

**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 2021**  
**Johannesburg, 13<sup>th</sup> August 2021**

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## 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 2021 (‘the Bill’) by 13<sup>th</sup> August 2021.

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 Content of the Bill

The Bill has four main provisions:

### 2.1 *Proposed sub-section 25(2)(b), 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 this changed form, it will then state: <sup>1</sup>

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 where land and any improvements thereon are expropriated for the purposes of land reform,...the amount of compensation may be nil’.

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<sup>1</sup> Clause 1(a), Draft Constitution Eighteenth Amendment Bill of 2021 (the Bill)

### 2.1.1 *Both land and improvements*

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 6<sup>th</sup> December 2018 and then reaffirmed by the Sixth Parliament in July 2019 and again in June 2021. 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*’.<sup>2</sup>

The Committee has no mandate to extend ‘nil’ compensation on expropriation (expropriation without compensation or 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, mines, 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.)<sup>3</sup>

Just and equitable compensation 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.

### 2.1.2 *The role of the courts regarding compensation*

The main difference between the current clause and the equivalent provision in an earlier version put forward by the Ad Hoc Committee in 2019 – the Draft Constitution Eighteenth Amendment Bill of 2019, or the 2019 Bill – is that the courts are no longer expressly required to decide in every instance whether compensation should be nil.

Committee members representing the African National Congress (ANC) have claimed that the difference in wording is immaterial as the courts will still have the power to ‘decide or approve’ the nil compensation to be paid if no agreement on this point can be reached between the state and the expropriated owner. The change is nevertheless far more important than the ANC has been willing to acknowledge.

On the wording of the 2019 Bill, nil compensation could not apply without specific court orders obtained in advance and authorising nil payment in all instances. The same requirement should, of course, apply under the amended wording in the 2021 Bill – which

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<sup>2</sup> Proceedings of the National Assembly, Establishment of Ad Hoc Committee to Amend Section 25 of Constitution, Motion Agreed, Unrevised Hansard, 6 December 2018, emphasis supplied by the IRR; see also Politicsweb.co.za 17 December 2018

<sup>3</sup> <http://www.cogta.gov.za/?p=966>

says that any disputed amount of compensation must ‘have been’ decided or approved by a court before an expropriation may proceed. As the Constitutional Court confirmed in the *Haffejee* case, this wording means that court approval or decision is needed in advance of any expropriation – save in the most exceptional circumstances.<sup>4</sup>

In practice, however, the 2021 Bill is clearly intended to limit the scope for court intervention by seeking to make this discretionary rather than automatic – and by obliging expropriated owners to be proactive in seeking out the help of the courts. In addition, if the current wording of the Expropriation Bill of 2020 remains unchanged, many owners will find that expropriations proceed so rapidly that their rights of ownership and possession will have passed to the state long before they are able to obtain hearings in the courts. In such situations, only the very wealthy will still be able to litigate. Most other erstwhile owners will be so busy scrambling to find new homes or business premises that litigation will be far too difficult and costly to manage as well.

This change in the Bill is likely to harm the poor the most. In many instances, the people who are most marginalised will have the least access to information and the least awareness of what limited remedial action they might be able to take. Like Bheki Dlamini in the Groutville area of KwaZulu-Natal – whose land was registered in the name of the KwaDukuza Municipality in 2013 without his ever having received a notice of expropriation – they may battle to ascertain the facts or to find out what their remedies might be.<sup>5</sup> Legal protections against the abuse of state power are important to everyone – but often their greatest value is to the poorest and most vulnerable.

## **2.2 Proposed sub-section 25(3)**

As regards sub-section 25(3), the current Bill is effectively the same as its 2019 predecessor. Under the current wording, 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.<sup>6</sup>

As in the 2019 version of the measure, 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

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<sup>4</sup> *Haffejee NO and others v eThekweni Municipality and others* [2011] ZACC 28

<sup>5</sup> KZN landowner in court battle with municipality over land expropriation’, [www.iol.co.za](http://www.iol.co.za), 15 November 2018; *Dlamini v KwaDukuza Local Municipality and others*, (D12577/2016) [2019] ZAKZPHC 55 (26 July 2019)

<sup>6</sup> Section 25(3), Constitution of the Republic of South Africa, 1996; Clause 1(b), Draft Eighteenth Constitution Amendment Bill of 2019; Clause 1(b), Draft Constitution Eighteenth Amendment Bill, 2021 (the Bill)

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.<sup>7</sup>

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.’<sup>8</sup>

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.<sup>9</sup> 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 wording in this sub-section of 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.

### ***2.3 Proposed sub-section 25(3A), allowing Parliament to decide when ‘nil’ compensation should apply***

According to a new sub-section 25(3A), ‘for the furtherance of land reform, national legislation must, subject to subsections (2) and (3), set out circumstances where the amount of compensation is nil’.<sup>10</sup>

#### *2.3.1 The role of the courts on ‘nil’ compensation*

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<sup>7</sup> 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

<sup>8</sup> Ibid, p138

<sup>9</sup> Ibid, p139

<sup>10</sup> Clause 1(c), the Bill

Under the 2019 wording, the national legislation Parliament was required to adopt would have had to set out ‘circumstances where *a court may determine* that the amount of compensation is nil’ (emphasis supplied by the IRR). Under the 2021 Bill, however, this reference to the courts falls away.

Though the jurisdiction of the courts has not been ousted, prior court approval for nil compensation will no longer be required. Instead, as discussed in the context of sub-section 25(2)(b), owners wanting more than nil compensation will have to seek out the help of the courts – and will often find it difficult to afford such litigation.

### 2.3.2 *Any number of new EWC statutes*

On the current wording of the Bill, Parliament will be compelled to enact any number of new national statutes specifying when ‘nil’ compensation is to be paid. All such laws will be enacted by the legislature by a simple (51%) majority.

Though all these laws will have to be framed in the land reform context, this constitutional provision vastly extends the circumstances in which ‘nil’ compensation will be paid. This in turn greatly erodes the protection for property rights that the Constitution is supposed to provide. At the very least, the amended Section 25 should itself set out the land reform circumstances in which nil compensation may apply. It should not give Parliament a blank cheque to decide this by simple majority from time to time.

For this reason too, the Bill does far more than make ‘explicit what is implicit’ in the existing Section 25. It also undermines 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. In practice, the efficacy of these safeguards is likely to diminish as the number of EWC statutes proliferate.

### 2.3.3 *Two examples of ‘national legislation’ likely to be adopted*

Parliament could use the new sub-section 25(3A) to adopt two possible statutes, beginning with the current Expropriation Bill of 2020 (the Expropriation Bill). In its present form, the Expropriation Bill lists five instances in which nil compensation may be paid.<sup>11</sup> But the Expropriation Bill also makes it clear that the circumstances in which nil compensation may apply are ‘not limited’ to the five it lists.

Nil compensation may thus be paid in a host of other circumstances too. In addition, there is no specific requirement that these further instances should 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.

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<sup>11</sup> Clause 12(3), Expropriation Bill of 2020 [B23-2020]

The Expropriation Bill is also impermissibly vague in its description of the instances where nil compensation may apply. Its current wording states, for instance, that nil compensation may be paid where ‘an owner has abandoned land by failing to exercise control over it’.<sup>12</sup> 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?

In addition, the prevalence of land invasions in South Africa makes sub-clause 12(3)(c) particularly unjust and inimical to the rule of law. Take, for example, the case of William and Walter Mnyandu, who had their homes (located within a former Lutheran mission in Ekuthuleni) burnt down in 2014. This arson attack was allegedly carried out by an *impi* under the local chief’s command. The police were present when the Mnyandus were threatened and driven out of their homes, which were then set ablaze. However, the police did not defend the Mnyandus, but rather helped escort them out. Nor did they intervene when the Mnyandus were told they would be killed if they tried to return home. William was still in hiding, thus, at the time of his death, while Walter found that the title deed he had finally obtained meant nothing in practice.<sup>13</sup>

Once sub-clause 12(3) of the Bill has been enacted into law, the local municipality (or any other relevant organ of state) could take advantage of Walter’s plight to expropriate his land for nil compensation. This would be justified on the basis that he no longer ‘exercised control’ over the land and had thereby ‘abandoned’ it. Such an outcome, however, would hardly be ‘just and equitable’. The sub-clause could also encourage an upsurge in land invasions, a further crumbling of law and order, and a shift towards the notion that ‘might is right’.

The current 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?<sup>14</sup> 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, this makes the wording of the clause impermissibly vague and offends against the rule of law.

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<sup>12</sup> Clause 12(3), Expropriation Bill of 2020 [B23-2020]

<sup>13</sup> Gabriel Crouse, ‘Expropriation Bill: The devil lies in the details’, *Politicsweb.co.za*, 5 November 2020

<sup>14</sup> Clause 12(3), Expropriation Bill of 2020

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 be put in place. This cannot be achieved, however, where Parliament is empowered to enact legislation providing for nil compensation in sweeping 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 impetus to implement them.<sup>15</sup>

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 double its list from the five 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 additional draconian powers on municipalities. Again, this would make a mockery of the general requirement for ‘just and equitable’ compensation in Section 25.

#### **2.4 *Land as ‘the common heritage’ of all citizens***

Under a new sub-section 25(4A), ‘the land is the common heritage of all citizens that the state must safeguard for future generations’.<sup>16</sup>

This sub-section presumably refers to all land in the country. It is clearly intended to provide a moral justification for the effective nationalisation of land under the rubric of custodianship, as outlined below. It also echoes a similar formulation that has already been used to justify custodianship of the nation’s mineral resources. According to Section 3 of the Mineral and Petroleum Resources Development Act or MPRDA of 2002: ‘Mineral...resources are the common heritage of all the people of South Africa and the State is the custodian thereof for the benefit of all South Africans.’<sup>17</sup>

#### **2.5 *State custodianship of ‘certain’ land***

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<sup>15</sup> *Business Day* 20 December 2019, *Politicsweb.co.za* 18 December 2019

<sup>16</sup> Clause 1(d), Bill

<sup>17</sup> Section 3(1), Mineral and Petroleum Resources Development Act of 2002



Under a revised sub-section 25(5), ‘the state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable state custodianship of certain land in order for citizens to gain access to land on an equitable basis’.<sup>18</sup>

The crucial change lies in the insertion of words effectively requiring the state to take custodianship of ‘certain’ land. How much land might in time be taken into state custodianship under this sub-section is unclear. However, ‘certain’ land could comprise all land other than that which is already owned by the state. This would include all privately-owned land in both urban and rural areas, as well as all land held in customary tenure.

Though the Bill does not spell this out, it is unlikely that any compensation would be paid when the state takes custodianship under the authority of this clause. Once the Constitution has been amended to include this provision, Parliament could easily use its powers under the new subsection 25(3A) to adopt, by simple 51% majority, a statute vesting all privately-owned land in the custodianship of the state. The new statute could also go on to provide that this vesting of custodianship in the state is one of the ‘circumstances’, aimed at ‘furthering land reform’, in which ‘the amount of compensation is nil’.

### **3 The significance of state custodianship**

The state’s taking of custodianship will extinguish all current ownership rights. Title deeds to all affected property will ‘mean nothing’ (as the Economic Freedom Fighters or EFF have put it) and all individuals and businesses will need revocable land-use licences from the government for the homes or buildings in which they live or work.

The taking of custodianship will amount to the uncompensated confiscation or nationalisation of all affected land. This will destroy the property market, prevent the use of land as collateral for bank loans, and undermine the stability of the banking system. It could also trigger a Zimbabwe-style economic implosion that would be devastating to the country and all its people.

At the end of July 2021, Ronald Lamola, minister of justice and correctional services, sharply criticised the EFF demand for state custodianship of all land. This, he said, would ‘amount to nationalisation of all land, something that would completely reorganise and disorganise land ownership’. It would also ‘disorganise the social structure of the country and the whole economy’, with ‘the Zimbabwean situation a good example of what it would do to the economy’.<sup>19</sup>

Giving the state custodianship over all land would also be ‘anti-black’, Mr Lamola continued. ‘The people are not fighting for the land to go to the state; they are fighting for the land to

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<sup>18</sup> Clause 1(e), Bill

<sup>19</sup> ‘ANC gives up on EFF land talks’, *Sunday Times* 1 August 2021, <https://www.timeslive.co.za/sunday-times/news/2021-08-01-anc-gives-up-on-eff-land-talks/>

come to them.’ Hence, the ANC’s position is that ‘once we expropriate this land, we must give it to the people’.<sup>20</sup>

Yet Mr Lamola has made no attempt to distance the ANC from the current wording of the Bill, which obliges the state to take custodianship of ‘certain’ land, rather than of ‘all’ land. The ‘certain’ land that is in issue could, of course, be defined in time as all privately-owned land, as earlier outlined. In this situation, there would be no practical difference whatsoever between the ANC and EFF proposals. The resulting ‘disorganisation’ of land ownership and the economy would be equally extensive – and equally disastrous too.

In claiming that the ANC will avoid the EFF’s ‘anti-black’ stance by ‘giving’ expropriated land to ‘the people’, Mr Lamola has also failed to explain on what basis this ‘gift’ will take place. He implies that it is ownership that is to be provided, but he fails to spell this out. Again, moreover, he makes no attempt to distance the ANC from the current wording in the Bill, which talks of providing people with ‘access’ to land, rather than ownership of it.

The minister’s ambiguous words could easily mean that the government (like the EFF) plans to ‘give’ people leases or land-use licences to the land the state has either expropriated or taken into its custodianship. Leasehold in place of ownership is also what existing ANC policy requires. The State Land Lease and Disposal Policy (SLLDP) of 2013, in particular, makes it crystal clear that the government’s policy is to retain all land acquired for redistribution for half a century or more before any transfer into private ownership can even be considered.

The SLLDP policy explains why the government reneged on its 2002 contract to sell successful black farmer David Rakgase the state land he had been leasing for decades. It also explains why the ANC was so determined to resist Mr Rakgase when in 2018 he finally sought the help of the courts in holding the government to its earlier agreement.

According to the government’s papers in the *Rakgase* case, the SLLDP policy is based on the ‘principle 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’. No exception was allowed for Mr Rakgase, despite the 2002 agreement – and the fact that he was already 77 years old and likely to die long before the expiry of a 50-year lease.<sup>21</sup>

What is striking too is how closely Mr Lamola’s recent reassurances echo those provided by President Cyril Ramaphosa some two months earlier. On Thursday 2<sup>nd</sup> June Mr Ramaphosa told a media briefing that the ANC differed from the EFF and did not want the pending constitutional amendment bill to include state custodianship of all land. He also told the

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<sup>20</sup> ANC gives up on EFF land talks’, *Sunday Times* 1 August 2021, <https://www.timeslive.co.za/sunday-times/news/2021-08-01-anc-gives-up-on-eff-land-talks/>

<sup>21</sup> *Rakgase and another v Minister of Rural Development and Land Reform and another*, (33497/2018) [2019] ZAGPPHC 375; [2019] 4 All SA 511 (GP); 2020 (1) SA 605 (4 September 2019)

media that ‘the notion of custodianship is to me like you’re nationalising everything’. The ANC was concerned that this would ‘blunt...entrepreneurial initiatives...and could even kill [them]’.<sup>22</sup>

Like Mr Lamola, the president also stressed that the ANC wanted black South Africans to have ‘tenure’ or ‘title’ to land, but he too failed to spell out what this would mean. He acknowledged a widespread desire for land ownership among ordinary people, but declined to clarify whether this was what the ANC intended to provide.

‘The resolution we took [at the ANC’s 2017 national conference] was about ownership of land,’ said Mr Ramaphosa. But the key question of who is to have that ownership – the state or the people – was left hanging. And the answer is again to be found in the SLLDP and its rules requiring land to be kept in the ownership or custodianship of the state for at least 50 years before any transfer into private ownership can be contemplated.

Notable too is the fact that Mr Ramaphosa’s statements have not prevented ANC members of the Ad Hoc Committee from putting forward the current Bill – even though its custodianship provisions differ little (or in practice not at all) from those being advocated by the EFF.

Both the president and the justice minister seem to intent on persuading South Africans that they need not worry about the custodianship provisions in the Bill because the ANC opposes blanket nationalisation and will not allow it to proceed. However, mere verbal assurances are not enough to save the country from the massive economic ‘disorganisation’ of which Mr Lamola has warned.

The only solution is for the Committee – acting in the best interests of the country, as the Constitution obliges all its members to do – to recognise that confining state custodianship to ‘certain’ land will not avoid the great dangers of which the ANC has spoken. Based on this acknowledgement, the Committee should decline to endorse the custodianship clauses in the Bill.

The entire Bill should also be abandoned – if only because the measure is incapable of addressing historical land injustices or ‘empowering the majority of South Africans to be productive participants in ownership, food security, and agricultural reform programmes’. These stated objectives of the Bill cannot be met unless effective action is first taken to resolve the many problems that have long bedeviled the land reform process and led to the collapse of most transferred farms. Since the Bill is incapable of overcoming these problems, there is little to be gained from proceeding with it – and much to be lost through the great economic damage it will inevitably cause (see *Massive economic damage from the Bill*, below).

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<sup>22</sup> ‘Ramaphosa holds firm against state custodianship of all land’, News24.com, 3 June 2021, <https://www.news24.com/news24/southafrica/news/ramaphosa-holds-firm-against-state-custodianship-of-all-land-20210604>

#### **4 No solution for land reform or housing problems**

The ANC has repeatedly claimed that the Bill will help ‘return’ the land to ‘the people’, but this is not so. Land expropriated or taken into state custodianship without compensation will be owned or controlled by the government, not by individual black South Africans. Inevitably, it will be used by the state – not to empower ordinary South Africans – but rather as a patronage tool and to help strengthen the ruling party’s faltering grip on power.

In addition, it is not the content of Section 25 of the Constitution that is to blame for either land reform failures or persistent bottlenecks in the state’s delivery of free RDP housing. Changing the Constitution by means of the Bill will therefore not address these problems.

##### **4.1 Pervasive land reform failures**

In the land reform context, the key problem lies in the fact that between 50% and 90% of land reform projects have failed, with once thriving farms lying fallow or producing 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’.<sup>23</sup>

What this also means, as former director general of land Thozì Ngwenya pointed out back in 2007, is that there is little point in accelerating the pace of land redistribution if the factors making for the collapse of formerly successful farms are not first overcome. Unless the government starts by fixing the underlying problems, speeding up land transfers will simply result in ‘more assets dying in the hands of the poor’.<sup>24</sup>

##### **4.1.1 Five core reasons for land reform failures**

Why then have so many transferred farms ceased to produce? 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 2021/22 financial year, for instance, R3.5bn has been allocated to land restitution and R4.7bn to other aspects of land reform. Together these sums, at R8.2bn, amount to a mere 0.4% of the R2 trillion the government has budgeted to spend in 2021/22.<sup>25</sup> If the government were willing to allocate even 2% of its total annual spending to land reform, there would be far more money available not only for additional land purchases but also for essential post-settlement support.

Second, the ANC – notwithstanding the recent assurances of the president and his justice minister – has long refused to allow individual ownership for land reform beneficiaries.

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<sup>23</sup> 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; Helen Zille, ‘What parallel universe does Gugile Nkwinti inhabit?’ *Politicsweb.co.za*, 29 June 2014

<sup>24</sup> John Kane-Berman, ‘From land to farming: bringing land reform down to earth’, @Liberty, IRR, Issue 25, May 2016, p16

<sup>25</sup> National Treasury, *2021 Budget Review*, 24 February 2021, p66

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 kept in state ownership and leased to disadvantaged farmers under the SLLDP, which leaves them with precarious tenure and without collateral to raise working capital.<sup>26</sup>

Third, the government commonly assumes that access to land is sufficient for success in farming. In fact, as IRR policy fellow John Kane-Berman has pointed 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.<sup>27</sup>

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’<sup>28</sup> – which has also persistently failed to do enough itself.

Fifth, the land reform process has been dogged by extraordinary levels of lethargy, inefficiency, and corruption. In the restitution sphere, for example, land officials have been too inept to keep proper records of how many land claims they have received, how many they have gazetted, how many they have wrongly gazetted (and need to delist), and how many they still need to resolve.<sup>29</sup> The process of investigating and settling claims has also been inordinately slow and is likely to take at least another 35 years to conclude.<sup>30</sup>

The handling of labour tenant claims has also been badly bungled over many years, as highlighted by the Constitutional Court in the *Mwelase* case (as described below). In addition, the minister of agriculture, land reform and rural development, Thoko Didiza, has recently been compelled to acknowledge that ‘public servants do not have the appropriate skills to adequately deal with land administration issues, which hampers government's land reform programme’.<sup>31</sup>

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<sup>26</sup> *Land Access Movement of South Africa and others v Chairperson of the National Council of Provinces and others*. [(2016) ZACC 22]; see also *Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change*, November 2017, pp38, 50-51; Department of Rural Development and Land Reform, *State Land Lease and Disposal Policy of 2013*

<sup>27</sup> John Kane-Berman, ‘From land to farming: bringing land reform down to earth’, @Liberty, IRR, Issue 25, May 2016, p7

<sup>28</sup> Ibid, p14

<sup>29</sup> Theo de Jager, ‘Legacy of the 1913 Natives Land Act – taking up the challenge’, *Focus*, Helen Suzman Foundation, Issue 70, pp44-45

<sup>30</sup> *Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change*, November 2017, p233

<sup>31</sup> <https://www.timeslive.co.za/politics/2021-03-23-lack-of-skills-is-hampering-land-reform-thoko-didiza/>

Corruption has also been widespread, with ANC insiders often using their political connections to benefit themselves, rather than help the disadvantaged. This kind of ‘elite capture’ of the land reform process is well illustrated by the purchase of the Bekendvlei Farm in Limpopo in 2011.

As the *Sunday Times* was later to report, 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 the then land reform minister, Gugile Nkwinti – who was alleged to 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.<sup>32</sup>

Added 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.’<sup>33</sup>

The salience of these five core reasons for land reform failures – none of which can or will be resolved by the Bill – was acknowledged by the High Level of Panel of Parliament in its November 2017 report.

The High Level Panel was established in 2015 to investigate the impact of the 1 000 or more laws the ANC had adopted since coming to power in 1994. One of the Panel’s key focus areas was the land reform programme, which it examined in depth. Following this intensive probe, the High Level Panel emphasised the salience of various important 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.

#### *4.1.2 The Constitution is not the problem*

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:<sup>34</sup>

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

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<sup>32</sup> *Sunday Times* 12 February 2017

<sup>33</sup> Ibid

<sup>34</sup> Report of the High Level Panel, pp38, 50-51

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.

A similar assessment was made by the Constitutional Court in handing down its judgment in the *Mwelase* case in 2019. Here the Court stressed that the Constitution is not to blame for the state's long-standing inability to resolve the thousands of land claims lodged by labour tenants as part of the land reform programme.<sup>35</sup>

Labour tenants, as the Court explained, generally live and work on commercial farms, where they use an agreed portion of the land for their own cropping and/or grazing and provide the farm owner with a percentage of their produce in return. Under the Land Reform (Labour Tenants) Act of 1996, labour tenants were empowered to claim ownership of the portions of land they had long been working – but had to submit their claims before a 2001 deadline. Though some 19 400 labour tenants lodged claims before the deadline expired, 'administrative lethargy' then set in (as the Constitutional Court describes it) and 'the great majority of labour tenant applications were simply not processed'.<sup>36</sup>

In time, a complaint was lodged with the Land Claims Court, which in 2014 ordered the land department to provide it with updated data on the status of labour tenant 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.<sup>37</sup>

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.'<sup>38</sup>

Added Judge Edwin Cameron: 'In this, the Department has jeopardised 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

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<sup>35</sup> *Mwelase and others v Director General of Rural Development and Land Reform and another*, CCT232/18, paragraphs 101, 102

<sup>36</sup> *Ibid*, paragraph 12

<sup>37</sup> *Ibid*, paragraph 18

<sup>38</sup> *Ibid*, paragraph 40

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.<sup>39</sup>

So pervasive was the bureaucratic malaise within the Department that the Constitutional Court took the unprecedented step of appointing a special master to oversee the processing of the outstanding labour tenant claims. This was necessary, it said, to remedy the Department's 'failing institutional functionality', which had long been 'of an extensive and sustained degree'.<sup>40</sup> This intervention signalled that land officials could no longer be trusted to do a proper job and had to have their work supervised by the courts if progress was to be made.<sup>41</sup>

The Bill cannot overcome any of the five key reasons for land reform failures, as identified above and confirmed by both the High Level Panel and the Constitutional Court (in the *Mwelase* case). Amending the Constitution to facilitate custodianship or to allow 'nil' compensation on expropriation will not 'address the slow and ineffective pace of land reform', as the High Level Panel stressed. The real obstacles to success, as identified by the Panel, are also worth repeating. For these lie not in land acquisition costs but rather in a failure to transfer ownership to land reform beneficiaries, coupled with 'increasing evidence of corruption by officials, the diversion of the land reform budget to elites, a lack of political will, and a lack of training and capacity'.<sup>42</sup>

#### **4.2 No solution to the housing backlog**

While most South Africans have little interest in farming land, there is an enormous unmet need for urban land for housing. This is why, in January 2020, the then minister of human settlements, water, and sanitation, Lindiwe Sisulu, promised the rapid release of some 14 000 hectares of state-owned land in urban areas to speed up housing provision.<sup>43</sup> The Bill is important here too, for it supposedly offers a mechanism to make privately-owned and well-located urban land available for housing purposes too. 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 bedeviled by inefficiency, corruption, and poor policy choices.

In the past 25 years, the state has provided more than 3 million houses and a further 1 million 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

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<sup>39</sup> *Mwelase and others v Director General of Rural Development and Land Reform and another*, CCT232/18, paragraph 41, emphasis supplied by the IRR

<sup>40</sup> *Ibid*, paragraph 69

<sup>41</sup> *Ibid*, paragraphs 26, 27

<sup>42</sup> *Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change*, November 2017

<sup>43</sup> *Sunday Independent* 19 January 2020; IRR, 'South Africa's Housing Conundrum', @Liberty, October 24, 2014, p10



to 1 185.<sup>44</sup> 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 2017 and averaging some 90 000 houses a year over the past five years.<sup>45</sup> 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.<sup>46</sup> 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.’<sup>47</sup>

Until such problems are resolved, the Bill can do little to increase the pace of housing provision. Nor can 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.

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<sup>44</sup> Centre for Risk Analysis, *Socio-Economic Survey*, 2021, p625

<sup>45</sup> *Ibid*, p665,

<sup>46</sup> *Ibid*

<sup>47</sup> IRR, ‘South Africa’s Housing Conundrum’, @Liberty, October 24, 2014, p10

## **5 Upending the property rights of both black and white South Africans**

The Bill profoundly threatens the property rights of all South Africans, both black and white. Yet 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 via the budget, black property ownership has grown 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 8.8 million black South Africans own their homes, as do some 1.2 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.<sup>48</sup>

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 5% 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 18 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.

The practical importance of private property rights and limited state controls has been evaluated for many years by the Fraser Institute in Canada, a think tank (see *The real objective underpinning the Bill*, below). 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.<sup>49</sup>

## **6 Massive economic damage from the Bill**

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<sup>48</sup> IRR, *2021 South Africa Survey*, p350; Agri SA, ‘Land Audit: A Transactions Approach’, *Politicsweb.co.za*, 1 November 2017, p9

<sup>49</sup> Ibid

If the Constitution is amended in the way the Bill seeks to do, this is sure to generate massive economic damage to fixed capital investment, growth, tax revenues, public debt, the country's sovereign debt rating, and employment.

### **6.1 Reduced capital formation and further economic harm**

Fixed capital investment, often known as 'capital formation', expands a given country's infrastructure (its power supply, transport logistics, and dams, for example) and increases physical capital of other kinds (buildings, machinery, vehicles, and tractors, for instance). This expansion in fixed assets provides an essential foundation for increased economic output, which in turn raises the growth rate and adds to prosperity.<sup>50</sup>

Successful developing countries generally aim at a ratio of fixed investment to gross domestic product (GDP) at between 35% and 40%. (Developed countries can rest content with a ratio of some 20% as they already have a critical mass of essential infrastructure already in place.) However, South Africa lags far behind the developing country objective. This is why the 2012 National Development Plan strongly recommended that the country's ratio of fixed investment to GDP should be increased from 19% in that year to 30% by 2030.<sup>51</sup> Instead, however, the ratio dropped to 18% in 2018 and remained much the same in 2019.<sup>52</sup> Since then, under the impact of the prolonged Covid-19 lockdown and increased concerns about property rights, the ratio has declined further.

Since fixed capital investment is inevitably aimed at generating returns over a long period, it requires a high degree of business confidence. However, that confidence cannot be sustained in countries that fundamentally undermine property rights by allowing EWC. This 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. Based on these examples, if the Bill is enacted into law, South Africa is likely to suffer a reduction in the ratio of at least 5% (scenario 1) and perhaps as much as 10% (scenario 2). Both scenarios are conservative projections compared to 14% reduction evident in these seven countries.<sup>53</sup>

In October 2018 (in a submission to the Constitutional Review Committee) economists Dr Roelof Botha and Professor Ilse Botha first modelled the likely negative effects of these scenarios over ten quarters from the time EWC was likely to be introduced. In January 2021, the two updated their model to take account of new developments and track likely impacts

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<sup>50</sup> Dr Roelof Botha and Professor Ilse Botha, *A macroeconomic impact assessment of a policy of land expropriation without compensation in South Africa*, produced by the GOPA Group Southern Africa (Pty) Ltd for Agri SA, January 2021, pp4, 9

<sup>51</sup> IRR *South Africa Survey*, 2019, p126; *National Development Plan*, National Planning Commission, The Presidency, 2012, p64

<sup>52</sup> IRR, *Fast Stats*, January 2020, p2; February 2020, p4; *Business Report* 13 February 2020, 2021 Survey, p71 Botha and Botha, *A macroeconomic impact assessment*, 2021, p9

<sup>53</sup> R Botha and I Botha, 'A macroeconomic impact assessment' 2021, p5

under both scenarios over a period of nine quarters, beginning in the third quarter (Q3) of 2020.<sup>54</sup>

Using official data from the South African Reserve Bank and the National Treasury, their updated modelling shows the following results under scenario 1 (a 5% decline in capital formation in response to EWC) and scenario 2 (a 10% decline):<sup>55</sup>

- under scenario 1, nominal annualised GDP in Q3 2022 will be R417bn less, equating to a loss of 7.2% of GDP, whereas under scenario 2, the decline will be R616bn or 10.7% of GDP;
- the cumulative loss of economic output over the nine quarters will be R735bn under scenario 1 and R1.05 trillion under scenario 2;
- in both scenarios, South Africa will remain in recession throughout the forecasting period and will not be able to recover from the 7% reduction in GDP triggered by the prolonged Covid-19 lockdown in 2020;
- total fiscal revenues will decline over the forecasting period by R215bn under scenario 1 and by R307bn under scenario 2, significantly constraining the government's capacity to maintain its current spending;
- the ratio of gross public debt to GDP in 2021/22 will increase from 91% (the estimate in the October 2020 medium term budget policy statement) to 96% under scenario 1 and to an even more worrying 101% under scenario 2;
- the country will be downgraded even further into sub-investment or junk status by international ratings agencies, which will push up bond yields, increase the interest payable on public debt, and crowd out spending on social grants, essential services, and the public sector wage bill;
- some 1.4 million jobs could be lost under scenario 1 and even more under scenario 2, which is likely to trigger social unrest and undermine confidence even more.

## **6.2 Prolonged recession, rather than growth**

Even before the Covid-19 crisis struck in 2020, South Africa's growth rate had virtually ground to a halt, with growth of 0.8% of GDP recorded in 2018 and an even more meagre growth rate (0.2% of GDP) evident in 2019. In 2020, after many months of lockdown restrictions, the economy contracted by a staggering 7.2% of GDP. Though the National Treasury, in its February 2021 *Budget Review*, expected growth to rebound off this low base to 3.3% of GDP in 2021, growth rates were set to decline thereafter to an average of 1.9% in 2022 and 2023.<sup>56</sup>

However, even without the negative impact of the Bill in reducing capital formation and shrinking GDP by between 7% and 11%, these growth projections are unlikely to be achieved. This is partly because the Treasury's February 2021 projections predate the July

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<sup>54</sup> R Botha and I Botha, 'A macroeconomic impact assessment' 2021, p5

<sup>55</sup> Ibid, pp5-6

<sup>56</sup> National Treasury, *2021 Budget Review*, 24 February 2021, pp1-2

2021 riots that cost more than 330 lives, caused enormous economic damage, and shook business confidence even further. In addition, Treasury projections dating back to 2010 have consistently overestimated the actual growth rates subsequently achieved by a cumulative 235%.<sup>57</sup> Even without the Bill, thus, growth is unlikely to exceed some 1.5% of GDP, which is far too little to meet the needs of an expanding population.

Growth rates of around 1.5% are also very much lower than the growth rates evident in other emerging markets. If this is the best that can be achieved – and the Bill will make it more difficult to attain even this modest gain – it will take until 2028 for the economy to get back to where it was in 2019. Even without the Bill, South Africa is thus already likely to experience eight ‘lost years’ of effectively zero growth.<sup>58</sup>

Worse still, if the Constitution is now amended in the way the Bill envisages, the country’s economic fundamentals will weaken still more sharply. Any prospect of raising the growth rate to 5.4% of GDP by 2030, as the National Development Plan urges, will be lost – and probably irreparably so.<sup>59</sup>

### **6.3 An even narrower tax base**

South Africa’s tax base is already very small, as shown by the Tax Statistics published in December 2020 by the South African Revenue Services (SARS). According to these tax figures, more than 22 million people were registered for personal income tax in 2019 (the latest year for which this SARS data is available). However, most had earnings below the personal income tax threshold and therefore paid no income tax at all. In all, only 4.3 million people (down from 5.6 million in 2016) earned enough in 2019 to be assessed for income tax. In addition, only 20.5% of these taxpayers (fewer than 890 000 people) paid 73% of the R529bn in personal income tax collected that year.<sup>60</sup>

A similar picture is evident as regards corporate income tax. Though some 2.5 million companies were registered for tax in 2020 (down from 3.2 million in 2018), fewer than 525 500 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 760 companies with taxable income greater than R100m constituted 0.1% of the number of companies, but paid 64% of assessed tax. This shows that the corporate tax base is already very narrow too.<sup>61</sup>

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<sup>57</sup> Ivo Vegter, The aloe ferox is dead, *The Daily Friend*, IRR, 26 February 2021

<sup>58</sup> Ibid

<sup>59</sup> 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](http://www.fin24.com), 9 January 2020, *Business Report* 13 February 2020

<sup>60</sup> Centre for Risk Analysis, Public Finance, March 2021, pp11, 7

<sup>61</sup> *Financial Mail* 9 January 2020; see also CRA, Public Finance March 2021, p16

As these figures underscore, the tax base is not only very small but has already shrunk significantly since 2016. If the Bill is enacted into law, this will not only reduce the tax take by between R215bn and R307bn (as projected in the two scenarios set out above) but could also trigger significant emigration among the taxpayers who provide the great bulk of tax revenues. 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 – and the government would find it even more difficult to sustain its spending on essential needs.

#### **6.4 Debt and downgrades**

In 2008 South Africa gross public debt stood at some R630bn or 26% of GDP. In 2021, however, its total debt is expected to reach R4.38 trillion (82% of GDP), before rising further to R5.23 trillion (87% of GDP) in 2023. This is an enormous increase over a relatively short period. Debt service costs thus already absorb some 21c out of every tax rand collected and are expected to amount to 5% of GDP in the current year. By 2023, debt service costs will have risen to close on R340bn (5.6% of GDP) and will increasingly be crowding out spending on healthcare, social services, and other essentials.<sup>62</sup>

The tax shortfall in 2020 was R213bn – and would have been even worse without a major increase in global commodity prices, which generated an unexpected increase in mining taxes. According to the February 2021 *Budget Review*, public spending must nevertheless be cut by some R265bn over the next three years to prevent gross public debt from spiralling even further out of control. This is to be achieved by limiting further increases in the public sector wage bill, reducing spending on other goods and services, and holding down increases in social grants to below the inflation rate.<sup>63</sup>

The best way to close what former finance minister Tito Mboweni called ‘the jaws of the hippo’ – the yawning gap between tax revenues and state spending – is to increase the growth rate to 5% of GDP or more and so expand the tax take. But the Bill will make it very much more difficult to achieve these vital goals. This will leave spending cuts of the kind mooted in the 2021 budget as the sole remaining option, and harm all South Africans heavily dependent on the state for a wide range of essential goods and services.

#### **6.5 Rand:dollar exchange rate**

In 2009 the rand:dollar exchange rate stood at R8.44 to the dollar. In August 2021 it stands at some R14.80 to the dollar, and would be worse still if the US currency had not weakened significantly in recent months. South Africa’s high ratio of public debt to GDP – which far exceeds the emerging market norm of some 60% of GDP – makes it particularly vulnerable to global risk aversion or other negative sentiment.

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<sup>62</sup> Centre for Risk Analysis, Public finance, March 2021, p37; National Treasury, 2021 Budget Review, p10

<sup>63</sup> <https://mg.co.za/business/2021-02-24-snip-snip-mboweni-eyes-wage-bill-other-future-spending-cuts/>; <https://www.dailymaverick.co.za/article/2021-02-24-south-africas-2021-budget-in-a-box/>; IRR, Fast Stats, February 2021, p3

South Africa has already been downgraded to sub-investment or junk status by all international ratings agencies, two of which have also kept the country on negative watch. If the Constitution is indeed amended in the way the Bill envisages, this could easily trigger yet further downgrades. Developments of this kind could see the rand's value slip in time to R20 or even R25 to the dollar, making oil and other essential imports significantly more costly.

### **6.6 Inflation**

As the exchange rate deteriorates, inflation is likely to soar. If farming is in time disrupted by the major farm expropriations an amended Constitution will encourage – or by the taking of ‘custodianship’ over agricultural land – food inflation is likely to be particularly severe. Food inflation could then more than double, rising from its current rate of 6.7% a year<sup>64</sup> to rates of 14% or more.

### **6.7 Unemployment**

On the narrow definition of unemployment which counts only those actively looking for work – and disregards millions of people too discouraged to keep searching for jobs – the number of unemployed South Africans has gone up from 1.98 million in 1994 to 7.2 million in the first quarter of 2021. The unemployment rate (on this same official definition) has gone up from 20% in 1994 to 32.6%, the worst it has been since 1994. The youth unemployment rate, among people aged 15 to 24, has long been far higher and stood at 63% in March 2021.<sup>65</sup>

Unemployment has long been at crisis levels and was driven even higher in 2020 by the prolonged Covid-19 lockdown, which cost the country more than a million jobs.<sup>66</sup> If the Constitution is amended too in the way the Bill envisages, the official unemployment rate could easily rise to 35% or more within the population as a whole and to 70% among young people.

### **6.8 A vicious cycle**

The Covid-19 lockdown has enormously compounded the damage to the economy over the past decade and is likely to continue hobbling investment, growth, and employment for another two to three years. The government's most urgent task at this juncture is therefore to embark on the structural policy reforms needed to restore business confidence, attract investment, increase growth, and help generate the millions more jobs needed to liberate the poor.

By contrast, if the Bill is enacted into law, the economic crisis will worsen sharply. A vicious cycle of diminishing investment and growth rates, compounded by rising debt, inflation, and unemployment, could easily be set in motion. Moreover, once the Constitution has been

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<sup>64</sup> CRA, Fast Stats, July 2021, p3

<sup>65</sup> <https://www.news24.com/fin24/economy/sas-jobless-grows-to-72-million-as-unemployment-rate-breaches-new-record-20210223>

<sup>66</sup> <https://www.business-humanrights.org/en/latest-news/so-africa-three-million-south-africans-have-lost-their-jobs-as-a-result-of-the-covid-19-pandemic-women-most-affected/>

amended and the property rights essential to prosperity have been so greatly weakened, it will be extremely difficult to break out of this downward spiral. This in time could trigger a sovereign debt crisis, leaving the government unable to service debt, pay public sector salaries, keep Eskom and other failing state-owned enterprises (SOEs) afloat, or fulfil its essential obligations to its citizens.

### **6.9 A probable banking crisis to compound the damage**

Under the Bill, many South Africans are likely to face the uncompensated expropriation of their houses, business premises, and farms (to name but some 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 2020 (the Expropriation Bill) – which the government looks set to enact as soon as the Constitution has been amended – provides an answer. 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.<sup>67</sup>

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 despite lacking the means to do so. Since this will be onerous enough, most will battle inordinately to pay off their outstanding mortgage loans as well.

At the same time, the banks cannot write off large amounts of mortgage debt without jeopardising the savings of depositors and destabilising the entire banking system. What then

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<sup>67</sup> Clauses 9, 18, Expropriation Bill of 2020



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 home loans?

The wider ramifications will also be severe. House prices will drop sharply and many people will find themselves in a negative equity position, 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, making it harder for new entrants to buy flats or houses and further harming 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.'<sup>68</sup>

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...'<sup>69</sup>

'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.<sup>70</sup>

Basa has since reiterated these concerns in its submissions to the Ad Hoc Committee on the 2019 version of the Bill. As *Business Day* reports, Basa again noted that 'banks have extended R1.6 trillion in residential, commercial and agricultural mortgages to borrowers'. It

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<sup>68</sup> PMG minutes, Banking Association of South Africa (Basa), Oral presentation to the Constitutional Review Committee, Parliament, September 2018

<sup>69</sup> PMG minutes, Nedbank, Oral presentation to the Constitutional Review Committee, Parliament, September 2018

<sup>70</sup> Ibid

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.<sup>71</sup>

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’.<sup>72</sup>

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.<sup>73</sup>

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.<sup>74</sup>

‘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.’<sup>75</sup>

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 the country needed to import.<sup>76</sup>

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,

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<sup>71</sup> *Business Day* 12 February 2020

<sup>72</sup> 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

<sup>73</sup> *Ibid*

<sup>74</sup> *Ibid*

<sup>75</sup> *Ibid*

<sup>76</sup> *Ibid*, pp6-7

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.’<sup>77</sup>

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’.<sup>78</sup> 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.’<sup>79</sup>

## **7 No SEIA assessment**

According to the government’s own Guidelines for the Socio-Economic Impact Assessment System (SEIAS), every proposed bill must be subjected to ‘an initial assessment’ aimed at identifying different ‘options for addressing the problem’ and making ‘a rough evaluation’ of their respective costs and benefits.

In addition, any bill released for public comment must be accompanied by a ‘final impact assessment’ giving details of its likely implementation and compliance costs. If a bill seems likely to generate ‘excessive costs for society’ – say, in the form of ‘disinvestment by business or a loss of skills to emigration’ – then the final SEIA report must point this out.

However, despite the massive economic damage this Bill is sure to trigger (as earlier outlined in *Section 6* of this submission), no SEIA report on it has been drawn up or made public. Instead, the Memorandum on the Objects of the Bill makes the astonishing claim that the measure has ‘no’ financial implications for the state. In fact, it is likely to reduce capital formation, diminish the tax take, add to public debt and an already heavy interest burden, make it increasingly difficult for the government to maintain its present spending, and trigger a banking crisis with devastating consequences for the entire economy.

The absence of a proper SEIA report is a fundamental procedural defect. It also makes it difficult for people to ‘know about the issues’ raised by the Bill – and hence for the public to participate effectively in the legislative process, as the Constitution requires.

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<sup>77</sup> 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, pp7-8

<sup>78</sup> Ibid, p4

<sup>79</sup> Ibid, pp3-4

## 8 Inadequate public participation in the legislative process

The Constitutional Court has 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*; *Doctors for Life International v Speaker of the National Assembly and others*; and *Land Access Movement of South Africa and others v Chairperson of the National Council of Provinces and others*. 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'.<sup>80</sup>

Proper public consultation is particularly vital where bills are especially important. And this Bill is an extraordinarily significant one, for 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 will fundamentally undermine the negotiated settlement of the mid-1990s. The Bill is also likely to cause great damage to an already fragile economy, severely curtailing its capacity to generate the investment, growth, and employment vital to prosperity and upward mobility. Consideration of a proposed constitutional amendment with such enormous ramifications must take full account of all relevant evidence and should not be rushed in any way.

### 8.1 Avoiding a truncated timeline

The Committee has nevertheless allowed a scant 28 days for public comment on the Bill, for the revised measure was tabled on 16<sup>th</sup> July 2021 with a deadline of 13<sup>th</sup> August 2021 for the sending in of written submissions. Fewer than 30 days have thus been allowed for the public to get to grips with a measure of exceptional significance.

This may perhaps comply with the letter of Section 74(5) of the Constitution, which requires 'at least 30 days before a Bill amending the Constitution' may be introduced in Parliament following its publication for comment in the *Government Gazette*. But this truncated period undoubtedly contradicts the spirit of the Constitution and the obligation resting on Parliament and its committees to 'facilitate', rather than curtail, proper public involvement in the law-making process.

This unreasonably short deadline is also inconsistent with several Constitutional Court rulings emphasising the importance of allowing adequate time for the public consultation process. In the *Land Access* case, for instance, the court stressed that 'a truncated timeline'

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<sup>80</sup> *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

for the adoption of a bill may itself be ‘inherently unreasonable’. If the period allowed is too short – as it was in the *Land Access* case, when roughly a month was allowed for the Restitution of Land Rights Amendment Bill of 2014 to proceed through the National Council of Provinces (NCOP) – then ‘it is simply impossible...to afford the public a meaningful opportunity to participate’, said the court.<sup>81</sup>

In the *Doctors for Life* case, where the timeline for adoption of the Bill was also short, the Constitutional Court made it clear that legislative timetables cannot be allowed to trump constitutional rights. Said the court: ‘The timetable must be subordinated to the rights guaranteed in the Constitution, and not the rights to the timetable.’<sup>82</sup>

In the *Land Access* case, the Constitutional Court not only cited this passage with approval but also went on to say: ‘In drawing a timetable that includes allowing the public to participate in the legislative process, [Parliament] cannot act perfunctorily. It must apply its mind taking into account: whether there is real – and not merely assumed – urgency; the time truly required to complete the process; and the magnitude of the right at issue’.<sup>83</sup>

These comments apply with even more force to this Bill. Hence, in imposing ‘a truncated timeline’ for written submissions (13<sup>th</sup> August 2021), the Ad Hoc Committee is acting unreasonably. It is also at risk of ‘subordinating’ a number of constitutionally guaranteed rights to an arbitrary timetable. Moreover, there is little to suggest that the committee has:

- ‘applied its mind...to whether there is real – and not merely assumed – urgency’;
- given adequate consideration to ‘the time truly required’ for the public to be able to ‘know about the issues and have an adequate say’; and
- properly weighed ‘the magnitude’ of the guaranteed rights that are here in issue.

More time for written comment is thus essential if the public consultation process on these vital matters is to comply with constitutional imperatives.

## **8.2 Providing a meaningful opportunity ‘to be heard’**

A tick-box approach to public participation is also not enough, for the Constitutional Court has also stressed that people must be given ‘a meaningful opportunity *to be heard* in the making of laws that will govern them’. It is therefore not enough for the Committee to invite written submissions and oral presentations and then largely disregard them – rather than giving them the careful attention they deserve. Yet this is precisely what happened during the earlier public consultation process on the 2019 version of the Bill, thereby generating disillusionment and distrust and tainting public participation on the current Bill as well.

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<sup>81</sup> *Land Access*, paras 61, 67

<sup>82</sup> *Doctors for Life*, para 194

<sup>83</sup> *Land Access*, para 70

### *8.2.1 Failure to engage with some 204 000 written submissions*

The Ad Hoc Committee gazetted the Draft Constitution Eighteenth Amendment Bill of 2019 on 13<sup>th</sup> December 2019 and invited public comment on it by a (revised) deadline of 28<sup>th</sup> February 2020. In return, the Committee received no fewer than 204 000 written submissions, which it then largely disregarded rather than taking into proper account.

The Covid-19 lockdown that began in March 2020 made it difficult for many months, of course, for the committee to get to grips with the submissions sent in to it. But when the lockdown was eased and the Committee resumed its work in late 2020, it simply delegated the task of reading and considering these 204 000 submissions to parliamentary staff, who were charged with compiling a brief summary of all these documents.

This is not nearly good enough. As opposition parties have pointed out, the MPs serving on legislative committees are the public's elected representatives. They are thus obliged to engage directly with the submissions they invite people to send in. They cannot shirk their responsibility for the proper performance of this task or palm it off on other functionaries.

### *8.2.2 Arbitrary invitations to make oral presentations*

It is a well-established principle in the public participation process that individuals and organisations that have asked in their written submissions for the opportunity to make oral presentations should be invited to do so.

The Committee nevertheless decided early in 2021 that it would exclude oral presentations altogether, as taking the time to hear these would interfere with its 31<sup>st</sup> March 2021 deadline for the finalisation of the 2019 bill. However, since many individuals and organisations had previously been promised that they would indeed be given the chance to make oral presentations, the Committee was compelled to change its mind and to allow oral presentations after all. However, since it had failed to engage with the 204 000 written submissions it had received, it had no idea how many individuals and organisations had asked to make oral presentations and so deserved to be heard.

Instead, the Committee made arbitrary and inequitable decisions on whom to include and whom to leave out. Moreover, having made an (irrational) decision to conclude all oral hearings by 25<sup>th</sup> March, it found that only three days could be set aside for this purpose. This in turn meant that many of the individuals and organisations (including the IRR) that had asked to make oral presentations could not be accommodated. Their arbitrary exclusion was inequitable too – and showed once again that the Committee was more concerned about sticking to its truncated timeline than ensuring proper public consultation.

### *8.2.3 Brushing aside many oral presentations*

The individuals and organisations that made oral presentations over these three days merited a meaningful opportunity to be heard, in keeping with key Constitutional Court rulings. Instead, their well-merited criticisms of the Bill were often simply brushed aside on irrelevant and spurious grounds.

Though only a couple of examples can be provided here, these point to a wider pattern of inappropriate behaviour on the part of the Committee. The Banking Association of South Africa (Basa) warned that the country's banks hold mortgages over 'land-based property' that are valued at some R1.6 trillion. Hence, if the 2019 bill were to bring about a 'marked decrease' in the value of such property, this could 'destabilise the banking sector' and precipitate a banking crisis. But instead of engaging with this important and evidence-based concern, ANC and EFF committee members made irrelevant comments about bank profits and home repossessions, while querying 'whether Basa was willing to share its profits with the marginalised'.<sup>84</sup>

Agri SA warned that the 2019 bill could 'potentially scare away investors and make it extremely difficult for farmers to access production credit. This, in turn, could impact on food security and the economy.' To which ANC and EFF committee members responded by accusing Agri SA members of benefiting from 'crimes against humanity' and of maintaining an 87:13 ratio of white:black land ownership which clearly no longer applies. (The most comprehensive and accurate land audit conducted to date shows that the state and previously disadvantaged individuals (PDIs) owned 27% of the country's total agricultural land in 2017 and 47% of its high potential land. In some provinces, moreover, the proportion of all farming land held by the state and PDIs was higher still, standing at 74% in KwaZulu-Natal and 52% in Limpopo.)<sup>85</sup>

The Council for the Advancement of the South African Constitution (Casac) cautioned that 'a change to the Constitution would not resolve [land reform problems]... The commission responsible for...restitution of land rights needed a new mandate and additional resources. There had to be a focus on corruption and looting in land reform, as there were many indications that land had also become a site of corruption. Capture of the land reform programme by the elite presented a danger as great the failure to distribute land to those who needed it the most'.<sup>86</sup>

To which an ANC member responded that the 2019 bill could help resolve 'capacitation issues' by enabling the state to move away from restitution and the 'impossible [task of] finding the rightful, original legal owners of the land'.<sup>87</sup> This, however, ignored the bulk of Casac's well-founded concerns, which remained unanswered.

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<sup>84</sup> Parliamentary Monitoring Group (PMG), minutes of oral hearings, day 2, Draft Constitution Eighteenth Amendment Bill of 2019, 24 March 2021

<sup>85</sup> Parliamentary Monitoring Group (PMG), minutes of oral hearings, day 1, Draft Constitution Eighteenth Amendment Bill of 2019, 23 March 2021; Agri SA, 'Land Audit: A Transactions Approach', November 2017, *Politicsweb.co.za*, 1 November 2017, 9, 19, 11, 12

<sup>86</sup> Parliamentary Monitoring Group (PMG), minutes of oral hearings, day 2, Draft Constitution Eighteenth Amendment Bill of 2019, 24 March 2021

<sup>87</sup> *Ibid*

#### 8.2.4 *Profound flaws in the public participation process*

The Committee has a constitutional obligation to ‘facilitate’ public involvement in the amendments to be made to Section 25. Instead, it has deterred and discouraged people from taking part in this process. It has done so by disregarding the 204 000 written submissions that were sent in on the 2019 bill, and by treating many of those who later made oral presentations on this bill with disdain, if not contempt.

Now that last-minute and fundamental shifts have been made to the content of the present Bill, the public is called upon to get to grips in short order with these very different provisions and then make written submissions once again. Yet people have every reason to believe – based on their experiences with the 2019 bill – that their legitimate concerns will be brushed aside by the Committee just as cavalierly as in the past. They also have every reason to believe that the Committee is simply ‘going through the motions’ on public participation and has no real interest in the public’s views or in ensuring that its decisions on the Bill are based on the best available evidence.

The Committee’s handling of the public participation process has fallen so far short of what the Constitution requires that it has lost the trust and confidence of much of the public. Nor can it easily regain this. This in itself now constitutes a major barrier to adequate public involvement in the legislative process on the Bill. Yet this Bill is the most important measure to be put before South Africans since 1996 – making the Committee’s failures on public participation still more egregious.

### **9 Last-minute shifts in content going well beyond the Committee’s mandate**

The Committee’s mandate from Parliament is to ‘initiate and introduce’ a bill to amend Section 25 that ‘makes explicit that which is implicit’ in the property clause and deals with the expropriation of land alone.<sup>88</sup>

The content of the 2019 bill was only partially in keeping with this mandate, for it overlooked the very limited circumstances in which ‘nil’ compensation may be justified under Section 25. It also brushed aside the overarching obligation under Section 25 to ‘strike an equitable balance’ between the public interest in land reform and the interests of the affected owner in every instance of expropriation. In addition, the 2019 bill allowed nil compensation not only for land, as the Committee’s mandate envisaged, but also for ‘any improvements thereon’. This brought the 2019 bill squarely into conflict with the mandate given to the committee and the authorised scope of its work.

The present Bill is even more inconsistent with the Committee’s mandate. All the unauthorised provisions in the 2019 bill have been retained, while additional unauthorised clauses have been inserted.

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<sup>88</sup> Proceedings of the National Assembly, Establishment of Ad Hoc Committee to Amend Section 25 of Constitution, Motion Agreed, Unrevised Hansard



The role of the courts in deciding in advance on whether ‘nil’ compensation should be paid has been whittled down, though this too is at odds with the committee’s mandate to ‘make explicit’ what is implicit in Section 25. As the Constitutional Court ruled in the *Haffejee* case in 2011, a disputed amount of compensation must – in all but the most exceptional cases – already ‘*have been* decided or approved by a court’ before an expropriation proceeds. The new wording in the Bill seeks to circumvent this by suggesting that an expropriation may take place *before* the courts have decided or approved the relevant amount.<sup>89</sup>

However, the greatest conflict between the committee’s mandate and the present Bill lies in the measure’s newly inserted provisions on state custodianship for ‘certain’ land, as earlier described (see *Section 3* of this submission). Since Section 25 has never envisaged or authorised the state’s taking of custodianship, all the custodianship provisions in the Bill are inconsistent with the Committee’s mandate to ‘make explicit’ what is already implicit in the property clause.

In short, all the key clauses in the current Bill fall outside the scope of the mandate conferred on the Committee and are ultra vires its powers. The committee therefore cannot lawfully adopt the Bill until such time as its mandate has been substantially extended by Parliament to authorise these provisions.

At the same time, however, Parliament itself lacks the authority to extend the Committee’s mandate in this way. Were it to attempt to do so, this would be inconsistent with the November 2018 recommendations of the Constitutional Review Committee (CRC) that Section 25 should be amended to make explicit that which is implicit within it. These CRC recommendations were adopted and endorsed by both the National Assembly and the National Council of Provinces in early December 2018 – and provide the foundation for the establishment of the Committee and the mandate it has been given.<sup>90</sup>

## **10 The real objective underpinning the Bill**

The real objective underpinning the Bill is not to provide redress for historical land injustices or to empower the disadvantaged but rather to advance the National Democratic Revolution (NDR) to which the ANC and its allies in the Congress of South African Trade Unions (Cosatu) and the South African Communist Party (SACP) have long been committed.

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

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<sup>89</sup> *Haffejee NO and others v eThekweni Municipality and others* [2011] ZACC 28; Section 25(2)(b), Constitution, emphasis supplied by the IRR

<sup>90</sup> Proceedings of the National Assembly, Establishment of Ad Hoc Committee to Amend Section 25 of Constitution, Motion Agreed, Unrevised Hansard, 6 December 2018

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.

The ANC has maintained its commitment to the NDR despite the fact that socialist and communist countries are notorious for abusing the fundamental civil liberties of their citizens. Pervasive state ownership and economic controls within these countries generally also cripple economic efficiency, leading to major shortages of food and other essentials, and impoverishing everyone except a small political elite. Not surprisingly, therefore, socialist and communist countries – along with states that have nationalised or expropriated land, mines, banks, oil, and other assets without adequate compensation – are 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.<sup>91</sup>

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.<sup>92</sup>

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

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<sup>91</sup> Fraser Institute, *Economic Freedom of the World*, 2019 Annual Report, p vi

<sup>92</sup> Ibid

economic collapse, pervasive hunger, extraordinarily high inflation, a 95% unemployment rate, and the flight of millions of impoverished people.<sup>93</sup>

Much the same is true in Venezuela, where GDP has halved in recent years, hunger is widespread, hyperinflation has soared at times to some 2 million per cent, and more than 4.6 million people (well over 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 R460 for a single child, or its old-age pension of R1 890 a month for a single pensioner.)<sup>94</sup>

All the members of the Committee are elected public representatives with a constitutional obligation to act in the best interests of the country and all its people. Their overarching duty, thus, is to recognise the NDR objectives behind the Bill, as well as the great suffering that socialism and communism have brought to many countries. Having recognised these realities, they should then jettison the Bill, lest it bring a similar fate to South Africa.

## **11 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.<sup>95</sup>

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<sup>93</sup> Botha and Botha, *A macroeconomic impact assessment*, pp6, 27-32

<sup>94</sup> Centre for Risk Analysis, *Social Security*, July 2021, p13; Botha and Botha, *A macroeconomic impact assessment*, pp6, 33-37

<sup>95</sup> Paul Hoffman, On the nationalisation of land, Politicsweb.co.za, 5 August 2018

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’.<sup>96</sup>

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).<sup>97</sup>

The blank cheque being given to Parliament to decide, by 51% majority, on the ‘circumstances where the amount of compensation is nil’ 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.

## **12 The best way forward**

The best way forward for South Africa and all its people, both black and white, is to jettison both the EWC idea and any attempt to introduce state custodianship for land – and to 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 mandating EWC and state custodianship 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 land and/or other assets.

The need to abandon the Bill has increased, moreover, in the aftermath of the violent disturbances that began on 9<sup>th</sup> July 2021. The week that followed saw looters swarm across

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<sup>96</sup> Paul Hoffman, On the nationalisation of land, Politicsweb.co.za, 5 August 2018

<sup>97</sup> Ibid

many areas of KwaZulu-Natal and Gauteng, breaking into shops and warehouses, stealing goods and setting fires. More than 200 shopping centres were looted while many were also set ablaze. Some 40 trucks and their contents were destroyed, while vital roads and ports were forced to close. More than a hundred cell phone towers were damaged, while at least as many schools were looted and vandalised. Economists estimate the overall damage at between R60bn to R80bn.<sup>98</sup>

The long-term economic consequences are likely to be severe. As economist Mike Schussler points out, ‘South Africa has just tentatively started to recover following the worst recession in 100 years, and the impact of the riots will act as a further hurdle to the economy... Early indications suggest that the real GDP growth rate for 2021 could be 0.5 to 1 percentage points lower than earlier estimates... The damage caused by the riots will [also] lead to lower taxes being collected,... as hundreds of businesses are affected and this could result in thousands of employees being left without income or jobs... [There is also] the added risk that many affected businesses might not open again at all, and the government itself estimates that 150 000 jobs could be at risk in KwaZulu-Natal alone.’<sup>99</sup>

Business and consumer confidence has also been sharply eroded by ‘the sheer extent of the destruction’, along with the ‘the inability of the South African security forces to handle the crisis effectively’. Global media coverage of the unrest was extensive too, which has further eroded South Africa’s capacity to attract foreign direct investment. Reduced investment, growth and jobs will make for larger budget deficits and higher ratios of public debt to GDP. Further ratings downgrades are thus likely to follow, which will push up bond yields and increase the interest burden on the state.<sup>100</sup>

The country’s economy has been so battered by escalating NDR interventions, the prolonged Covid-19 lockdown, and the destruction unleashed by the riots that South Africa simply cannot afford the further great damage the Bill will bring. At the same time, the mooted nationalisation of land will do little to rectify historical wrongs or counter widespread poverty and unemployment. Instead, it will empower a dysfunctional and often venal state – and further enrich a corrupt and self-serving elite intent on expanding its own power and wealth.

If the Bill is adopted, moreover, this will further destroy the rule of law. Already, the riots have resulted in thousands of citizens being deprived of their possessions without any payment. Once the Bill’s EWC and custodianship provisions have been written into the Constitution, the state will have confiscation powers that enable it to do the same to millions more South Africans – but this time under the cover of the law.

The mere enactment of the Bill by Parliament (even before any further custodianship or EWC

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<sup>98</sup> Mike Schussler, ‘SA rioting and civil unrest: Economic pain and long-term impacts’, Biznews.co.za, 3 August 2021; ‘More than 100 network towers hit in violent protests’, Sowetan, 14 July 2021

<sup>99</sup> Schussler, *ibid*

<sup>100</sup> *Ibid*

laws are adopted) will give moral sanction to the notion that people's belongings may be taken from them without their consent and without compensation. This is likely to encourage land invasions and other forms of lawlessness. It will also signal the collapse of the rule of law. Land and other assets will then increasingly pass to those most able and willing to use violence to expand whatever property they hold. Ordinary people – and especially the poor – will suffer the most in this anarchic situation.<sup>101</sup>

The Bill must be abandoned, thus, while the sanctity of property rights and the rule of law 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 and state custodianship are incapable of overcoming.

The ANC should also abandon the socialist goals that underpin both the Bill and its commitment to a long outdated NDR ideology. 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'.

**South African Institute of Race Relations NPC (IRR)**

**13<sup>th</sup> August 2021**

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<sup>101</sup> Craig J Richardson, 'How the Loss of Property Rights Caused Zimbabwe's Collapse', Cato Institute, 14 November 2005, pp3-4