensure that ‘access’ to land ‘reflects the demographics of the country’. The panel also seems to think that the government should seek to ‘redistribute the country’s 72% of land which is in private ownership’.³³

An agrarian ‘revolution’ as well

According to the panel, the entire ‘agricultural system’ must also be made ‘demographically representative of the national population’. This shift will form part of an ‘agrarian reform or revolution’, which is aimed at ‘supporting household and smallholder farmers’, ‘transforming...commercial production’, and introducing a ‘public-private food systems committee’ to oversee ‘food production and distribution systems’ and ‘align public and private approaches’.³⁴

In keeping with this agrarian revolution, the panel wants redistributed land to be allocated primarily to ‘farm dwellers, labour tenants, and subsistence farmers’ as well as ‘smallholder farmers producing for local markets’. It sees these small-scale farmers as ‘the backbone of rural livelihoods and food production’. It therefore seeks to protect them from ‘a globalised food system that favours concentrated large-scale and highly mechanised agribusiness’. It also aims to safeguard them from the ‘monopoly behaviour within the [local] food production chain’ that was allegedly ‘exposed’ by the Competition Commission in 2018.³⁵

To help achieve these objectives, the panel talks of ‘special interventions to support household and smallholder farmers’. It wants a ‘fundamental shift in agriculture practices’, so as to ‘improve rural and urban incomes’, produce ‘food that is more nutritious and accessible’, and realise a number of environmental benefits. Small-scale farmers, it says, must thus engage in ‘low-carbon’, ‘low-tillage’, and ‘agro-ecological farming methods’, marked (for example) by a shift from ‘feedlot production towards grass-fed livestock production’.³⁶

To reinforce the primacy of small-scale production over current commercial production, the panel recommends that water rights should be ‘re-allocated to smallholder farmers’, with priority given to those who ‘pursue alternative production methods’. The water sector, it adds, is already ‘constitutionally enabled to expropriate, but very little action has occurred’. Clearly, it wants this situation to change, even though (in other parts of its report) it recognises the need for ‘large-scale farming to maintain output’.³⁷

These recommendations are reminiscent of the One Household One Hectare (1HH1HA) policy adopted by the Department of Rural Development and Land Reform in 2015, along with the ‘One Household Two Dairy Cows’ (1HH2DC) policy the department has since proposed.

According to these policy documents, large swathes of rural land (including land acquired by the state for redistribution or restitution, or held by the government as custodian) must be divided into one-hectare plots, each of which will become home to one household and two dairy cows. The state will then supply the millions of households living on these plots with all the support they need for successful farming – from implements to fertilisers, seeds, cows, chickens, pesticides, pack sheds, irrigation, fencing, and broiler units.

South Africa is already 65% urbanised and is likely to be 70% urbanised by 2030. How are the cities realistically to be fed if so much of the country’s rural land is to be turned over to small-scale farming?

All one-hectare households will be organised into primary co-operatives, which in turn will be organised into secondary co-operatives. These, in turn, will jointly own a 70% share in the agri-parks being established to help small producers gain access to agri-processing and marketing.

These ambitious plans are neatly laid out in diagrams and organograms in a June 2017 briefing document compiled by the land department. Agriparks are already being established (at a projected overall cost of some R2bn), while close on R300m has been budgeted to settle an initial 6 700 households on their one-hectare sites.

However, South Africa is a water-stressed country in which one hectare often has limited crop-carrying capacity. In many areas, moreover, no fewer than five hectares are needed to support a single head of cattle. Hence, one hectare will often support a mere fifth of a cow – rather than the two dairy cows the government’s neat diagrams envisage.

In addition, South Africa is already 65% urbanised and is likely to be 70% urbanised by 2030. How are the cities realistically to be fed if so much of the country’s rural land is to be turned over to small-scale farming? A return to farming is also not what most South Africans want, as the shift to the cities clearly shows.

The ANC’s aim is nevertheless to turn the clock back to 1913 and restore ‘the beauty of ubuntu’ (as the land department’s June 2017 document puts it) by getting millions of people to take up peasant farming. The advisory panel’s report does not overtly espouse such aims – but its emphasis on household, subsistence, and small-scale farming suggests it may implicitly agree with these objectives.

Land tenure and land occupations

The panel seems conflicted on land tenure options. In an appendix to its main report, it stresses that ‘group farming models are universally unsuccessful’ and that both smallholder and commercial farming operations work best with individual ownership.³⁸

Group operations generally fail, the appendix goes on, because ‘projects are poorly designed’ and

'problems arise with managing labour, input and investment', leading to 'conflicts within communities'. Research into land reform projects in the North West, it adds, has shown that smaller groups (<5) are the most successful, that success rates decline as the number of participants increases, and that only a third of projects with 50 or more members succeed.³⁹

Individual smallholders operating on land which is owned by the state are also unlikely to succeed, the appendix notes, unless leases are long enough (at least five years) for farmers to be able to borrow working capital from banks. However, even this is not the best arrangement. Rather, 'the most prevalent and successful small farmer model around the world' is the one in which the smallholder is 'also the landowner'.⁴⁰

The appendix also acknowledges that 'commercial operations on privately owned land are the most successful' in global experience. 'The reason is that work, management and investment incentives are all aligned because of the private profit objective of the model and the farmers who use it. It is also the model of the large-scale commercial farming sector in South Africa, which has been a high performing sector in the past 20 years', despite the removal of the subsidies and policies that previously helped support it.⁴¹

Other contradictions on tenure rights are evident too. On the one hand, the panel endorses customary communal title to land, saying this should not be 'subservient' to private ownership rights. On the other hand, it criticises 'the very limited rights' such tenure gives to rural black women, in particular. Such women, it says, are 'economically incapacitated' by their dependence on males for access to land and still 'remain on the receiving end of patriarchal practices and brutality brought on by landlessness'.⁴²

In its main report, however, the panel gives short shrift to Western ideas of property ownership. South Africa's Roman-Dutch system, it says, with its 'privileging' of 'individual' and 'private' rights, 'wrongfully sidelines' the long-established benefits of communal land ownership under customary law. 'The supremacy of Roman-Dutch law thus remains a critical roadblock in forging out sustainable land reform'. But South Africa need not remain within the framework of 'oppressive' Roman-Dutch law, Western-imposed ideas, and the 'language of apartheid and colonialism'. Instead, there is now an opportunity to advance 'Afrocentric solutions'.⁴³

The panel notes that 'the most prevalent and successful small farmer model around the world' is the one in which the smallholder is 'also the landowner'. It also acknowledges that 'commercial operations on privately owned land are the most successful' in agricultural production in global experience.

The panel recommends a 'land tenure formula which ensures that communal land tenure rights are not subservient to private property rights ownership'. It criticises financial institutions for seeking to impose 'non-endogenous measures such as land titling' on rural communities, which 'should not have to reconcile themselves to the financial requirements and dictates of banks'. Instead, it says, 'it is incumbent on financial institutions to modify and transform their financial instruments' to meet community needs and 'take cognisance of the workings of the communal system that has stood the test of time'.⁴⁴

In keeping with these views, the panel 'warns against private titling of communal land'. Instead, it suggests that there should be 'different types and forms' of land tenure that align with different needs. A new system of land registration should be introduced, which would 'accommodate flexible and diverse systems of land rights within a unitary framework' and 'allow people to choose the tenure system most appropriate to their circumstances'. A Land Records Bill should therefore be speedily enacted to allow the estimated 60% of South Africans – who 'currently hold property "off-register" – to record and register their property'.⁴⁵

People living in informal settlements or who have occupied inner-city buildings must also be able to record their 'off-register' rights and be provided with 'proof of residence' and sufficient 'evidence to secure their rights'. In keeping with its emphasis on recognising informal rights, the panel further seeks a 'moratorium on all farm evictions'. It also wants priority for labour tenants in the land reform process, 'including via expropriation'.⁴⁶

In addition, the panel proposes ‘an end to the criminalisation of unlawful occupation by the poor’ and the ‘re-orientation’ of the police role in enforcing evictions. Adding that ‘unlawful occupation is not, in and of itself a crime’, it states that ‘authorities, including the Anti-Land Invasion Units and “Red Ants” need to protect the rights of vulnerably housed residents and occupiers’.⁴⁷

Though the panel does not spell this out, the implication is that trespass laws should be repealed, land invasions should become lawful – and the role of the Red Ants should be to protect land invaders, rather than evict them. But this would signal the collapse of the rule of law. Land would then increasingly pass to those most able and willing to use violence to expand their holdings. Ordinary people, and especially the poor, would suffer the most in this situation.

Financing of land reform

The panel recommends a new ‘compensation policy’, developed with the help of the Land Court, under which compensation will range from ‘zero’ to ‘minimal’ to ‘substantial’ to ‘market-related’, depending on the circumstances. This suggests that market value will become an exception to be allowed sparingly, if at all – for even ‘market-related’ compensation need not be the same as market value.⁴⁸

The panel claims such a policy would be in keeping with the Constitution. But the Constitution in fact requires compensation which is ‘just and equitable’, and which ‘reflects an equitable balance between the public interest and the interests of those affected’. In addition, individual owners should not be expected to foot the bill for effective land reform, which is a governmental responsibility. Nor should they be expected to compensate for the state’s failures to generate investment, growth, skills, and jobs over the past 25 years.

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The panel nevertheless seems to believe that white South Africans are at least morally obliged to contribute to the financing of land reform. ‘White farmers were not the only beneficiaries of the old regime, and most of those who benefited from apartheid live in urban areas while still benefitting from the injustices of the past’, it says. Hence, ‘voluntary financial donations’ should be made by ‘the financial services industry’, along with ‘the mining and manufacturing and other non-agricultural sectors’.⁴⁹

The panel makes no attempt to quantify the overall costs of its proposals. These range from extensive land acquisition (to be done on the cheap) to the establishment of a host of bureaucratic bodies to plan, implement, and monitor its manifold interventions.

The panel also fails to provide a convincing analysis of how these unquantified costs are to be covered. Its financing suggestions include a land tax on commercial farms, donations, and land reform bonds to be issued by the Land Bank. It further recommends ‘joint venture financing models’, to be implemented by ‘agribusinesses, large commercial farmers, property developers, and the commercial banks, amongst others’. Such initiatives, it suggests, might be modelled on the commitments already made by the Agricultural Business Chamber and the Banking Association of South Africa to match the state’s budget for land reform by providing loans at preferential rates over set periods.⁵⁰

The panel further seeks the introduction of ‘prescribed asset’ rules, though it does not use this terminology. Instead, it urges ‘a specific drive to mobilise the private sector, ie commercial banks, asset managers and pension funds, to respond to the urgency of financing the excluded majority’. This drive, it says, should also ‘mobilise land-reform related funding’.⁵¹

Institutions, investigations, policies, and laws

The panel wants a host of *new institutions* to be established. In addition to the ‘food systems committee’, it proposes a Land and Agrarian Reform Agency (Lara); an ‘expropriation body’ to complement the existing Office of the Valuer General (which is charged with valuing all land targeted for land reform); a ‘central

authority to proactively manage state land', a Land Reform Fund (complemented perhaps by 'equivalent urban land reform funds') to 'support land acquisition' and provide beneficiary funding of various kinds; a Consolidated Planning System; and a Land Depository to keep a proper record of all land parcels donated 'by mines, churches, municipalities, SOEs, government departments, absentee landlords and general land-owners'.⁵²

The panel also urges various *changes to existing institutions*. Among other things, it wants the current Land Claims Court to be renamed the Land Court and turned into a permanent institution; for all government departments involved in land redistribution to be compelled to provide 'a full range of technical, financial, resource, administrative, accounting, and other support to beneficiaries'; and for municipalities across the country to be made responsible (as earlier noted) for identifying land suitable for redistribution and then acquiring it by donation, negotiation, or expropriation. In addition, it wants the Deeds Registry to start recording and verifying the race, gender, and citizenship of all land owners – and suggests that those who fail to provide the necessary information should 'forfeit' their land to the state.⁵³

Various *investigations* are needed too, the panel says. It wants a comprehensive assessment of optimum land ceilings in different regions, so that 'surplus' land can be 'compulsorily acquired' by the state or 'punitively taxed'. It also wants a 'land tax inquiry' to examine the pros and cons of a land tax on agricultural land, which will be aimed at deterring the 'retention of large and unproductive land-holdings'. In addition, it seeks a more comprehensive audit of state and private (including trust and corporate) land ownership, coupled with a probe into foreign land ownership.⁵⁴

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The panel also wants to investigate the extent of 'land demand', as this is crucial to its proposal for 'a demand-driven land-reform process in which citizens are encouraged and supported to articulate their land demands'. It further seeks new methods of selecting beneficiaries, administering land, and allocating post-settlement support. In addition, it seeks 'policy clarity on agrarian reform', to be attained (at least in part) by the urgent convening of an 'agrarian reform summit'. It also wants a 'review', and then a re-allocation, of all 'dysfunctional farms' from previous land reform schemes.⁵⁵

Several new policies, backed by appropriate laws, must also be introduced, the panel proposes. Among other things:

- The 1913 cut-off date for land restitution claims should be repealed via a further constitutional amendment;⁵⁶
- a 'proactive' and 'coherent' land acquisition and allocation programme must be developed, which should extend to housing needs in urban areas;⁵⁷
- the purchase by foreigners of coastal land, 'strategic' land, and land required for redistribution must be prevented;⁵⁸
- a national land rights protector must be introduced to help put a stop to 'land-related corruption in all forms' and 'manage state accountability for the enforcement and implementation' of relevant policies and laws;⁵⁹
- the Ingonyama Trust Act, which vests almost all communal land in KwaZulu-Natal in the trusteeship of Zulu monarch King Goodwill Zwelithini, must be repealed and the trust disbanded entirely;⁶⁰ and
- a comprehensive monitoring and evaluation system must be developed, which must start by defining 'what constitutes "success" for different land reform objectives' and then collect and analyse all relevant data, including figures on 'production in communal areas' and the 'multiplier effects of land reform on local economies'.⁶¹

The ideology behind the EWC demand

Ever since the ANC took power in 1994, it has been busy implementing a national democratic revolution (NDR) aimed at taking South Africa, by gradual and incremental steps, from a free market to a socialist and then communist economy. The ANC first embraced the NDR back in 1969. It has recommitted itself to this ongoing revolution at each of its five post-1994 national conferences: at Mafikeng in 1997, Stellenbosch in 2002, Polokwane in 2007, Mangaung in 2012, and Nasrec in 2017.

The NDR is a Soviet strategy, which was developed by Moscow in the 1950s to help take newly independent colonies in Asia and Africa from capitalism to communism over a period of time. However, the NDR idea was initially difficult to apply to South Africa, as the country had gained independence from Britain in 1910 and so ceased to be a colony. In addition, white South Africans had been living in the country for hundreds of years, making it questionable whether they could be identified as colonial outsiders who should simply be sent back to their imperial homes.⁶²

In 1950, however, the Communist Party of South Africa (CPSA) claimed to have found a way around these difficulties. According to the CPSA, South Africa had ‘the characteristics of both an imperialist state and a colony within a single, indivisible, geographical, political and economic entity’. In this ‘colonialism of a special type’ (CST), white South Africa was effectively an ‘imperialist state’ and black South Africa was its ‘colony’. This also meant, or so the Communist Party claimed, that the wealth of white South Africans had nothing to do with enterprise, skill, or technological innovation. Rather, it derived solely from the ruthless dispossession and exploitation of the black majority.⁶³

In 2002 the Stellenbosch Preface called for ‘the elimination of apartheid property relations’. The reference to ‘apartheid’ suggests that the aim is to provide redress. However, given the socialist objectives of the NDR, this word is a red herring.

Skewed land ownership in South Africa can readily be interpreted in a way that fits the CST narrative. It is also a long-standing injustice, which can be used to push not only for comprehensive land redistribution but also for a wider re-ordering of property rights. The ANC’s intention to nationalise property of various kinds was thus made clear in the Freedom Charter of 1955, which was drawn up with considerable communist input. This document, still regarded by the ANC as its ‘lodestar’, calls both for ‘the land to be re-divided’ and for the nationalisation of minerals, banks, and ‘monopoly industry’.⁶⁴

Similar demands feature strongly in the SACP’s 1962 programme, *The Road to South African Freedom*. This document calls for ‘drastic agrarian reform to restore the land to the people’ and so ‘lay an indispensable basis’ for the country’s ‘advance to a communist and socialist future’. The SACP’s 1989 programme, *The Path to Power*, further emphasises the need for land reform, calling for ‘state ownership of large-scale farms’, major ‘redistribution of land among the land-hungry masses’, and ‘the setting up of co-operative farms’.⁶⁵

In the post-apartheid period, ANC *Strategy & Tactics* documents have gradually become more open about NDR objectives. In 1997, the Mafikeng document spoke only of the need to ‘intensify land reform programmes’, so as to help rural communities and encourage agricultural production. In 2002, however, the Stellenbosch *Preface* called for ‘the elimination of apartheid property relations’. The reference to ‘apartheid’ suggests that the aim is to provide redress. However, given the socialist objectives of the NDR, this word is a red herring. Replace it with the word ‘existing’ and the real aim becomes apparent – to put an end to the private ownership of land and other assets.⁶⁶

Similar goals were expressed at the Mangaung conference in 2012, where the ANC resolved to embrace more ‘radical’ policies and confront ‘the dominance of the capitalist system’. The primary NDR objective was further clarified at the Nasrec conference in 2017, when the ANC resolved that ‘the expropriation

of land without compensation should be among the mechanisms available to give effect to land reform and redistribution'.⁶⁷

This resolution was carefully worded to suggest that EWC would be used sparingly and solely to speed up land reform. This type of messaging is typical of the ANC strategy (set out in the Stellenbosch *Preface*) of combining 'dexterity in tact' – superficially convincing but essentially empty reassurances – with 'firmness in principle': a determination to proceed irrespective of practical constraints or constitutional objections.⁶⁸

The real purpose behind the EWC demand is not merely to promote land transfers to black South Africans. The true objective is rather to deploy the land injustice as a 'wedge' issue that can in time be used to weaken property rights more widely (see *Section 2*). This is being done via incremental steps, as 'premature attempts to eliminate all private property' can alienate citizens and 'do incalculable harm to the quest for socialism', as the SACP warned in 1989.⁶⁹

Since the open expression of the NDR reasons for the EWC demand would also alienate most people, the ANC has instead relied on hostile racial rhetoric to buttress its EWC call. It has also steadfastly refused to acknowledge the real reasons for land reform failures, or how little the use of EWC is likely to remedy these shortcomings.

The propaganda being used to buttress the EWC demand

Since 1994, white farmers have repeatedly been stereotyped as incorrigible racists who commonly abuse, assault, and even kill their hapless farm workers. Evidence of good relationships between farmers and their employees has been ignored or played down, while incidents of violence on farms have been given major and often distorted coverage. This stigmatisation has paved the way for a major propaganda campaign in support of EWC. This campaign involves the constant repetition of various key themes, so as to conceal the truth and skew public perceptions. Racially charged rhetoric about whites having 'stolen' the land is a particularly important theme in this wider narrative.

Mr Zuma gave impetus to this narrative in 2015, when he blamed all the country's current problems on

Mr Malema has intensified the racial rhetoric with his frequent accusations that whites stole the land, his claims that whites 'committed a black genocide', and his persistent demand that the land be 'restored to the rightful owners, [who are] unashamedly black people'.

Jan van Riebeeck's arrival in 1652. In 2016 he followed up by declaring that the government should no longer pay for 'stolen' land, which was 'the key source of poverty, inequality and unemployment'. In 2017 he took the next step by identifying EWC as the solution, and saying the Constitution might have to be amended to allow this.⁷⁰

Other prominent ANC leaders have added to this racial rhetoric. 'Our land was stolen from our forebears, leading to the destruction of the asset base of the African people and resulting in the impoverishment of the black nation', said Cyril Ramaphosa in November 2017. 'White people...have looted and even stolen the land from black people' and yet they complain about the ANC's plans for radical economic transformation', said Nkosazana Dlamini-Zuma in December 2017. 'Let us not forget that the land was taken from the masses of our people through the brutal wars of dispossession during the colonial and apartheid eras', added land reform minister Maite Nkoana-Mashabane in March 2018. For many months after the Nasrec conference, moreover, Mr Ramaphosa repeatedly blamed whites for the 'original sin' of land dispossession.⁷¹

Mr Malema has intensified the racial rhetoric with his frequent accusations that whites stole the land, his claims that whites 'committed a black genocide', and his persistent demand that the land be 'restored to the rightful owners, [who are] unashamedly black people'. In February 2018, in introducing the EFF's motion for a constitutional amendment to allow EWC, Mr Malema derided Van Riebeeck as 'a criminal' and accused him of 'leading a full-blown colonial genocide, anti-black land dispossession criminal project'. He

also claimed that Van Riebeeck had treated black people ‘as part of the animal world’ and ‘disregarded their humanity’ because ‘they could not produce title deeds to the land they had been living in for more than a thousand years’.⁷²

These statements grossly distort the historical record. They also overlook the extent to which black people likewise acquired land by conquest and treaty during the colonial period. In this period, there were forcible land acquisitions not only by whites from blacks, but also by the Xhosa (King Hintsa) from the Khoi and the San; by the Hurutshe from the Tswana; by the Zulu (King Shaka) from the Hlubi, the Ngwane and the Swazi; by the Ndebele (King Mzilikazi) from the Tswana; by the Kgatla from the Po; by the Tswana in the Kalahari area from the Khoi, the San, the Kgalagadi, and the Yei; and by many other groups against their weaker rivals. In addition, after the discovery of gold on the Witwatersrand in 1886, the independent Voortrekker republics in the Orange Free State and Transvaal were defeated by Britain in the Anglo-Boer War and brought under the sovereignty of the British Crown.⁷³

This complex history is once again ignored in the panel’s recent report on land reform, which speaks solely – and often in distorted terms – of ‘the conquest of the land of the African people by Europeans in South Africa’.⁷⁴ The historical record is also being set at naught by increasingly hostile political rhetoric singling out whites alone for blame. This rhetoric contradicts the preamble to the Constitution, which pays tribute to all those who ‘worked to build and develop our country’. In addition, it is premised on a doctrine of collective guilt which undermines the rule of law and the respect for individual human rights that underpins the Constitution.

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The reality behind the rhetoric

Since 1994, the ANC government has been pursuing a land reform programme with three key prongs: the restitution of land to the dispossessed, the redistribution of 30% of commercial farming land to black South Africans, and the granting of secure title to land to those lacking this. Some progress has been made towards these goals, but:⁷⁵

- some 20 000 land restitution claims lodged before December 1998 have yet to be finalised;
- only some 9.2 million hectares of land, less than half the 25.8 million target, have been acquired under both the restitution and redistribution prongs;⁷⁶
- some 17 million black people with informal rights to customary plots in the former homelands have yet to obtain secure tenure;⁷⁷ and
- most of the 7.5 million black people who own formal houses still lack title deeds to them.⁷⁸

In addition, as the government has previously acknowledged, between 70% and 90% of land reform projects have failed. Once thriving farms now lie fallow or produce only at subsistence levels. What this means, says journalist Stephan Hofstatter, is that the government, ‘by its own admission, has spent billions of rands in taxpayers’ money to take hundreds of farms out of production, costing thousands of jobs and billions more in lost revenue’.⁷⁹

Five reasons for these failures are particularly salient. First, the budget for land reform has rarely exceeded 1% of total budgeted expenditure, and has often been less. In the 2019/20 financial year, for instance, R3.6bn has been allocated to land restitution, which is a mere 0.2% of total budgeted state spending of some R1.83 trillion.⁸⁰

Second, in keeping with its NDR objectives, the ANC does not allow individual ownership for land reform beneficiaries. Restitution land is transferred either to traditional leaders or to communal property associa-

tions (CPAs), which often find themselves paralysed by internal divisions. Under the State Land Lease and Disposal Policy of 2013, redistribution land is now kept in state ownership and leased to disadvantaged farmers, which leaves them without collateral to raise working capital.⁸¹

Third, the government commonly assumes that access to land is sufficient for success in farming. In fact, as IRR policy fellow John Kane-Berman points out, land is only the first in a long list of requirements. No less important are entrepreneurship and working capital, along with know-how, machinery, labour, fuel, electricity, seed, chemicals, feed for livestock, security, and water. Yet little has been done to meet these further needs.⁸²

Fourth, many of the inexperienced people to whom land has been transferred have simply been dumped on farms with little effective support from the state. According to Salam Abram, an ANC MP who is himself a farmer, land reform has been a 'dismal failure' because no proper 'after-settlement' support has been provided to beneficiaries. White commercial farmers have often made great efforts to help, but their support has 'never really been accepted by the government'.⁸³

Fifth, the restitution process, in particular, has been dogged by so much inefficiency and corruption that officials often do not know how many claims they have received, how many they have gazetted, how many have been wrongly gazetted (and should be delisted), and how many have yet to be resolved. Moreover, once claims have been lodged, farmers are often reluctant to invest in land which they are likely to lose in due course. Hence, much of the land under claim – some of it for more than 20 years – is no longer fully worked. Agri SA has thus commented that the flawed restitution process has probably been 'done more damage to commercial agriculture than the Anglo Boer War'.⁸⁴

The government commonly assumes that access to land is sufficient for success in farming. In fact, land is only the first in a long list of requirements. No less important are entrepreneurship and working capital, along with know-how, machinery, labour, fuel, electricity, seed, chemicals, feed for livestock, security, and water.

The land reform process has also been abused to benefit ANC insiders, who use their political connections to get the state to buy them farms and then sell off cattle and other assets while allowing crop land to fall fallow. What Parliament's High Level Panel criticised as 'elite capture' of the land reform process⁵⁹ is illustrated by the case of the Bekendvlei Farm in Limpopo.

As the *Sunday Times* reports, two ANC members (one of whom had worked at Luthuli House for ten years), wanted to buy the farm but could not afford it. They spoke about this to land reform minister Gugile Nkwinti (who is alleged to have received R2m in return for his help, though this has never been proven). Thereafter, the farm was bought by the state and leased to the two men, even though they had no farming experience and were not listed on the department's data base of possible land reform beneficiaries.⁸⁶

Adds the *Sunday Times* report: 'Soon after the [two] men took over, there was no money to pay 31 workers on the farm. No wages were paid for five months and the farm became run down. Despite the department bankrolling an additional R30m for machinery, salaries, and construction, the once-thriving farm quickly fell into disrepair. About 3 000 cattle, worth R18m, were sold off, machinery disappeared and crops died... After four years of lavish spending and regularly failing to pay farm workers or make lease-agreement payments, Mr Nkwinti was forced to take legal action to evict the men.'⁸⁷

The High Level of Panel of Parliament, which was established in 2015 to investigate the impact of the thousand laws adopted by the ANC since 1994, acknowledged many of these fundamental obstacles to successful land reform. It also stressed that the cost of land acquisition was not a major factor in land reform failures, and advised against amending the Constitution, as described below. However, the High Level Panel's recommendations have been brushed aside in the ideological push for EWC.

The report of the presidential advisory panel also recognises that land reform has been undermined by limited budgets, gross inefficiency, persistent corruption, inadequate post-settlement support, uncertain tenure for beneficiaries, frequent policy shifts, and what it describes as a lack of ‘political will to expropriate land’.⁸⁸ However, the solutions it proposes are unlikely to be effective. Rather, they are likely to make present problems still worse, for all the reasons earlier outlined.

Ramifications of the EWC demand

Property rights, including the rights of individuals to own land, houses, and other assets, are vital to democracy, development, upward mobility, and rising prosperity for all. That is why the racially discriminatory laws that earlier barred black South Africans from owning land and houses in ‘white’ areas were so profoundly unjust.

Once these restrictions began to crumble in 1975 – and were at last abolished by the National Party government in 1991 – black ownership of houses, land, and other assets grew exponentially. To speed up this process, South Africa needs an annual growth rate of 7% of GDP – which would double the size of the economy every ten years – along with an upsurge in investment and employment. However, these advances will not be possible if the law is changed to allow EWC.⁸⁹

Under the Expropriation Bill, the 8.5 million black, so-called ‘coloured’, and Indian people who own their homes will be just as vulnerable to the expropriation of their houses as the 1 million whites with home ownership. The black South Africans who have already bought some 4 million hectares of farming land on the open market since 1991 could likewise see their farms expropriated by cash-strapped municipalities and other state entities. Some 17m black people with customary land use rights – especially those living near major cities – could have these informal rights expropriated too. So too could all land reform beneficiaries with leases or other use rights over the roughly 9.2 million hectares already acquired for restitution and redistribution, as earlier outlined.⁹⁰

Under the Expropriation Bill, the 8.5 million black, so-called ‘coloured’, and Indian people who own their homes will be just as vulnerable to the expropriation of their houses as the 1 million whites with home ownership. Some 17m black people with customary land use rights could have these informal rights expropriated too.

In all these instances, the people affected will be left without adequate compensation and with little effective redress for the loss of their homes, business premises, customary plots, or other vital assets. Often, these will be their only assets – built up by them over a lifetime of endeavour.⁹¹

If the government uses the definition of ‘expropriation’ in the Bill to vest custodianship of all land in the state under a National Land Act, all existing title deeds to land will effectively be negated. Everyone will need a land-use lease from the state. These leases will be vulnerable to early termination, irrespective of what contrary assurances may at times be provided.

Banks will find it difficult to accept land as collateral for loans. Individuals will see little reason to put money into the houses, farms, or plots they are leasing from the state, especially as these leases could be prematurely terminated. Businesses will increasingly decline to invest in fixed property. Access to land will become a key patronage tool for the ruling party. It will be used by the ANC to buttress the state’s coffers (through the rent that everyone will have to pay) and to shore up its own flagging electoral support – via warnings that land-use leases could be terminated in areas that vote against it.⁹²

Regulatory expropriations of the kind earlier outlined will further damage both individuals and businesses. Firms unwilling or unable to enter into 51% BEE or indigenisation deals may close down, retrenching many thousands of workers. Mines unable to break even at the ‘developmental prices’ set by the state for the minerals they extract could shutter many shafts, costing further jobs in the industry and the wider economy.

Depending on how low the state sets the prices they are allowed to charge under the NHI system, private hospitals could in time become unprofitable too. So too could many enterprises that currently supply medicines, medical devices, and a host of other healthcare goods and services. Doctors and other health professionals might also decide to emigrate, rather than accept the state's unrealistic limits on their fees.

Financially crippled medical schemes might cease to exist over time, leaving South Africa (as former health minister Dr Aaron Motsoaledi has mooted) with only one remaining medical aid: the state-run NHI Fund. The resulting state monopoly over healthcare is likely to be just as inefficient and corrupt as existing state monopolies over electricity (Eskom) and rail transport (Transnet and Prasa).

Pensioners and people saving for their retirement are likely to find their pension benefits much reduced. The compulsory loans that pension funds will have to make to Eskom and other failing SOEs are unlikely to generate the healthy returns that people need for a comfortable retirement.

The overall damage to the economy is likely to be incalculable. Incentives to invest, already limited, will diminish further. So too will growth and employment. Poverty will worsen, public debt will rapidly increase, inflation will spiral upwards, and people with skills in demand in other countries will find increasing reason to emigrate. Tax revenues will decline further, making it harder still for the government to pay the interest on its debt, let alone maintain social grants and the bloated public sector wage bill.

The damage to the quality of South Africa's democracy could also be enormous. The property clause was one of the most tightly negotiated compromises in the final Constitution and was crucial to the settlement reached. An EWC constitutional amendment would thus unravel one of the most important provisions in the Bill of Rights. It could also set a precedent for further damaging changes. The doctrine of judicial review, for example, is already being eroded through the ANC's significant control over judicial appointments. But the doctrine might then be jettisoned altogether, so that the legislation adopted by Parliament can no longer be 'undermined' by unelected judges. This would take South Africa back to the doctrine of parliamentary sovereignty and fundamentally weaken all constitutional safeguards against the abuse of power.

The compensation provisions in Section 25 are also not the reason for land reform failures, as the High Level Panel has stressed. Rather, the 'key constraints' on land reform are 'a lack of capacity, inadequate resources, and failures of accountability', among other things.

What, then, should be done?

The first imperative is to **jettison the pending constitutional amendment bill**, which should simply be abandoned. Expropriation is a drastic remedy, which should be used only as a very last resort. In addition, Section 25 of the Constitution already allows for compensation on expropriation to be set at less than market value where this is 'just and equitable'.

The compensation provisions in Section 25 are also not the reason for land reform failures, as the High Level Panel has stressed. Rather, the 'key constraints' on land reform are 'a lack of capacity, inadequate resources, and failures of accountability'. Adds the panel:⁹³

The Panel is reporting at a time when some are proposing that the Constitution be amended to allow for expropriation without compensation to address the slow and ineffective pace of land reform. This at a time when the budget for land reform is at an all-time low at less than 0.4% of the national budget, with less than 0.1% set aside for land redistribution. Moreover, those who do receive redistributed land are made tenants of the state, rather than owners of the land. Experts advise that the need to pay compensation is not the most serious constraint on land reform in South Africa to date – other constraints, including increasing evidence of corruption by officials, the diversion of the land reform budget to elites, lack of political will, and lack of training and capacity, have proved far more serious stumbling blocks to land reform.

The most important need is to overcome these barriers to success – not to put both property rights and political freedom at risk through wide-ranging EWC rules.

The **ad hoc committee** which has been mandated to develop a constitutional amendment bill allowing EWC should thus be disbanded. Instead, the ruling party should focus on how best to develop appropriate expropriation legislation, fix the problems in land reform, revitalize housing provision, and breathe fresh life into the economy via other essential policy shifts, as further outlined below.

New expropriation legislation is needed to bring the current Expropriation Act of 1975 into line with the Constitution. The 2019 Expropriation Bill needs, however, to be extensively recast. In keeping with an alternative bill developed by the IRR, the current measure must be amended so as to:⁹⁴

- a) bring its current narrow definition of expropriation into line with the broad meaning of expropriation in international law;
- b) require an expropriating authority, whenever a dispute arises, to obtain a prior court order confirming the constitutionality of a proposed expropriation before it issues a notice of expropriation;
- c) put the onus on the expropriating authority to prove that its intended expropriation is truly in the public interest and otherwise complies with all relevant constitutional provisions;
- d) provide expropriated owners with compensation for all resulting direct losses, such as moving costs and losses of income;
- e) ensure that people are paid the compensation due to them before ownership passes to the expropriating authority;
- f) remove the unnecessary, contradictory, and unconstitutional powers of expropriation specifically conferred on the minister of public works in Chapter 2 of the Bill; and
- g) remove the Bill's 'nil' compensation provisions.

In rethinking land reform, the government should acknowledge – as then director general of land Tozi Gwanya said in 2007 – that land transfers are meaningless unless they bring real benefits to the disadvantaged in terms of jobs created and incomes earned.

In **rethinking land reform**, the government should acknowledge – as then director general of land Tozi Gwanya said in 2007 – that land transfers are meaningless unless they bring real benefits to the disadvantaged in terms of jobs created and incomes earned. There is little point, as Mr Gwanya noted, in handing out land and 'ending up with assets that are dying in the hands of the poor'.⁹⁵

The IRR's 'Ipulazi' proposal

The steps needed to turn land reform in rural areas from failure to success are not difficult to discern. In the apartheid past, the formula for success was founded in particular on three essential elements: secure individual title, access to finance at preferential interest rates, and appropriate support from the state. These factors played a vital role in helping to build up the established commercial farming sector – and disadvantaged entrants deserve no less. Modern farming, however, generally requires both sophisticated skills and economies of scale to unlock maximum productivity, and these factors must also be taken into account.

The first essential is to shift the focus of policy from land to farming, as set out in the IRR 'Ipulazi' ('farm', in isiZulu) proposal. The crucial issue is not the scale or speed of (unproductive) land transfers, but how rather best to **increase** the number of successful commercial farmers. Disadvantaged farmers wanting to expand into large-scale production must be helped to do so. However, no one should be encouraged to believe that farming is an easy option, for agriculture is an exceptionally high-risk sector – and all the more so in a water-stressed country such as South Africa.⁹⁶

What of necessary financing for disadvantaged farmers? The first step is to quantify what is needed and then find innovative ways to **provide** it. A Commercial Farming Fund (CFF) should be established within the Land Bank, which should be responsible for issuing Farming Empowerment Bonds (FEBs) backed by

Treasury guarantees.⁹⁷ People and organisations that invest in these bonds will receive tax benefits and will also be entitled to CFF empowerment points (preferably in terms of a wider ‘economic empowerment for the disadvantaged’ or ‘EED’ empowerment strategy, as recommended by the IRR). The Commercial Farming Fund will use the monies thus raised from investors and donors, both domestic and foreign, to lend to established and disadvantaged commercial farmers. However, those who are disadvantaged – as identified on a socio-economic test – will benefit from preferential interest rates. Differences between prime and preferential interest rates will be financed by the state out of tax revenues, while the capital repayments made over time will help expand the monies available.

Disadvantaged farmers operating on their own would be able to borrow at particularly advantageous rates, set at between 0% and 2%. Established commercial producers who enter into joint ventures with disadvantaged farmers would be able to borrow at, say, between 3% and 6%. All other commercial farmers would pay market-related rates and would generally borrow at prime. Loans for land purchases should be repayable over lengthy periods (of 50 years or more), so as to reduce the burden of repayments. Such interest as is payable should be deferred (but capitalised) in the crucial early years, when new enterprises face particularly heavy start-up costs. Loans for capital spending should also have the benefit of extended repayment periods.

Production capital should also be made available by the Commercial Farming Fund. Interest on loans of this kind would be reduced to the same preferential rates for disadvantaged farmers operating either on their own or in conjunction with established commercial producers.

The IRR has calculated how many new commercial farmers could be established with the help of R59bn (this being a portion of the overall Eskom bailout this year). This could fund roughly 2 950 new commercial farmers in a single year, which is a significant figure for new entrants.

Financial help of this kind would be far more helpful than the (R2bn) agri-parks the state is intent on establishing as part of its unrealistic One Household One Hectare (1HH1HA) policy. Such assistance would also be a far better use of tax revenues than repeatedly providing billions in bail-outs to Eskom, South African Airways (SAA), and other poorly managed state-owned enterprises. Instead, SAA and various other SOEs should be privatised – and a goodly part of the proceeds paid into the Commercial Farming Fund to help provide finance to disadvantaged commercial farmers.⁹⁸

To illustrate what could be achieved, the IRR has calculated how many new commercial farmers could be established with the help of R59bn (this being a portion of the overall bailout the state plans to provide to Eskom in the current financial year). Assume that this R59bn is instead paid into the Commercial Farming Fund. Assume also that a disadvantaged commercial farmer needs to borrow R20m from this Fund to buy land and have enough start-up capital, and that this sum is to be repaid over 50 years at an interest rate of 0% a year. On this basis, the Commercial Farming Fund could fund roughly 2 950 new commercial farmers in a single year – and without having to raise any additional funding at all through its Farming Empowerment Bonds.

Since there are only some 32 500 established commercial farmers in the country, this is a significant figure for new entrants. In addition, a 10% cut in the public sector wage bill (which amounts to R585bn in 2019/20) could save the fiscus R58bn in this financial year alone and so fund the establishment of another 2 900 commercial farmers. A further R100bn could be saved from both public service and SOE salaries over the next four years, which could finance another 5 000 new commercial farmers. Between the initial R59bn outlay and these additional tax monies, the country could have at least 10 850 additional and well-funded commercial farmers within five years. Combined with the further monies made available through Farming Empowerment Bonds, new entrants could make up half the country’s current commercial farmers by 2024.

Many other inputs would be needed to promote the success of these new farmers, as further outlined

below. In addition, policy should not aim simply at expanding the overall number of commercial farmers, for economies of scale are increasingly vital and will require consolidation into a smaller number of larger and more sophisticated farming units over time. What is essential, however, is to increase the farming opportunities available to the disadvantaged – and to find realistic ways of replacing the many commercial farmers who are already drawing close to retirement age. What these broad figures further demonstrate, moreover, is that innovative ways of meeting the vital financing requirement can indeed be found – and that this can often be achieved simply by cutting the fat out of current state spending.

The next requirement is to identify and **upskill** beneficiaries. Necessary mentoring and agricultural extension services should be provided, not by inexperienced officials, as now, but rather by existing farming organisations, such as Grain SA and the Milk Producers Association. These organisations, together with purchaser groups, can together fund these extension services, as many already do. New entrants will thus be able to obtain the extension services and other help they need from experts with unparalleled practical knowledge and experience.

As for the **land** required, the state should not provide ‘free’ land to farmers (for it does not do the same for entrepreneurs in retail, manufacturing, and other spheres). Instead the government should sell much of the land it already owns – including all it has acquired for redistribution purposes – to disadvantaged farmers at market prices. Other disadvantaged individuals could buy the land they need from the 20 000 or so farms already on the market.

For the rest, the state should focus on the critically important task of **augmenting** rural infrastructure and essential services in the form of roads, railways, dams, safety, and bio-security (to safeguard both domestic and export markets). Solar electricity, abattoirs, produce markets, milling and storage facilities could be provided either by the state or the private sector. Where the state is responsible for provision, it should enter into public/private partnerships so as to take advantage of private sector efficiencies. Such partnerships must be concluded through open, non-racial, and competitive tendering processes.¹⁰⁰

All commercial farmers, whether established or emergent, must have secure and registered individual title to their land. This is the essential foundation for their business confidence as well as their capacity to borrow and in time expand their operations.

Also essential is a **zero tolerance** approach to land grabs, farm attacks, and threats to property rights. This will encourage South Africa’s current commercial farmers (now numbering some 35 250 people) to stay on the land and keep producing. This will help feed the nation, contribute to export earnings, and provide the necessary mentoring to new entrants. The 7% of farmers who produce most of the country’s food are particularly vital in maintaining food security and must be assured that their land holdings will not in fact be capped in the way the presidential advisory panel has suggested. The population is expanding – from 40 million in 1994 to a projected 67 million in 2030 – and will soon be more than 70% urbanised. Its need for secure and affordable food supplies cannot be met in any other way.¹⁰¹

In addition, all commercial farmers, whether established or emergent, must have secure and registered **individual title** to their land. This is the essential foundation for their business confidence as well as their capacity to borrow and in time expand their operations.

Individual title must also be introduced wherever land is held in collective or communal ownership. This is particularly important for the generally high potential but generally unused farmland held in customary communal tenure in former homeland areas. This land cannot be made more productive without the benefits of secure individual title. Such title should therefore be transferred at reasonable prices to present occupants – including the women who often labour under significant disadvantage under customary tenure rules.¹⁰²

With the future of commercial farming safeguarded in these ways, there will be many more job opportunities on farms and in revitalised small towns. However, many South Africans will still want to move

to urban areas. This urbanisation process is already well in train and echoes developments all around the world, where people have generally preferred to move off the land and into jobs in towns and cities. South Africa's problem is that the necessary urban houses and jobs are not being generated on anything like the scale required.¹⁰³

EWC and wider expropriation policies, as advocated by the president's advisory panel, are no solution to these challenges. Major policy reforms are instead required to help overcome the housing backlog and generate the millions more jobs so urgently needed. The IRR's 'Indlu' proposal shows how the housing challenge can be overcome. Its *National Growth Strategy* outlines the further reforms that must be implemented to promote investment, encourage the creation of millions more jobs, and unleash South Africa's enormous growth potential.¹⁰⁴

The IRR's 'Indlu' proposal

In the past 25 years, the state has provided more than 2.5 million houses and a further 1.2 million serviced sites. Despite this, the housing backlog has nevertheless grown from 1.5 million units in 1994 to 1.9 million units today, while the number of informal settlements has expanded from 300 to 1 185. At the same time, the housing subsidy has shot up from R12 500 per household to a staggering R160 570 per household. Yet many of the RDP (Reconstruction and Development Programme) or Breaking New Ground (BNG) houses built via this subsidy are so small, badly built, and poorly located that the ANC itself describes them as "incubators of poverty" that do more to entrench disadvantage than to overcome it.

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State spending on housing has also grown faster than any other budget item since 1999. Housing and 'community amenities' – which includes the administration of housing developments and the supply of water – currently consume almost 10% of budgeted expenditure and amount to 3.2% of GDP. In nominal terms, spending here has risen from R5bn in 1994 to the R176 billion budgeted in the 2019/20 financial year. This is an increase of some 3 300%. By contrast, spending on social grants and other forms of social protection has risen from around R14bn in 1994 to roughly R284bn this year, an increase of some 1 900%.¹⁰⁵

Despite this rapid increase in the housing budget, the delivery of 'free' houses has slowed, dropping to less than 64 000 in 2016 and averaging some 90 000 houses a year over the past five years.¹⁰⁶ At this rate, it will take at least two decades for the state to build enough homes for the 1.9m households already on the waiting list, let alone try to meet future needs.

The private sector's delivery of housing stock for the lower-income market has also fallen sharply, from a high of some 76 500 houses a decade ago to roughly 6 500 a year now.¹⁰⁷ Obstacles to faster delivery include a lack of bulk infrastructure and slow turnaround times due to extensive and poorly administered red tape. A key part of the problem, as the government has at times acknowledged, is that it often takes about three years to move from 'land to stand', which is 'too long'. In practice, the delays are often much longer, says housing expert Taffy Adler, with 'ten-year turnarounds' not uncommon.

Explained Harry Gey van Pittius, chairman of the South African Affordable Residential Developers Association in 2014: 'Before 2008, the industry built 60 000 houses a year in Gauteng alone. Now we cannot even manage 4 000... Municipalities don't have the necessary skills, especially engineers and building inspectors, and decision-making has been centralised at political level. There is no money for bulk services, so developers have to contribute huge amounts to make projects happen. That expenditure only adds to overheads, as it cannot be recovered in the prices of the houses sold. Approvals that used to be given in a year or 18 months now take up to three years.'¹⁰⁸

Housing policy thus needs a fundamental rethink to empower individuals, provide better value for money, and break current delivery logjams. The IRR's Indlu proposal (from the word for 'house' in isiZulu) outlines what should be done.

The first essential is **individual title** for all home owners. Most, if not all, the 1m white people who own homes have formally registered individual title. This allows them to borrow against the collateral of their houses and build up important assets which they can bequeath to their children. By contrast, though roughly 8.5 million black, 'coloured', and Indian South Africans also own houses – most of which are formal brick-and-mortar structures – the majority lack recognised individual title to their homes. Yet if all households across the country were provided with such title, this would bring 'dead' capital to life and immediately give households the full benefit of assets cumulatively worth many billions of rands.

Also urgently required is a **national housing voucher** programme under which all low-income households would receive tax-funded vouchers redeemable solely for housing-related purchases. This programme would be funded by redirecting much of the current budget for housing and community amenities into these vouchers. This would give the country far more 'bang' for its extensive tax 'buck', as every household empowered in this way would have a personal interest in ensuring the best possible use of these resources.

The voucher system – and the market it would create – would encourage the private sector to build many more terrace houses and/or apartment blocks, or to revamp many more existing structures for housing purposes. Beneficiaries would also find it easier to gain mortgage finance, which would further stimulate new housing developments. Beneficiaries who already own their homes would be able to use their housing vouchers to extend or otherwise improve them. Some might choose to use their vouchers to build backyard flats, which they could then rent out to tenants also armed with housing vouchers and so able to afford a reasonable rental. This too would help increase the rental stock available. Accelerating housing delivery in this way would also increase capital investment, generate more jobs, and give the weak economy a vital boost.

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This new approach would **diminish dependence** on an inefficient state to provide. Instead of having to wait endlessly on the government to construct the 1.9 million houses currently required, individuals would be empowered to start meeting their own housing needs. The quality of the houses being built would also improve.

The quality issue is an important one. At present, bureaucratic inefficiency and often corrupt preferential tendering commonly result in poor construction and defective homes. In recent years, the national department has thus spent more than R2bn on fixing badly-built RDP houses. However, this is only a small fraction of a rectification bill put by the state at R58bn in 2011. In 2015 the government nevertheless terminated the rectification programme, saying beneficiaries must in future fix their own houses as part of their maintenance obligations. Yet many of the defects lie beyond the capacity of beneficiaries to overcome. As *The Star* reports, 'a large number of RDP houses are poorly designed, erected on land without roads, sewage, water and electricity, and built without professional supervision by architects, structural engineers or soil analysts'. Hence, in one development, '40% of houses had such serious structural defects that they had to be demolished and rebuilt'.

With the voucher programme in place, the government's role in delivery would largely be reduced to the speedy identification and release of state and municipal **land** suitable for new housing developments. The state must also speed up land re-zoning and town-planning processes. In general, it should outsource these tasks to the private sector through a transparent and cost-effective tendering system. This would

help ensure that housing development is no longer held up for three years or more by incapacity within the public service.

Under this new policy, the in-situ **upgrading of informal settlements** would also be given a vital boost. In practice, such upgrading is extremely difficult to implement and is unlikely to succeed unless the housing stock available to the poor is simultaneously being increased. The voucher system would address this key obstacle as it would encourage new construction as well as the refurbishment of existing structures.

People living in informal settlements would then have a host of housing options available to them. Some would move into new housing complexes, while others would shift to renovated backyard or other flats. Informal settlements would become less crowded, making upgrading easier. Those who chose to remain in them would be able to use their housing vouchers to buy building supplies, hire electricians, plumbers, and other artisans, contribute their own labour or 'sweat equity' to reduce costs, and gradually upgrade their homes.

To help ensure good quality construction, housing advice centres would be established by private developers, non-governmental organisations, and social housing institutions. These centres would provide people with a variety of low-cost housing plans as well as advice on a diverse range of building materials and housing choices. They would also provide information on the housing voucher scheme, other funding options, and how best to achieve quality and manage debt.

The IRR's Indlu policy, in short, would give effect to what ordinary people have long been saying – that the state should transfer the housing subsidy directly to them, as they could use it more efficiently and make every rand stretch very much further.

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Other policy changes would also be needed for sustainability and optimum results. The new system would work best in an environment of expanding employment and rising prosperity. The state's main emphasis should thus shift from ever more redistribution to promoting economic growth, as the IRR's 'National Growth Strategy' proposes.

A practical National Growth Strategy

The IRR's National Growth Strategy has four essential elements. First, **property rights** must be strengthened by jettisoning the EWC idea and reversing all the current laws and proposed policies that undermine and threaten them. Without this essential step, direct investment at the scale required will continue to bypass South Africa.

Second, **a business-friendly environment** must be put in place. Many parastatals on the brink of bankruptcy should be sold off on terms that guard against corruption and the emergence of new private monopolies. Effective public/private partnerships should also be used to expand essential infrastructure and better maintain what already exists. Red tape must be slashed, especially for small businesses. The inefficient public service must be trimmed and professionalised, and the tax load lightened for both companies and individuals. The fraud and inflated prices that currently taint up to 40% of state procurement must be stamped out.

Third, **labour laws** must be substantially reformed. The government has itself acknowledged that entry-level wages are so high as to lock the unskilled and inexperienced out of jobs. Rules which push up labour costs – including the extension of bargaining council agreements to non-parties and the newly introduced national minimum wage – should be scrapped. Instead, private employers must be allowed to take a leaf out of the government's book and pay the unskilled, as the state does, a stipend of some R90 a day. This is far below the entry-level wages generally paid in other spheres, but the government provides these work

opportunities because it recognises that a small income is better than none. By contrast, if people were allowed to work for the same low wages in the private sector, they would generally receive better training, notch up more relevant experience, and have greater prospects of moving into higher paying jobs over time.

Increased flexibility in the hiring and firing process is also essential, as business needs to be able to adjust to peaks and valleys in demand. Employers will hire freely only if they can fire more easily. The presumption that dismissals are unfair unless the employer can prove otherwise should be removed. Instead, employers should be free to dismiss employees under the notice periods agreed in their employment contracts.

Fourth, South Africa's ineffective and damaging **'transformation' policies** require fundamental reform. BEE is by far the most ambitious and far-reaching affirmative action programme in the world. Partly for this reason, misperceptions have grown up around its effects. Some people criticise it for harming the economic prospects of whites, but this is the least of the damage it has done. Far more significant is the harm that it has caused to the great majority of black South Africans.

Most black people – and especially the most disadvantaged among them – lack the skills and political connections needed to benefit from BEE ownership deals, preferential tenders, and management posts. At the same time, they suffer greatly from the consequences of BEE policies, which include massive public service inefficiency, decaying infrastructure, rampant corruption, wasted tax revenues, and the hobbling of investment, growth, and jobs.

An alternative empowerment policy is urgently required. The IRR is busy developing such a strategy, which it calls **'EED' or 'Economic Empowerment for the Disadvantaged'**.

What EED proposes is a paradigm shift to a system that no longer bypasses the disadvantaged but rather takes effective steps to empower them and help them scale the economic ladder. It focuses on carrots rather than sticks – and takes care to incentivise and reward the vital contributions made by business to investment, employment, and development.

EED selects its beneficiaries on a socio-economic basis, as does the social grants system. It puts its emphasis not on racial targets, but rather on the inputs needed to empower the poor. It therefore gives firms 'EED' points for investments made, jobs created or sustained, and all contributions to tax revenues or export earnings notched up. EED points can also be earned for appointing staff on a 'wide' definition of merit which takes account of disadvantage, for spending on research and development (R&D), and for all successful innovations. Further EED points can be achieved by entering into effective public-private partnerships to improve education, housing, and healthcare for the benefit of the poor.

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This reform package would loosen the leg irons that currently shackle the economy. South Africa's economic challenges are becoming increasingly serious, but they are not yet intractable. The country still has enormous strengths. With these vital structural shifts in place, it could soon start living up to its great potential.

The IRR's proposed policy shifts would have a measurable impact on investment, growth, employment, and income levels within 12 months. They would also provide the foundation for sustainable growth rates of 6% to 7% of GDP within a decade. This would be far more effective than EWC – or any of the government's other intrusive and damaging interventions – in overcoming unemployment, poverty, and inequality. These reforms would also free the country from the burden of NDR ideology and allow it to emerge as a prosperous middle-income economy by the 2030s.

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