South African Institute of Race Relations NPC (IRR)
Submission to the
Ad Hoc Committee to Initiate and Introduce
Legislation Amending Section 25 of the
Constitution of the Republic of South Africa, 1996,
regarding the
DRAFT CONSTITUTION EIGHTEENTH AMENDMENT BILL OF 2019
Johannesburg, 28 February 2020

Contents

1 Introduction

The Ad Hoc Committee to Initiate and Introduce Legislation Amending Section 25 of the Constitution of the Republic of South Africa ('the Committee') has invited interested persons to submit written comments on the Draft Constitution Eighteenth Amendment Bill of 2019 ('the Bill') by an amended deadline of 29th February 2020.

This submission on the Bill is made by the South African Institute of Race Relations NPC (IRR), a non-profit organisation formed in 1929 to oppose racial discrimination and promote racial goodwill. Its current objects are to promote democracy, human rights, development, and reconciliation between the peoples of South Africa.

2 The importance of proper public consultation

The Committee gazetted the Bill on 13th December 2019, initially for public comment by 31st January 2020. The time thus allowed exceeded the 30-day minimum specified in Section 74(5) of the Constitution. However, it overlooked the fact that the country largely shuts down for the festive period from the middle of December until the middle of January in every year. Many people were thus away from work and home over from 13th December 2019 to 12th January 2020 and could not reasonably be expected to give adequate attention during this period to the contents of the Bill.

The Bill is also an extraordinarily important one. It is the first proposed amendment to the Bill of Rights since 1996. In addition, the changes it seeks to make to Section 25 of the Constitution, the property clause, will fundamentally undermine the negotiated settlement of the mid-1990s. It is also likely to have an extremely negative impact on an already fragile economy and hence on the country's capacity to generate the investment, growth, and employment vital to the upward mobility of many millions of people. Consideration of a proposed constitutional amendment with such major ramifications should not be rushed in any way.

The Constitutional Court has also repeatedly stressed that proper public participation in the law-making process is a vital aspect of South Africa's democracy. Relevant rulings here include *Matatiele Municipality and others* v *President of the Republic of South Africa and others*; [(2006) ZACC 12] *Doctors for Life International* v *Speaker of the National Assembly and others*; [2006 (6) SA 416 (CC)] and *Land Access Movement of South Africa and others* v *Chairperson of the National Council of Provinces and others*. [(2016) ZACC 22]
In these judgments, the Constitutional Court has elaborated on what is needed for proper public consultation. According to the court, citizens must be given 'a meaningful opportunity to be heard in the making of laws that will govern them'. They must also be given 'a reasonable opportunity to know about the issues and to have an adequate say'.[1]

On 30th January 2020, the day before the initial deadline was due to expire, the Committee unexpectedly allowed an additional month for public comment. At the last minute, thus, the Committee agreed to give the public a more reasonable period in which to get to grips with

the Bill and its complex ramifications and then to raise their concerns. However, it would clearly have been preferable if this extra month had been allowed from the start, as Agri SA and others had requested. In addition, the absence of a proper SEIAS assessment has further undermined the public consultation process and made it more difficult for people to 'know about' and understand what is at stake.

3 No SEIAS assessment

Since September 2015, all new legislation in South Africa has had to be subjected to a 'socio-economic impact assessment' before it is adopted. This must be done in terms of the Guidelines for the Socio-Economic Impact Assessment System (SEIAS) developed by the Department of Planning, Monitoring, and Evaluation in May 2015. The aim of this new system is to ensure that 'the full costs of regulations and especially the impact on the economy' are fully understood before new rules are introduced.[2]

According to the Guidelines, SEIAS must be applied at various stages in the policy process. Once new legislation has been proposed, 'an initial assessment' must be conducted to identify different 'options for addressing the problem' and making 'a rough evaluation' of their respective costs and benefits. Thereafter, 'appropriate consultation' is needed, along with 'a continual review of the impact assessment as the proposals evolve'.[3]

A 'final impact assessment' must then be developed that 'provides a detailed evaluation of the likely effects of the [proposed law] in terms of implementation and compliance costs as well as the anticipated outcome'. This final assessment, with its comprehensive assessment of likely economic and other costs, must be attached to a bill when it is published 'for public comment and consultation with stakeholders'.[4]

According to the Guidelines, it is particularly important that the final SEIAS report should 'identify' and caution against proposed legislation where 'the burdens of change loom so large that they could lead to excessive costs to society, for instance through disinvestment by business or a loss of skills to emigration'.[5]

The Bill put forward by the Committee is likely to trigger precisely such 'excessive costs', in the form of both disinvestment and emigration. Changing the Constitution to allow expropriation without compensation (EWC) is also inordinately risky when the economic growth rate is so low, the relevant tax base is so small, public debt is so high, and the government's capacity to sustain its spending on infrastructure and other essential needs is already in doubt.

However, no SEIAS assessment of the Bill has been carried out. Nor has a final SEIAS report been appended to the Bill to help inform the public and so empower it to 'know about' the issues and have a reasonable opportunity to influence the decisions to be made. This is a fundamental shortcoming which has further eroded the constitutional right to appropriate public involvement in the legislative process.

4 The Content of the Bill

The Bill has two main provisions, and makes a small consequential amendment to the wording of sub-section 25(3) of the Constitution. Its three key clauses are as follows:

4.1 Proposed sub-section 25(2), allowing 'nil' compensation for both land and improvements

The Bill proposes that sub-section 25(2) of the Constitution be amended to include the underlined words. In its amended form, it will then state:[6]

> Section 25(2): Property may be expropriated only in terms of law of general application –
> (a) for a public purpose or in the public interest; and
> '(b) subject to compensation, the amount of which and the time and manner of payment of which have been agreed to by those affected or decided or approved by a court: Provided that in accordance with subsection (3A) a court may, where land and any improvements thereon are expropriated for the purposes of land reform, determine that the amount of compensation is nil'.

The new subsection (3A), as further described below, essentially allows Parliament to adopt 'national legislation…setting out specific circumstances' in which nil compensation may apply.

The proposed new sub-section 25(2)(b), in seeking to allow nil compensation for both land 'and any improvements thereon', exceeds the mandate given to the Committee by the National Assembly. That mandate was first granted by the Fifth Parliament on 6th December 2018 and then reaffirmed by the Sixth Parliament on 25th July 2019. It instructs the Committee to introduce legislation 'amend[ing] Section 25 of the Constitution to *make explicit what is implicit in the Constitution, with regard to expropriation of land without compensation, as a legitimate option for land reform, so as to address the historic wrongs caused by the arbitrary dispossession of land'.*[7]

The Committee has no mandate to extend 'nil' compensation on expropriation (EWC, in other words) from land to 'any improvements thereon'. Such improvements may take many forms, ranging from houses and office blocks to factories, smelters, shopping centres, hospitals, and private dams. These immovable structures accede to the land on which they have been built, but their value is separate from that of the land. (Such values can also be determined quite easily, as many municipalities already do in levying rates on both plots of land and the buildings erected on them.)[8]

Just and equitable expropriation for the expropriation of these structures must, at minimum, be paid. As the mandate given to the Committee makes clear, the underlying rationale for EWC is to 'address the historic wrongs caused by the arbitrary dispossession of land'. In

almost all instances, however, there has been no 'arbitrary dispossession' from structures erected only some time later.

4.2 Proposed sub-section 25(3), with one small change

As regards sub-section 25(3), the Bill largely retains the present wording. Hence, the amount of compensation, and the time and manner of 'any' payment to be made, must be 'just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances'. The circumstances listed in this clause include both market value and four other factors, which are often called the 'discount' factors because their effect may be to reduce compensation from market value to something less. The listed 'discount' factors include the history of the acquisition of the property (for example, whether it has been obtained via the forced removal of its previous owners) and the extent to which the state has previously subsidised its purchase or capital improvement.[9]

The main difference proposed by the Bill is the insertion of the word 'any' in relation to the payments to be made. This is in recognition of the fact that compensation under the Bill's new sub-section 25(2)(b) may be 'nil'. That the proposed amendment maintains the need for 'an equitable balance' to be struck 'between the public interest and the interests of these affected' is both welcome and important. It is also in keeping with expropriation laws in many countries. These regard the payment of compensation as 'almost always an essential prerequisite of expropriation' – as Mr Justice Antonie Gildenhuys, retired judge of the Land Claims Court and the High Court of South Africa, has pointed out.[10]

Notes Judge Gildenhuys: 'The constitutions of most constitutional democracies worldwide require that the expropriation of property be subject to the payment of just, fair, full, or adequate compensation to its owner.' The underlying idea, according to the High Court of Botswana (in explaining the meaning of 'adequate' compensation) is that the expropriated owner must 'insofar as money can do it, be put back in the same position as he would have been had the land not been expropriated.'[11]

This doctrine of 'equivalence' is based on the principle that 'it is unfair for the individual to bear an unreasonable burden to provide a benefit to society'. Moreover, where property is expropriated, 'the burden borne by the individual owner almost always seems to be unfair, [so] fairness is achieved through the payment of just and equitable compensation'.

It is, however, possible (as Judge Gildenhuys points out) that an owner's interest in his property might be so 'small or non-existent' that the payment of limited, or even nil, compensation might be accepted as just and equitable.[12] But this would apply solely in narrow and exceptional circumstances: in essence, where the land in issue genuinely has no market value. 'Nil' compensation might thus be 'just and equitable' on the expropriation of mining land which has been depleted of all recoverable minerals and is so riddled with underground tunnels that it cannot be used for housing or other purposes without costly prior remediation.

By contrast, the third key sub-section in the Bill disregards the doctrine of equivalence. Instead, it makes it clear that nil compensation is to apply in a wide range of circumstances, while declining to identify or define the many instances in which EWC is to be authorised.

4.3 Proposed sub-section 25(3A), allowing Parliament to decide when 'nil' compensation should apply

Under a new sub-section 25(3A), Parliament will be empowered to adopt 'national legislation' setting out 'the specific circumstances where a court may determine that the amount of compensation is nil'.[13] On the current wording of the Bill, the 'just and equitable' principle would still apply, as would the need to strike an equitable balance between societal and owner interests. However, the proposed wording seems to override these constraints by allowing any number of national statutes to specify when 'nil' compensation may be paid. In also makes it plain that all such laws may be enacted by the legislature by a simple (51%) majority.

This proposed sub-section vastly extends the circumstances in which 'nil' compensation could be paid. In fact, it opens up a potentially endless vista of possible EWC takings. For this reason too, the Bill does far more than make 'explicit what is implicit' in the existing Section 25. In practice, it could severely undermine sub-section 25(3), with its emphasis on the need for 'just and equitable' compensation and a 'just and equitable balance' between the public interest in land reform and the plight of the expropriated owner.

4.3.1 Examples of 'national legislation' likely to be adopted under the new sub-section 25(3A)

Parliament could use the new sub-section 25(3A) to adopt at least three possible statutes, beginning with the current Expropriation Bill of 2019.

The Expropriation Bill, as gazetted for public comment in December 2018, was reportedly modified in December 2019, following discussions between the government, labour, and business at the National Economic Development and Labour Council (Nedlac). In its current form, the Expropriation Bill includes an (easily expandable) list of six instances – already up from the five initially set out – in which nil compensation may be paid.[14]

The Expropriation Bill further states that the circumstances in which nil compensation may apply are 'not limited' to those it lists. Hence, nil compensation may be paid in a host of other circumstances too. Moreover, these further instances need not even be *sui generis* (of the same kind as) those expressly included. This contradicts 'the doctrine against vagueness of laws', for it gives an unfettered discretion to a host of expropriating authorities to expand the list in ways that cannot be predicted and are likely to differ significantly in different instances.

The Expropriation Bill is often also impermissibly vague in its description of the listed factors that could justify nil compensation. Its revised wording states, for instance, that nil

compensation may apply where 'an owner has abandoned land by failing to exercise control over it'.[15] But what if illegal occupiers have 'hijacked' land and its owner lacks the means to go to court and obtain an eviction order? Has he or she truly 'abandoned' the land in these circumstances? And is it fair to penalise him or her for an unavoidable inability to exercise control, which has its origins in the state's own failures to maintain law and order or create a climate conducive to investment, growth, and employment?

The revised Expropriation Bill also says that 'nil' compensation may be paid where land is 'not being used and the owner's main purpose is not to develop the land or use it to generate income, but to benefit from appreciation of its market value'. But what does 'main purpose' mean?[16] Would the test be satisfied if the owner had no immediate aim to develop the land, but would do so if rising market values indicated increasing demand for housing in the area? How, in practice, are officials from a host of different expropriating authorities to decide what the owner's 'main purpose' is? Inevitably, different officials will come to different conclusions in different factual situations, yet all their conclusions will plausibly fit within Clause 12(3). Again, the wording of the clause is impermissibly vague and so offends against the rule of law.

The ambiguous terms of the Expropriation Bill underscore the risks in allowing Parliament to decide by ordinary legislation when nil compensation should apply. 'Nil' compensation is such an abrogation from the 'just and equitable' compensation generally required by Section 25 that adequate safeguards must at all times be ensured. This cannot be achieved, however, when Parliament is given such sweeping powers to enact legislation providing for nil compensation in wide-ranging and unspecified circumstances.

Second, the current Expropriation Bill could be amended in ways that would be very much in keeping with two of the proposals put forward by the Presidential Advisory Panel on Land Reform and Agriculture in its June 2019 report. These proposals have since been endorsed by the Cabinet, giving the ANC increased reason to implement them.[17]

One of the panel's recommendations is that nil compensation should apply in ten listed (but again not exclusive) instances. The Expropriation Bill might thus be changed, before it is put before Parliament for adoption, to expand its list from the six instances it now contains to the ten the panel has proposed.

The panel has also recommended that municipalities across the country, in both rural and urban areas, should be empowered to identify land which they regard as 'suitable' for redistribution because it is well-located and already serviced. According to the panel, the owners of land identified in this way should then donate it to the municipality or sell it at an agreed price – failing which they should face expropriation in return for compensation likely to be set at 'nil' or 'minimal'. The Expropriation Bill could thus also be changed to confer these draconian powers on municipalities. Again, this would make a mockery of the general requirement for 'just and equitable' compensation in Section 25.

A third possible statute would be even more damaging. In this scenario, Parliament might adopt, again by a simple 51% majority, a statute vesting all land (and the improvements on it) in the ownership or custodianship of the state. This legislation might go on to provide that this vesting of ownership or custodianship in the state is a 'specific instance where a court may determine that the amount of compensation is nil'. If the Constitutional Court were to uphold this, then no further court challenge would be possible.

All South Africans would then lose their current property rights and would have to obtain 'land-use licences' from the government. These licences would foster massive dependency on the state, especially as they would probably be open to early termination whenever bureaucrats considered this to be 'in the public interest'. In this situation, it might also become difficult for South Africa to avoid the catastrophic economic collapse that Zimbabwe has experienced, as outlined below.

5 The special majority needed for the Bill's adoption

The Committee has proposed that the Bill should in time be adopted under Section 74(2) of the Constitution. Section 74(2) deals with amendments to the Bill of Rights. It requires that any such amendment be supported by two-thirds (66.6%) of the members of the National Assembly, along with six provinces in the National Council of Provinces.

However, some provisions in the Bill of Rights are so intrinsic to the rule of law – 'the supremacy' of which is guaranteed in the Constitution's founding provisions in Section 1 – that these clauses can be amended only with the same majority as is needed for changing Section 1 itself. That majority, according to Section 74(1) of the Constitution, is 'at least 75%' of the members of the Assembly.

Various legal experts have put forward pertinent arguments as to why a 75% majority is required for the Bill. Advocate Paul Hoffman SC, director of Accountability Now, points out, for example, that the World Justice Project has developed a global Rule of Law Index to measure the success of different countries in upholding the rule of law. The Project has also developed a widely accepted definition of the rule of law, which it uses as the foundation for its assessments.

According to the World Justice Project, the rule of law requires that 'laws are clear, publicised, stable and just; are applied evenly; and protect fundamental rights, including the security of persons and property'.

Security of property rights is thus intrinsic to the rule of law. But property rights will be greatly curtailed by the Bill's EWC provisions – which means that the supremacy of the rule of law will be diminished too. Hence, if the Bill is to pass constitutional muster, it must be adopted by a 75% majority in the House of Assembly, not the two-thirds majority generally required for amendments to the Bill of Rights.

Writes Adv Hoffman: 'When any contemplated amendment affects the rule of law, then the procedure set out in Section 74(1) is applicable, whether or not the proposed amendment is to a right in Chapter Two' (the Bill of Rights).

The blank cheque being given to Parliament to decide, by 51% majority, on the 'specific circumstances' in which EWC will apply, further contradicts the rule of law. Since property rights are intrinsic to the rule of law, changing them requires a 75% majority in the National Assembly. Instead, the Bill proposes that a mere 51% majority should suffice. This provision so erodes the rule of law that it also requires a 75% majority.

Concludes Adv Hoffman: 'That [the Bill] affects the rule of law is beyond question. In essence, the current protection of property rights (part of the rule of law)… [is] watered down, [while] Parliament is being given untrammelled power to make the rules of the [EWC] game.' The Committee's proposal that the Bill be adopted by a two-thirds majority is thus 'conduct inconsistent with the Constitution' and is itself invalid.

6 Ramifications of the Bill

According to the Memorandum on the Objects of the Bill, the measure is intended to make EWC available to the state, 'as a legitimate option for land reform, so as to address the historic wrongs caused by the arbitrary dispossession of land, and in so doing ensure equitable access to land and further empower the majority of South Africans to be productive participants in ownership, food security, and agricultural reform programs'.[18]

However, EWC cannot rectify the government's long-standing failures in land reform. Nor can it help provide black South Africans with 'ownership' or 'food security'. It may allow them to participate in 'agricultural reform programmes' but these are unlikely to be any more successful than other land reform projects have been to date.

6.1 EWC cannot rectify the failures of land reform

Since 1994 the 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:[19]

- between 17 000 and 20 000 of the 80 000 or so land restitution claims lodged before December 1998 have still to be finalised through the implementation of court orders, while some 5 700 of these claims have yet to be processed ;[20]
- only some 12.1 million hectares of land, about half the 25.8 million target, have been transferred, either physically or notionally, under the restitution and redistribution prongs; (The 'notional' element arises from the 2 million or so hectares of land which could have been transferred to successful restitution claimants if they had not chosen to receive cash in lieu of land.)[21]
- some 17 million black people with informal rights to customary plots in the former homelands have yet to obtain secure tenure;[22] and

- many of the 7.8 million black South Africans who own houses still lack title deeds to them.[23]

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'.[24]

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 2020/21 financial year, for instance, R3.4bn has been allocated to land restitution and R1.7bn to land reform. Together these sums, at R5.1bn, amount to a mere 0.26% of the R1.95 trillion the government has budgeted to spend in 2020/21.[25]

Second, in keeping with its ultimate socialist objectives, the ANC does not allow individual ownership for land reform beneficiaries. Restitution land is transferred either to traditional leaders or to communal property associations (CPAs), which often find themselves paralysed by internal divisions. Redistribution land is now kept in state ownership and leased to disadvantaged farmers, which leaves them without collateral to raise working capital.[26]

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 essential needs.[27]

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'.[28]

Fifth, the restitution process, in particular, has been dogged by so much inefficiency and corruption that officials 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 comments that this flawed restitution process has probably been 'done more damage to commercial agriculture than the Anglo Boer War'.[29]

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 process[30] 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. After they had spoken to land reform minister Gugile Nkwinti (who may have received R2m in return for his help), the farm was bought by the land department in 2011 for R97m. It was then 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.[31]

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.'[32]

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, has acknowledged many of these fundamental obstacles to successful land reform. In its November 2017 report on its findings, it also stressed that the cost of land acquisition is not a major factor in land reform failures – and advised against amending the Constitution.

According to the High Level Panel, the compensation provisions in Section 25 are not the main reason for land reform failures. Rather, the 'key constraints' on land reform are 'a lack of capacity, inadequate resources, and failures of accountability'. Added the panel:[33]

> The High Level 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 Constitutional Court, in the *Mwelase* case in 2019, has also emphasised that the Constitution is not to blame for the state's long-standing inability to implement the labour tenant provisions in its overall land reform programme.[34]

As the Constitutional Court explained in handing down this ruling, labour tenants generally live on commercial farms, where they engage in cropping or grazing on a portion of the land. They do so partly for their own benefit and partly for that of the farm owner, to whom they must generally transfer a percentage of their produce. Under the Land Reform (Labour Tenants) Act of 1996, labour tenants have been given the right to claim ownership of those portions of land they have long been farming in this way.

Some 19 400 labour tenant claims were submitted before the 2001 deadline laid down in the 1996 Act. However, as the Constitutional Court describes it, 'administrative lethargy' then set in and 'the great majority of labour tenant applications were simply not processed'.[35]

A complaint about slow progress went first to the Land Claims Court, which in 2014 ordered the land department to provide it with updated data on the status of these claims. But this was still not done, seemingly because the relevant records were 'non-existent or shambolic'. In 2016 the department finally acknowledged that nearly 11 000 labour tenant applications still needed to be dealt with.[36]

Commented the Constitutional Court: 'Over nearly two decades...the department has manifested and sustained what has seemed to be an obstinate misapprehension of its statutory duties. It has shown unresponsiveness, plus a refusal to account to those dependent on its cooperation... And, despite repeated promises, plans and undertakings, it has displayed a patent incapacity or inability to get the job done.'[37]

Added Judge Edwin Cameron: 'In this, the Department has jeopardized not only the rights of land claimants but the constitutional security and future of all. South Africans have been waiting for more than 25 years for equitable land reform. More accurately, they have been waiting for centuries before. The Department's failure to practically manage and expedite land reform measures in accordance with constitutional and statutory promises has profoundly exacerbated the intensity and bitterness of our national debate about land reform. It is not the Constitution, nor the courts, nor the laws of the country that are at fault. It is the institutional incapacity of the Department to do what the statute and the Constitution require of it that lies at the heart of this colossal crisis.'[38]

In response to this bureaucratic malaise, the Constitutional Court took the extraordinary step of confirming the appointment of a special master to oversee the processing of the outstanding claims. This was necessary, it said, to remedy the Department's 'failing institutional functionality', which had long been 'of an extensive and sustained degree'.[39] What this intervention signalled, thus, was that land officials could no longer be trusted to do a proper job and had to have their work supervised by the courts in order to make progress.[40]

The most important need is to overcome these barriers to success – not push ahead with EWC. However, the High Level Panel's recommendations, along with many other cogent analyses of the reasons for land reform failures, have been brushed aside in the ANC's eagerness to expand state power under the rubric of EWC.

6.2 EWC offers no remedy for the housing backlog

While most South Africans have little interest in farming land, there is an enormous unmet need for urban land for housing. The minister of human settlements, water, and sanitation, Lindiwe Sisulu, has thus recently promised the rapid release of some 14 000 hectares of state-owned land in urban areas to speed up housing provision.[41] But the Bill is important here too, for it offers a mechanism to make privately-owned and well-located urban land available for housing purposes as well. It does so, of course, by authorising the expropriation of such land for nil compensation. Again, however, it is not the cost of land acquisition that is the primary barrier to housing provision in urban areas. Instead, the government's housing programme has mainly been bedevilled by inefficiency, corruption, and poor policy choices.

In the past 25 years, the state has provided more than 3 million houses and a further 1million serviced sites. Despite this, the housing backlog has reportedly grown from 1.5 million units in 1994 to 1.9 million units, while the number of informal settlements has expanded from 300 to 1 185.[42] At the same time, the housing subsidy has shot up from R12 500 per household to a staggering R160 570 per household, at which amount it has since been pegged. 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.

Despite a rapid increase in the housing budget since 1994, the state's delivery of 'free' houses has slowed, dropping from a peak of 235 600 in 1998 to fewer than 64 000 in 2016 and averaging some 90 000 houses a year over the past five years.[43] 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 year a decade ago to roughly 39 500 a year in 2017/18.[44] 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.'[45]

EWC will not increase the pace of state provision. Nor will it overcome the massive inefficiencies in municipal administration and the provision of essential infrastructure. In addition, the more existing houses are expropriated for nil compensation, the more difficult it will be for the government to find the necessary funding – either from its own depleted coffers or from private institutions – to turn these properties into social housing. More seriously still, people want jobs and income as well as homes, whereas any significant uncompensated expropriation of existing houses will further cripple the economy and its capacity to generate employment, as described below.

6.3 EWC will empower the state, not ordinary people

The ANC has repeatedly claimed that EWC will 'return' the land to 'the people'. However, this is fundamentally misleading. Land expropriated without compensation will be owned by the state, not by individual black South Africans. Nor will it transferred to them thereafter, for the ANC's policy is to keep land in state ownership under the State Land Lease and Disposal Policy of 2013. Land acquired via EWC will be held by the state as a patronage tool and used by it to deepen dependency on the ruling party. This is the fraud at the heart of the government's EWC promises.[46]

The extent of the ANC's determination to keep land in state ownership has recently been illustrated by the *David Rakgase* case. Here, 77-year-old David Rakgase had been fighting for 17 years to get the land department to honour its 2002 agreement to transfer to him the ownership of the farm he had long been leasing from the state. For eight years land department officials dragged their heels on the transfer. In 2010 the department did an about-face and refused to sell him the farm after all. Instead, it offered him another lease (without an option to purchase) and threatened to evict him if he failed to accept this. In 2016, moreover, the farm was invaded by unlawful occupiers who argued that Mr Rakgase had no locus standi to evict them because he did not own the land.[47]

In September 2019 the Pretoria High Court set aside the decision to deny ownership to Mr Rakgase as arbitrary, irrational, and unreasonable. It was unconstitutional too, the court went on. Land reform was a constitutional imperative, and Section 237 of the Constitution required 'all constitutional obligations to be performed diligently and without delay'.[48]

Instead of giving him ownership, as earlier agreed, the Department had offered Mr Rakgase a 50-year lease (30 years first, and then another 20) under the State Land Lease and Disposal Policy of 2013. In its court papers, moreover, the Department had reiterated that 'black farming households and communities may obtain 30-year leases, renewable for a further 20 years, before the state will consider transferring ownership to them'.

The court rejected this approach, for Mr Rakgase was already 77 years old and was unlikely to outlive a lease of this duration. In addition, said the court, the Department's claim that Mr Rakgase had 'security of tenure' and was not at risk of being evicted 'smacked of callousness and cynicism, particularly given our country's historical deficiencies in dealing with land reform'.[49]

The court accordingly instructed the Department to implement the sale agreement it had previously concluded with Mr Rakgase. Far from heeding this court ruling, the Department's first response was to say it would appeal against the judgment and so have it set aside. More recently, the Department has offered to sell Mr Rakgase the farm, but only at a price (R5.5 million) which is roughly seven times higher than the price (R621 000) which had been agreed in 2002. If the Department persists in demanding this increased price, it will clearly be in contempt of the Pretoria high court's ruling.[50]

Many other problems with the State Land Lease and Disposal Policy are also evident. As Professor Ruth Hall of the Institute for Poverty, Land and Agrarian Studies at the University of the Western Cape and Professor Thembela Kepe have pointed out (in a study focused on land reform in the Eastern Cape), few beneficiaries are granted leases at all – let alone the 30-year ones they are initially supposed to receive.

On the contrary, since many beneficiaries cannot afford to pay rent to the government, they are confined to 'caretaker' agreements which absolve them from having to pay rent, but oblige them to look after the state's property. However, the duration of these caretaker agreements is usually a scant three months – during which the state can also give them notice to vacate within 30 days. So precarious is the tenure of these beneficiaries that, in one instance (note Professors Hall and Kepe) a family was granted permission to occupy a state farm without a lease, and was asked by the department to deliver an informal eviction notice to those already occupying it.[51]

Situations like these – where people lack any documented rights, or have nothing but expired leases or caretakership agreements – produce high degrees of uncertainty. Working capital is also extremely difficult to borrow in these circumstances. In addition, beneficiaries are effectively prevented from investing in either infrastructure or production. Those new farmers who have nevertheless pressed ahead with fixing roofs or putting up fencing have been told by departmental officials that they have no right to make such changes on land belonging to the state.[52]

Land reform 'beneficiaries' are thus often little more than temporary squatters on land over which they have no rights. Sadly, many of them still believe that at some point in the future they will be granted ownership of this land. This is what the Thabo Mbeki administration (from 1999 to 2008) was willing to agree – and what the 'option to purchase' clauses commonly included in lease agreements earlier confirmed. Since 2010, however, options to purchase have been removed from leases, while existing agreements to sell (as in the case of

Mr Rakgase) have effectively been repudiated. The government is no longer willing to grant ownership to land reform beneficiaries, as its 2013 policy makes clear. However, its change of stance – and its resulting determination to retain for itself all land acquired for redistribution – is seldom explained to ordinary South Africans.[53]

Farm workers are often also badly affected. When farms are acquired by the state, commercial farming operations cease and most farm workers lose their jobs. Some continue to live on the farms in question – but often then feel deeply insecure as they have no leases, jobs, or recognised rights. Instead, they are simply undocumented occupiers of state-owned land.[54]

6.4 EWC brings many economic risks

EWC is likely to cause significant damage to fixed capital investment, growth, tax revenues, public debt, the country's sovereign debt rating, and employment.

6.4.1 Reduced fixed capital investment

Fixed capital investment (often known as 'capital formation') is vital to growth and prosperity. The ratio of fixed investment to gross domestic product (GDP) in successful developing countries thus typically stands at between 35% and 40%. However, South Africa lags far behind this. This is why the National Development Plan strongly recommended that the ratio should be increased from 19% in 2012 to 30% by 2030.[55] Instead, however, the ratio dropped to 18% in 2018 and remained stuck at much the same level in 2019. [56]

If the Bill is enacted into law, fixed investment is likely to decline considerably faster – as has been demonstrated by the experiences of seven other countries which have adopted EWC-style policies in the recent past. (These countries are Ethiopia, Portugal, Romania, Spain, Venezuela, Vietnam and Zimbabwe.) In these nations, the ratio of fixed investment to GDP showed an average decline of 14% after EWC-type policies took effect. In South Africa, the enactment of the Bill is thus likely to reduce the ratio by at least 10%: a conservative projection compared to what has happened in these seven countries.[57]

In a submission to the Constitutional Review Committee in October 2018, economists Dr Roelof Botha and Professor Ilse Botha analysed the negative impacts likely to arise in South Africa from a 10% decline in fixed investment over a relatively short period. This period was set at the ten quarters following on from the time when EWC policies were likely to become operative. Using official data (from the South African Reserve Bank and the National Treasury), their modeling showed that a 10% decline in the ratio of fixed investment to GDP would trigger a significant recession, with GDP shrinking by 1.9% over these ten quarters. This in turn would diminish tax revenues, increase public debt, expand the budget deficit, add to the interest burden on the state, and cost more than 2 million jobs.[58]

This modeling was done at a time (2018) when the economy was performing significantly better than is currently the case. In 2018, for instance, the budget deficit was expected to

come in at a relatively benign 3.7% of GDP in the third quarter of 2020. In the past two years, however, the country's key financial indicators have deteriorated sharply. Even without EWC, the budget deficit is now expected to rise to 6.8% in 2020/21 and to average 6.2% between 2020 and 2022.[59] In these circumstances, the negative consequences the model predicted back in 2018 are likely to be much worse. Hence, if the Bill is now enacted into law, the damage to GDP, revenue, debt, employment and other key indicators will be far more severe than was foreseeable in 2018.[60]

6.4.2 Recession, rather than growth

South Africa's growth rate is already far below the rates being notched up in other BRIC countries. According to the National Treasury's most recent projections, South Africa's real growth rate in 2019 was a meagre 0.3% of GDP. This put the economic growth rate well below the population growth rate (of 1.6%) for the fifth successive year.[61] In the same year, by contrast, Brazil grew by 1.2%, Russia by 1.1%, India by 4.9% and China by 6.1%.[62] The Treasury's growth projections for 2020 and beyond are also pedestrian: 0.9% in 2020, 1.3% in 2021 and 1.6% in 2022. Yet even these low rates are unlikely to be achieved in practice, as recent budget figures have persistently over-estimated the economy's growth potential.[63]

This already disturbing situation will deteriorate still further once the Bill is adopted. Growth is then likely to turn negative, while a prolonged recession could follow. Even without EWC, business confidence is already at a 35-year low and the economy is in its longest downward cycle since 1945. Add the Bill into the policy mix and the country's economic fundamentals will weaken sharply. Any prospect of raising the growth rate to 5.4% of GDP by 2030 (as the National Development Plan urges) will then be lost – and probably irreparably so. [64]

6.4.3 Reduced tax revenues

South Africa's tax base is already very small, as shown by the 'Tax Statistics' published in December 2019 by the South African Revenue Services (SARS). According to these tax figures, more than 20 million people were registered for personal income tax in 2018 (the latest year for which this SARS data is available). However, many had earnings below the tax threshold and therefore paid no tax at all. In all, as the *Financial Mail* reports, 'there were just 189 891 people in the country who earned more than R1m each in 2018 and who contributed 36.9% of all personal income tax collected'. What these figures show, thus, is that 'the government is overwhelmingly reliant on 0.3% of the population to finance its spending on the rest'.[65]

A similar picture is evident as regards corporate income tax. Though some 3.2 million companies were registered for tax in 2018, only 814 151 qualified to be assessed. Of these companies, as SARS reports, a mere 24.3% had 'positive taxable income' whereas '48.3% had taxable income equal to zero and the remaining 27.4% reported an assessed loss'. Roughly 75% of South African companies thus earned too little to pay any tax at all. Some 57.2% of all the corporate tax collected in 2018 came from 380 large companies, indicating that the corporate tax base is very narrow too.[66]

South Africa is thus heavily dependent on a small number of individuals and companies to sustain government spending on both fixed investment and all other needs – including social grants and the public sector wage bill. If even a quarter of these taxpayers were to emigrate or disinvest in response to the enactment of the Bill, the impact on tax revenues would be severe.

Even without the Bill, moreover, tax revenues are already sharply down. According to the *2020 Budget Review*, the National Treasury anticipates a R63bn shortfall in the revenue likely to be collected in the 2019/20 financial year, as compared to its 2019 budget projections. It also expects revenue to be almost R130bn lower than was anticipated in October 2019 in its *Medium Term Budget Policy Statement*.[67]

6.4.4 Increased public debt

South Africa's public debt has been rising very rapidly since 2008, when it stood at R630bn or 26% of GDP. Even without the Bill, public debt will exceed R3.6 trillion (or 66% of GDP) in the 2020/2021 financial year and is expected to increase to some R4.4 trillion (72% of GDP) in 2022. Thereafter, the Treasury expects public debt to keep rising to a projected 85% of GDP in the 2027/28 financial year.[68]

At the same time, the total debt of state-owned enterprises (SOE) debt, including the R450bn owed by Eskom, already amounts 'to just over R1 trillion (or about 22% of GDP), as the *Financial Mail* reports. Since much of this debt has also been guaranteed by the government, the state's contingent liabilities are expected to rise to R980bn by March 2020. If government guarantees for the debts of Eskom and other SOEs are factored in, then overall public debt – according to Moody's Investors Service, the only international ratings agency that still rates the country's sovereign debt at investment grade – will amount to 80% of GDP within a scant three years.[69]

6.4.5 Further sovereign credit ratings downgrades

The government's inability to contain rapidly rising public debt has already prompted two international ratings agencies to downgrade South Africa's sovereign debt to sub-investment or junk status. If public debt cannot convincingly be controlled – and the enactment of the Bill will reduce growth and make this far more difficult to achieve – then further ratings downgrades, by both Moody's and other agencies, are sure to follow.

This will further harm the economy. It will also significantly increase the government's interest bill, which is budgeted at R230bn (much the same as the amount allocated to public healthcare) in the current financial year.[70] Interest payments already absorb 13% of total spending – and this proportion could easily rise to 20% within a few years. At that point, writes economist Nazmeera Moola, 'one in every five rands government spends will go towards interest', rather than education, healthcare, housing, social grants and other vital needs.[71]

6.4.6 Great damage to the banking sector and hence to the entire economy

When the country's sovereign credit rating is downgraded, the credit ratings of its banks will be reduced as well. In a pointer to what is to come, Moody's has already downgraded the Land Bank to one notch below investment grade, saying it doubts the South African government has the financial capacity to continue supporting the bank. This downgrade will result in the Land Bank having to borrow at higher rates. This will leave it with little choice but to increase the interest rates it charges to farmers needing to raise working capital.[72] Further downgrades to the credit ratings of all other banks will increase the costs of borrowing for everyone.

However, the increased borrowing costs that will result from the Bill are only a small part of the story. The likely impact of the Bill on the use of land and buildings as collateral for debt will be far more damaging – and could have disastrous consequences for both the banking industry and the wider economy.

Under the Bill, many South Africans are likely to face the uncompensated expropriation of their houses, business premises, and farms (to name but a few examples). What will happen if they have mortgage bonds over these properties and still owe substantial sums to their banks on the assets they have lost?

The Bill is silent on this issue. However, the Expropriation Bill of 2019 – which 'the government stands ready' to enact once the Constitution has been amended (as President Cyril Ramaphosa noted in his recent SONA or state-of-the-nation address) – provides an answer.[73]

Under the Expropriation Bill, if the expropriated property is mortgaged to a bank, the mortgage will automatically be terminated on the date of expropriation stated in the notice of expropriation. On that date, ownership will automatically pass to the relevant expropriating authority and any registered mortgage will simultaneously come to an end. This ensures that the bank can no longer foreclose on the property now owned by the state.[74]

However, the loan agreement that was earlier secured by the mortgage does not come to an end. The expropriated owner is still expected to pay off the debt to the bank – but may not have the means to do so. This risk is particularly high, of course, where 'nil' compensation applies.

These provisions are largely in line with the current Expropriation Act of 1975, which also provides for the automatic termination of a mortgage bond when ownership of expropriated property passes to the state. Under the Act, however, there is little danger that the amount of compensation – market value, plus an amount to make good all resulting losses – will be less than the loan still owing to the bank. Hence, it is relatively easy for the expropriated owner to pay off the loan and still have something left over.

By contrast, once the state is empowered to expropriate for 'nil' (or limited) compensation, enormous financial pressures on both owners and banks are sure to result.

Owners will have lost key assets: for many people, their sole and most valuable properties, built up over a lifetime of endeavour. Yet they will somehow have to pay for new accommodation or business premises without having the means to do so. Since this will be onerous enough, they will battle to pay off their outstanding mortgage loans as well.

At the same time, the banks cannot write off large amounts of mortgage debt without undermining the confidence of depositors and destabilising the entire banking system. What then are they to do to enforce payment? Push expropriated owners into bankruptcy? Make them sell off their cars and household effects to help pay off their loans?

The wider ramifications will also be severe. House prices will drop sharply and many people will find themselves owing more on their bonds than their houses are now worth. Banks unable to use property as collateral will be more reluctant to enter into mortgage loans and are likely to charge higher interest rates to compensate for the increased risk. Some banks might decide to withdraw altogether from the mortgage market. Home and other loans will become more difficult and costly to secure. This will further damage the property market, make it harder for new entrants to buy flats or houses, and greatly harm the entire economy.

The Banking Association of South Africa (Basa) has repeatedly warned against these risks. As long ago as September 2018, Basa explained its concerns to the Constitutional Review Committee (CRC) charged with examining whether a constitutional amendment was necessary to implement EWC.

Said Basa's managing director Cas Coovadia to the CRC: 'An amendment to section 25 has the potential to undermine all property rights. As such, it poses a risk to every home owner, business owner and investor. Banks have invested R1.6 trillion of South Africans' savings, salaries, and investments in property loans. Properties [provide] security for loans, if [this is] needed to recover depositors' money. Should property values decrease markedly due to legislation or lack of investor confidence, banks and the economy could not absorb the shock.' [75]

Added Mike Brown, chief executive of Nedbank, in a separate presentation to the CRC: '[Nedbank] has obligations not only to the eight million clients who entrust the bank to protect their hard-earned savings, but also to the safety and soundness of the entire financial system... [76]

'Every bonded property that is expropriated without compensation is likely to result in a [bad debt],...even if such a loan remains technically legally due and payable.... [Yet] maintaining confidence in the banking system is absolutely imperative for depositors to feel that their money is safe.' Without that confidence, moreover, 'a classical banking crisis' is likely to result.[77]

Basa has since reiterated these concerns in its submission on the Bill to this Committee. As *Business Day* reports, Basa has again noted that 'banks have extended R1.6 trillion in residential, commercial and agricultural mortgages to borrowers'. It has also pointed out that 'the market value of land-based property in South Africa is estimated at R7 trillion'. This is a very large sum and one which is enormously important to 'ordinary people' because it 'represents their homes and savings'. If the value of this land-based property starts to decline, key assets will be worth less, market confidence will diminish – and the outcome could well be a major banking crisis.[78]

Experience in Zimbabwe shows just how serious such a banking crisis could be. In Zimbabwe, writes Craig Richardson, associate professor of economics at Salem College (in Winston-Salem, North Carolina) and author of a book on Zimbabwe's collapse, the story began in 2001 when the country's constitution was amended to allow EWC. Before long, he adds, 'the Zimbabwean government declared itself the owner of all farmland'.[79]

What this also meant, of course, was that 'banks and other property owners now held worthless titles'. Land became what Peruvian economist Hernando de Soto calls 'dead capital' because it could no longer be leveraged and used as collateral.[80]

The impact on the banking system and the wider economy was devastating. Notes Professor Richardson: 'With banks now holding worthless titles and unable to foreclose on properties, 13 of Zimbabwe's 41 banking institutions were in financial crisis by late 2004. The amount of credit sharply contracted, affecting all sectors of the economy. Gross fixed capital formation, heavily dependent on loans, fell by 43 per cent' between 1999 and 2001.[81]

'Zimbabwe's conversion from productive to dead capital was now nearly complete. Just as De Soto's work has shown how developing countries can harvest wealth by turning "dead" capital into "live" capital as a result of titling land and using that property as collateral for bank loans, the case of Zimbabwe shows that these ideas work in reverse as well – with grim results.'[82]

Those 'grim results' included a major sell-off of Zimbabwe equities by foreign investors, a massive exodus of farming and other skills, a sharp decline in agricultural and other production, a dramatic narrowing of the tax base, a sudden decrease in the hard currency that agricultural and other exports had previously earned, and crippling shortages of the food, fuel, and medicines that needed to be imported.[83]

As Professor Richardson recounts: 'Without hard currency in its coffers, the Mugabe government turned to the Reserve Bank of Zimbabwe to pay its bills. Annual money supply growth rose from 57 percent in January 2001 to 103 percent by the end of the year, inaugurating a cycle of devastating hyperinflation.' Acute food shortages meant the country had to 'print billions of Zimbabwe dollars to import food'. The imported ink needed to print

dollar notes was so scarce that bills were often printed on one side only. 'By March 2006 it took Z$60 000 to buy one loaf of bread.'[84]

South Africa is still far away from this haunting tale of woe. But, with the Bill soon to be put before Parliament for adoption, there is no room for complacency. As Professor Richardson points out, property rights are like 'the concrete foundations of a building: critical for supporting the frame and the roof, yet virtually invisible to its inhabitants'.[85] Take them away, however, and the structure no longer stands secure.

The resulting damage can also be extraordinarily rapid and widespread. The initial erosion of property rights might seem relatively limited, but it can easily develop a domino effect. Writes Professor Richardson: 'The lesson [from Zimbabwe] is that well-protected property rights are crucial for economic growth and serve as the market economy's lynch pin. Once those rights are damaged or removed, economies are prone to collapse with surprising and devastating speed.'[86]

6.4.7 An upsurge in unemployment

On a broad definition (which takes account of those too discouraged to keep looking for jobs), the number of unemployed South Africans has gone up from 3.6 million in 1994 to 10.2 million in 2019. The unemployment rate, on this same broad definition, has gone up from 32% in 1994 to 38.5% in 2019. The expanded youth unemployment rate, among people aged 15 to 24, has long been far worse and stood at a disastrous 68% in 2019.[87]

Though unemployment is already at crisis levels, the increase in joblessness has at least been relatively slow in recent years. However, if the Bill is adopted with all the negative economic consequences already outlined, unemployment is likely to expand much faster. The jobless rate could soon rise to more than 40% in general on the broad definition, and to a devastating 70% among young people.

7 The vital importance of private property rights

Private property rights are vital for direct investment, economic growth, and the generation of new jobs. They are a key foundation for upward mobility and individual prosperity. They also provide an essential basis for economic independence from the state – and hence for political freedom and other fundamental civil liberties.

This explains why the racially discriminatory laws that earlier barred black South Africans from owning land, houses, and other property were so fundamentally unjust. It also explains why a key purpose of the struggle against National Party rule was not simply to end racial discrimination but also to extend to black people the private property rights that whites had long enjoyed.

Significant progress towards that goal is now evident. Helped by major redistribution from via the budget, black property ownership has been growing steadily since 1975, when a 30-year leasehold option for township houses was introduced. This was soon replaced by 99-year

leasehold; and then, in the 1980s, by freehold rights. Today, close on 7.8 million black South Africans own their homes, as do almost 1 million so-called 'coloured' and Indian people – and roughly 1 million whites. Since 1991, when the National Party government repealed the notorious Land Acts, black people have also bought an estimated 6.1 million hectares of rural and urban land on the open market, without the intervention of the state.[88]

Though private property ownership is still racially skewed, black ownership of land, houses, and other assets has been growing steadily for many years. To accelerate this process, the country needs an annual average growth rate of 6% of GDP, accompanied by an upsurge in investment and employment. Black home ownership also needs to be formalised in many instances through the issuing of proper title deeds, which would help unlock the full economic value of these houses. In addition, some 17 million black people living on roughly 13 million hectares of land in customary tenure in the former homelands need individual title to the plots they occupy, which again would help to bring this dead capital to life.

Instead, economic growth is being steadily undermined and the property rights of all South Africans are being put at risk. The Bill is but the latest salvo in a sustained barrage against property rights, which already includes:

- the vesting of all water and mineral resources in the state (which means that none of these rights can ever be privately owned by individual black South Africans);
- the proposed re-opening of the damaging land claims process (under which more and more land will be vested in communal property associations or traditional leaders, further limiting the scope for individual black ownership of land);
- the mooted Regulation of Land Holdings Bill of 2017, which will prevent farmers, both black and white, from owning land in excess of state-imposed ceilings (seemingly to be set at a maximum of 5 000 hectares for most large farms, but probably to be revised downwards over time).

This steady erosion of property rights – including now the present Bill – ignores both the gains that have already been made and the importance of further expanding the ownership rights of all black South Africans. Instead, the ruling party – together with its allies in the Congress of South African Trade Unions (Cosatu) and the South African Communist Party (SACP) – remains intent on pursuing the National Democratic Revolution (NDR) to which the ANC first committed itself at the Morogoro national conference in 1969, some 50 years ago.

Both Cosatu and the SACP openly describe the NDR as providing 'the most direct path' to a socialist and then communist future. The ANC is more circumspect about overtly embracing this goal, but has nevertheless recommitted itself to the NDR at every one of the five-yearly national conferences it has held since 1994.

In pursuing the NDR, one of the ANC's key objectives, also regularly reaffirmed, is to bring about the 'elimination of apartheid property relations'. However, the word 'apartheid' is

essentially a red herring. Replace it with the word ‘existing’ and the real meaning of this goal becomes apparent.

Socialist and communist countries are notorious for abusing the fundamental civil liberties of their citizens. Pervasive state ownership and economic controls within these countries have generally also crippled economic efficiency, leading to major shortages of food and other essentials, and impoverishing everyone except a small political elite. Socialist and communist countries – along with states that have nationalised or expropriated land, mines, banks, oil, and other assets without adequate compensation – are also among the poorest in the world. By contrast, those countries that limit state intervention and safeguard private property rights are among the richest in the world.

The practical importance of individual property rights and limited state ownership and control has been evaluated for many years by the Fraser Institute in Canada, a think tank. The Fraser Institute’s research shows that the countries which do the best in upholding private property rights and limiting state power are the ‘most free’, in the economic sense. They are also by far the most prosperous. Moreover, the poorest 10% of people in the most free countries have a much higher standard of living than their counterparts in the ‘least free’ countries, where state ownership of land and assets is pervasive and private property rights are tenuous at best.

In 2017, for example, nations in the top quartile for economic freedom had average per-capita GDP of $37 770, as compared to $6 140 for countries in the bottom quartile (as measured in PPP constant US$). In the top quartile, moreover, the average income of the poorest 10% was roughly $10 650, as opposed to $1 500 for the poorest 10% in nations in the bottom quartile. The average income of the poorest 10% in the most free countries was thus two-thirds higher than the average per-capita income in the least free nations.[89]

In addition, for countries in the top quartile, only 1.8% of the population lived in extreme poverty (on less than US$1.90 a day), as compared to 27.2% in the bottom quartile. Among the most free nations, infant mortality stood at 6.7 per 1 000 live births, as opposed to 40.5 in the least free countries. In addition, life expectancy, gender equality, happiness levels, and political and civil liberties were all significantly higher for people living in the most free countries than for those living in the less free nations.[90]

The importance of property rights is further confirmed by the experience of both Zimbabwe and Venezuela. In Zimbabwe, as earlier outlined, the expropriation of farmland has led to economic collapse, pervasive hunger, extraordinarily high inflation, a 90% unemployment rate, and the flight of millions of impoverished people.

Much the same is true in Venezuela, where GDP has halved in recent years, hunger is widespread, hyperinflation has soared to some 2 million per cent, and more than 3 million people (a tenth of the population) have been forced to flee. Many families in Venezuela, which used to be the richest country in Latin America, now have no choice but to try to survive on US$5 to US$10 a month, and sometimes less. (These amounts are equivalent to

between R75 and R150: far less than South Africa's monthly child support grant of R445 for a single child, or its old-age pension of R1 860 a month for a single pensioner.)

8 The way forward

The best way forward for South Africa and all its people, both black and white, is to jettison the EWC idea and leave Section 25 of the Constitution unchanged.

Amending Section 25, as the Bill proposes, will not overcome current barriers to effective land reform or housing delivery. Profoundly weakening property rights by allowing EWC in a host of unspecified circumstances will, however, greatly damage the economy. At the very least, it will deter investment, trigger downgrades and recession, and worsen the country's unemployment crisis. At worst, it could set off the economic devastation that both Zimbabwe and Venezuela have experienced since they amended their constitutions to allow the uncompensated confiscation of (supposedly) 'stolen' or 'idle' land.

The Bill must thus be abandoned, while the sanctity of property rights must be strongly reaffirmed. At the same time, the government must start developing sound and practical proposals to counter the problems in land reform and housing delivery that EWC is incapable of overcoming.

The ANC should also abandon the socialist goals that underpin its ideologically outdated NDR. If it has any real regard for the welfare of the country and its people, it should withdraw all NDR policies, clamp down on corruption, improve public sector efficiency, strengthen law and order, uphold the rule of law – and strongly embrace the market-friendly reforms that are supposed to be the hallmark of President Ramaphosa's bright 'new dawn'.

References

[1] *Matatiele Municipality and others* v *President of the Republic of South Africa and others*; [(2006) ZACC 12] *Doctors for Life International* v *Speaker of the National Assembly and others*; [2006 (6) SA 416 (CC)] and *Land Access Movement of South Africa and others* v *Chairperson of the National Council of Provinces and others*. [(2016) ZACC 22]; *Minister for Health and another* v *New Clicks South Africa (Pty) Ltd and others*, [2005] ZACC 14, at para 630

[2] Department of Planning, Monitoring and Evaluation, 'Socio-Economic Impact Assessment System (SEIAS), Revised Impact Assessment: National Health Insurance Bill', 26 June 2019 (2019 SEIAS Assessment); *SEIAS Guidelines*, p3, May 2015

[3] *SEIAS Guidelines* p7

[4] Ibid

[5] Ibid, p11

[6] Clause 1(a), Bill

[7] Hansard transcript, Politicsweb.co.za 17 December 2018, emphasis supplied by the IRR

[8] http://www.cogta.gov.za/?p=966

[9] *Draft Expropriation Bill of 2019*, clause 12

[10] Antonie Gildenhuys, 'The Debate about Full, Partial or Nil Compensation in Expropriations for Land Reform Purposes in South Africa', https://doi.org.10.1515/eplj-2019-0007, pp136-180, at p137

[11] Ibid, p138

[12] Ibid, p139

[13] Clause 1 (c), Bill
[14] Clause 12(3), Expropriation Bill of 2019, as amended in December 2019
[15] Clause 12(3), ibid
[16] Clause 12(3), ibid
[17] *Business Day* 20 December 2019, *Politicsweb.co.za* 18 December 2019
[18] Memorandum on the Objects of the Constitution Eighteenth Amendment Bill, 2019, para 1
[19] Ibid, pp29-30
[20] *Speaker of the National Assembly and another* v *Land Access Movement of South Africa and others*, http://www.saflii.org/za/cases/ZACC/2019/10.pdf , at para 46, fn47
[21] Reply by Ministry of Rural Development and Land Reform to 2018 parliamentary question, cited by Dan Kriek and Nick Serfontein, *Alternative perspectives on land reform based on sustainable economic growth and national building principles*, 2019, p51
[22] Helen Zille, 'What parallel universe does Gugile Nkwinti inhabit?' *Politicsweb.co.za*, 29 June 2014
[23] *2020 South Africa Survey*, IRR, Johannesburg, p377
[24] Minister Gugile Nkwinti, 'Debate of the State of the Nation Address', *Politicsweb.co.za*, 14 February 2017, p2; *Business Report* 29 June 2011; Ernst Roets, 'The real state of land ownership', *Politicsweb.co.za*, 24 April 2018; Zille, 'What parallel universe?'
[25] *2019 Budget Review*, p62; IRR, *Fast Facts*, February 2019, p3; National Treasury, *2020 Budget Review*, pp72, iii
[26] IRR, Full Submission on EWC, p8; Department of Rural Development and Land Reform, *State Land Lease and Disposal Policy of 2013*
[27] John Kane-Berman, 'From land to farming: bringing land reform down to earth', *@Liberty*, IRR, Issue 25, May 2016, p7
[28] Ibid, p14
[29] Theo de Jager, 'Legacy of the 1913 Natives Land Act – taking up the challenge', *Focus*, Helen Suzman Foundation, Issue 70, pp44-45
[30] Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, www. Parliament.gov.za, November 2017, p37
[31] *Sunday Times* 12 February 2017
[32] Ibid
[33] Report of the High Level Panel, pp38, 50-51
[34] *Mwelase and others* v *Director General of Rural Development and Land Reform and another*, CCT232/18, paragraphs 101, 102
[35] Ibid, paragraph 12
[36] Ibid, paragraph 18
[37] Ibid, paragraph 40
[38] Ibid, paragraph 41
[39] Ibid, paragraph 69
[40] Ibid, Paragraphs 26,27
[41] *Sunday Independent* 19 January 2020
[42] IRR, *South Africa Survey*, 2020, p659
[43] Ibid, p665
[44] Ibid
[45] IRR, 'South Africa's Housing Conundrum', *@Liberty*, October 24, 2014, p10
[46]ANC NEC's January 8th Statement of 2020, Clause 3.4
[47] *Rakgase and another* v *Minister of Rural Development and Land Reform and others* (33497/2018) [2019] ZAGPPHC 375; [2019] 4 All SA 511 (CC), Clause 3.19
[48] Ibid, Clause 5.4.7
[49] Ibid, Clause 5.4.6
[50] *Business Day*, 20 January 2020
[51] Ruth Hall and Thembela Kepe, 'Elite capture and state neglect: New evidence on South Africa's land reform', *Review of African Political Economy*, Vol 44, 2017, Issue 151
[52] Ibid, pp5-6
[53] Ibid
[54] Ibid, pp6-7
[55] IRR *South Africa Survey*, 2019, p126; *National Development Plan*, National Planning Commission, The Presidency, 2012, p64
[56] IRR, *Fast Stats*, January 2020, p2; February 2020, p4; *Business Report* 13 February 2020
[57] R Botha and I Botha, 'A macroeconomic impact assessment of a policy of land expropriation without compensation in South Africa', Submission to the Constitutional Review Committee, October 2018

[58] Ibid
[59] *Business Day*, 27 February 2020
[60] Botha and Botha, 'A macroeconomic impact assessment of a policy of land expropriation without compensation in South Africa', October 2018
[61] *Business Day* 21 January 2020
[62] *The Economist* 11 January 2020
[63] National Treasury, *2020 Budget Review*, p ii
[64] John Kane-Berman, 'Best Laid Schemes,' IRR, *Fast Facts*, July 2013, p4; Magnus Heystek, 'Financial catastrophe is upon South Africa', *BizNews* 16 October 2019; www.fin24.com, 9 January 2020, *Business Report* 13 February 2020
[65] *Financial Mail* 9 January 2020
[66] Ibid
[67] Treasury, *2020 Budget Review*, pp ii, 25
[68] *Sunday Times Business Times* 3 November 2019, *Financial Mail* 14 November 2019
[69] *Saturday Star* 2 November, *Sunday Times Business Times* 3 November, *businesslive.co.za* 3 November 2019; National Treasury, *2020 Budget Review*, p10; *Business Day*, *The Citizen* 27 February 2020; Treasury, *2020 Budget Review*, p78
[70] *Fast Facts*, February 2019, p2; *Business Day* 27 February 2020; National Treasury, *2020 Budget Review*, p iv
[71] Nazmeera Moola, 'Government doesn't seem to grasp the meaning of SA's parlous finances', *Daily Maverick*, 13 November 2019; *Business Day* 27 February 2020
[72] *www.fin24.com*, 'Moody's downgrades Land Bank to junk', 21 January 2020
[73] *BizNews* 21 February 2020
[74] Clause 18, Expropriation Bill of 2019
[75] PMG minutes, Basa, Oral presentation to the Constitutional Review Committee, Parliament, September 2018
[76] PMG minutes, Nedbank, Oral presentation to the Constitutional Review Committee, Parliament, September 2018
[77] Ibid
[78] *Business Day* 12 February 2020
[79] Craig J Richardson, 'Learning from Failure: Property Rights, Land Reforms, and the Hidden Architecture of Capitalism', American Enterprise Institute for Public Policy Research, No 2, 2006, p6
[80] Ibid
[81] Ibid
[82] Ibid
[83] Ibid, pp6-7
[84] Ibid, pp7-8
[85] Ibid,p4
[86] Craig J Richardson, 'How the Loss of Property Rights Caused Zimbabwe's Collapse', Cato Institute, 14 November 2005, pp3-4
[87]IRR, *2020 South Africa Survey*, pp283, 285, 288
[88] IRR, *2019 South Africa Survey*, p402; Agri SA, 'Land Audit: A Transactions Approach', *Politicsweb.co.za*, 1 November 2017, p9
[89] Fraser Institute, *Economic Freedom of the World*, 2019 Annual Report, p vi
[90] Ibid