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RULE OF LAW PROJECT
FREE MARKET FOUNDATION

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SUBMISSION TO THE

PORTFOLIO COMMITTEE ON PUBLIC WORKS AND INFRASTRUCTURE

ON THE

EXPROPRIATION BILL, 2020

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Executive summary

The Free Market Foundation played an important role in the creation and entrenchment of section 25 of the Constitution, the property rights provision, in the mid-1990s. We therefore consider it of paramount importance to continuously and diligently engage in defending the morality and integrity of this provision. Our submission on the Expropriation Bill, 2020, should be seen in this light.

If the Expropriation Bill is passed in its current form, South Africa will be in the unenviable position where the Constitution recognises and protects individuals' and communities' property rights, but the legislation through which constitutional provisions must find their practical application, does not. In fact, the legislation will be undermining such constitutional property rights. The Bill, regrettably, is marketed and sold to the public in the garb of social justice and land reform, when in fact it is undermining the public's freedom. This creates the impression that rights are an idea owned by the State, and not the people. This would be faulty both according to human rights theory, but also according to the logic of the Constitution itself.

Section 1(c) of the Constitution provides for the co-equal supremacy of the Constitution and the Rule of Law. The Rule of Law among other things requires that law be clear, non-contradictory, and reasonable, and that provisions not be written in such a way as to give officials unbridled discretionary powers. Furthermore, the constitutional guarantee of property rights must be respected to ensure a prosperous and free society.

The Bill, among other things, is problematic for the following reasons:

Three of the Bill's definitions – expropriating authority, public interest, and public purpose – are too vague and would entail absurd consequences, and thus fall foul of the Rule of Law imperative.

The Bill bizarrely gives executive government entities the right to refuse expropriation. This is contrary to the nature of expropriation, which is involuntary. Section 9(1) of the Constitution, which guarantees equal application of the law, would be undermined if different rules apply to ordinary South Africans than those that apply to government entities and officials. Expropriation should either be voluntary for everyone, or involuntary for everyone.

The provisions that provide for "partial expropriations" allow the Minister, if they are "satisfied" that the property is no longer viable after a portion thereof has been expropriated, to expropriate the remainder of the property. This is problematic because only the user or owner of the property is qualified to decide whether they still have use for the property in such circumstances. Giving the Minister such an unconstrained discretionary power is inappropriate to a Rule of Law-respecting society.

The controversial provisions that apply to expropriation without compensation should be changed to remove the ill-considered references to labour tenants and land speculation, among other things. Providing nil compensation for abandoned land and State-owned land is, however, a worthy feature of the law.

Finally, the Bill was not accompanied by a legally-mandated socio-economic impact assessment. For this reason alone, the Bill must be withdrawn and subjected to deep and intellectually-honest study.

The Free Market Foundation has recommended in this submission under heading 4 how Parliament could rectify these and other problems.

In general, however, the Bill seeks to make it too easy for government to engage in expropriation in general, and must be beefed up with additional safeguards for the rights and interests of citizens and others who own property in South Africa.

Free Market Foundation and Rule of Law Project

The Free Market Foundation (FMF)[1] is an independent public benefit organisation founded in 1975 to promote and foster an open society, the Rule of Law, personal liberty, and economic and press freedom as fundamental components of its advocacy of human rights and democracy based on classical liberal principles. It is financed by membership subscriptions, donations, and sponsorships.

Most of the work of the FMF is devoted to promoting economic freedom as the empirically best policy for bringing about economic growth, wealth creation, employment, poverty reduction, and greater human welfare.

The FMF's Rule of Law Project[2] is dedicated to promoting a climate of appreciation throughout South Africa, among the public and government, for the Rule of Law; continually improving the quality of South African law; identifying problematic provisions in existing and proposed laws, and, where feasible, advocating rectification.

1. Introduction

The FMF played an important role in the creation and entrenchment of section 25 of the Constitution, the property rights provision, in the mid-1990s. In our submission to the Constitutional Court in the certification judgment, we noted that the right to property is a fundamental right found in almost all international human rights covenants and bills of rights. The constitutional guarantee of property rights must be respected to ensure a prosperous and free society.

The universality of property rights was acknowledged by all major political parties in South Africa at the time, including the majority African National Congress in such sources as its 1988 draft bill of rights. We therefore consider it of paramount importance to continuously and diligently engage in defending the morality and integrity of this provision.

An underappreciated element of our constitutional order is the Founding Provisions, which *inter alia* provide for the advancement of human rights and freedoms in section 1(a), and for the supremacy of the Constitution and the Rule of Law in section 1(c). The Rule of Law, among other things, requires that law be clear, non-contradictory, and reasonable, and that provisions not be written in such a way as to give officials unbridled discretionary powers.

The FMF has identified various provisions in the Expropriation Bill that fall foul of the imperatives of property rights and of the advancement of human rights and the Rule of Law. Where appropriate, we recommend rectification or removal from the final version of the Bill.

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1 www.freemarketfoundation.com.

2 www.ruleoflaw.org.za.

2. The nature of property rights

2.1 Elementary principles of property rights

Much emphasis in constitutional discourse is placed on freedom of expression, so much so that it is often regarded as the *basic* right which makes all other rights possible. Property rights, on the other hand, is oftentimes seen as clinical or merely ancillary. Indeed, the property rights of individuals is arguably the most-disregarded right,[3] as well as the right treated with the most scorn.[4]

Property rights are often misconstrued as the protection of 'white privilege'. They should rather be appreciated as one of the rights for which the struggle was fought, as something black people lived and died for, as a fundamental right *for black South Africans* that should never again be compromised. The FMF is proud that this has been our position for 45 years. We are surprised by how easily the legal means by which black land rights were violated can be forgotten and Apartheid-style legislation reconsidered.

The property rights of the individual are not merely a superficial medium by which the individual is able to exercise control over objects. Instead, property rights are foundational to various other rights, such as human dignity,[5] life,[6] trade,[7] and housing.[8]

The essence of 'property' lies in *ownership*. Ownership is what makes an 'object' or a 'thing' into property. When something is unowned or cannot be owned – like the Sun and Moon – we would have no reason to conceive of it as anything other than a thing or object. Therefore, in a world where only one person lives, without the possibility of there being others, the concept of 'property' will not exist, because there is nobody to challenge this person's exercising of the entitlements of ownership.

Various entitlements flow from ownership, some of which will be listed below. However, the essence of all of them, is that the owner has the right to decide what to do or not to do with his property. This is why deprivation of ownership is treated as a serious matter; indeed, the deprivation of black South

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3 For instance, when new taxes are levied in order to fulfil certain welfare obligations, ministers of finance make scant reference to the fact that increasing taxes takes more property away from ordinary citizens. Similarly, when civil society organisations campaign for government programmes, they often omit acknowledging that such programmes inevitably involve limiting the property rights of citizens. On the other hand, the same is not true for measures which violate, for example, the right to dignity or freedom of expression.

4 See variously: http://www.sabc.co.za/news/a/ca61e500402f4d068001ebf8e0b8bbd7/EFF-calls-for-amendment-to-Property-Clause-20172402; https://www.pressreader.com/south-africa/business-day/20170306/281788513850731. Accessed: 29 March 2017.

5 Section 10 of the Constitution. A dignified existence implies enjoying the fruits of one's labour and being able to leave a proprietary legacy for one's descendants, without the state micromanaging one's affairs as if one were a perpetual child.

6 Section 11 of the Constitution. Life is a logical impossibility without accepting the premises of private property. See Hoppe H-H. *The Economics and Ethics of Private Property*. (2006, 2nd edition). 339-346. https://mises.org/system/tdf/Economics%20and%20Ethics%20of%20Private%20Property%20Studies%20in%20Political%20Economy%20and%20Philosophy_3.pdf?file=1&type=document. Accessed: 29 March 2017.

7 Section 22 of the Constitution. Freedom of trade necessitates the ability to trade in one's own property.

8 Section 26 of the Constitution. Section 26(3) mentions South Africa's "homes". Ownership of the property of the home establishes a connection necessary for dignified living between the resident and the physical home. Being 'housed' on public property cannot create the 'homey' condition, and places the resident's security of tenure in permanent question.

Africans of their property by the Apartheid government was widely condemned, and to this day is a painful reminder of an oppressive past. Some entitlements are:[9]

- The entitlement of control
- The entitlement of use
- The entitlement of enjoyment of the fruits of the property
- The entitlement of encumbrance[10]
- The entitlement of alienation[11]
- The entitlement of vindication[12]
- The entitlement of defence[13]

These entitlements of ownership are the vehicles by which property rights can emancipate the poor, and give them dignity in their ownership.

2.2 Conflict avoidance

The most crucial function of property rights is to avoid conflict. Once a property right over a thing is established, there can be no question about that individual or community's rightful use, enjoyment, and alienation of the thing. In times past, this guarded against self-help, whereby individuals would simply take what they want from each other, and hurt one another if necessary. Property rights was an inevitable consequence of human nature.

The French assemblyman and political and economic philosopher, Frederic Bastiat, considered the nature of law and property in his 1850 text, *The Law*.[14] According to Bastiat, the law came about as a consequence of human nature. Bastiat wrote:

> "Existence, faculties, assimilation — in other words, personality, liberty, property — this is man.
>
> It is of these three things that it may be said, apart from all demagogic subtlety, that they are anterior and superior to all human legislation.
>
> It is not because men have made laws, that personality, liberty, and property exist. On the contrary, it is because personality, liberty, and property exist beforehand, that men make laws. What, then, is law? As I have said elsewhere, it is the collective organization of the individual right to lawful defense."[15]

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9 Van Schalkwyk L Neil & Van der Spuy P. *General Principles of the Law of Things*. (2012, 8th edition). 96.

10 I.e. to encumber the property with limited real or personality rights, such as a bond.

11 I.e. to sell, destroy, donate, or otherwise dispose of the property.

12 I.e. to have the property returned to the true owner if someone else unlawfully controls it.

13 I.e. to defend the property against unlawful infringement.

14 Bastiat C-F. *The Law.* (1850). https://mises.org/system/tdf/thelaw.pdf?file=1&type=document. Accessed: 29 March 2017.

15 Bastiat (footnote 14 above) 2.

In other words, positive law – what Bastiat calls "human legislation" – is a result of the pre-existing attributes of humanity, as a mechanism to protect those attributes and their exercise. Bastiat further discusses the origin of property rights:[16]

> "Man can only derive life and enjoyment from a perpetual search and appropriation; that is, from a perpetual application of his faculties to objects, or from labor. This is the origin of property.
>
> But also he may live and enjoy, by seizing and appropriating the productions of the faculties of his fellow men. This is the origin of plunder."

Individuals enter into an 'agreement' with the State to avoid this 'plunder'. In exchange for protection of their persons and property, individuals agree to adhere to the law which does the protecting, and, therefore, not resort to self-help. This agreement is known as the 'social contract', and the social contract is the framework within which governance must take place. Bastiat sets out this framework thus:

> "When law and force keep a man within the bounds of justice, they impose nothing upon him but a mere negation. They only oblige him to abstain from doing harm. They violate neither his personality, his liberty, nor his property. They only guard the personality, the liberty, the property of others. They hold themselves on the defensive; they defend the equal right of all."[17]

This social contract, however, has not been adhered to, according to Bastiat. He writes:

> "[The law] has acted in direct opposition to its proper end; it has destroyed its own object; it has been employed in annihilating that justice which it ought to have established, in effacing amongst Rights, that limit which it was its true mission to respect; it has placed the collective force in the service of those who wish to traffic, without risk and without scruple, in the persons, the liberty, and the property of others; it has converted plunder into a right, that it may protect it, and lawful defense into a crime, that it may punish it."[18]

What Bastiat is referring to here is the law being used as a tool for 'redistribution' of property, which clearly violates private property.

'Redistribution', in this context, is a rejection of the social contract. 'Restitution', however, is not. This submission should therefore not be construed as an argument against restitution. Where a true owner has had his property deprived from him by someone else, be it a criminal or government, he does not lose ownership.[19] Government must restore the property to its rightful owner. This principle

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16 Bastiat (footnote 14 above) 5.

17 Bastiat (footnote 14 above) 19.

18 Bastiat (footnote 14 above) 4.

19 This is true even for expropriation. The Apartheid government used its lawful expropriation powers liberally during the previous era, and this is considered illegitimate, rightly, under our current constitutional dispensation. Expropriation must be just – not merely legal – to qualify as a valid transfer of property.

applies to the descendants of true owners as well, which is a relevant consideration in post-colonial and post-Apartheid South Africa.

3. The Constitution and the Rule of Law

3.1 The Constitution

The Constitution contains various provisions, especially in the Bill of Rights, that protect the freedom of South Africans to determine their own affairs.

The most important provision underlying all of the other provisions is found in section 1 of the Constitution – the Founding Provisions. Section 1(a) provides that South Africa is founded on "[h]uman dignity, the achievement of equality and the **advancement of human rights and freedoms**" (my emphasis). This provision permeates all the provisions of the Bill of Rights by virtue of being a founding value.

Other provisions relevant to the advancement of human rights and freedoms of choice include the following:

- Section 7(1) provides that the Bill of Rights "enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and **freedom**" (my emphasis). Section 9(2) provides that the right to equality "includes the full and equal enjoyment of **all rights and freedoms**" (my emphasis).
- Section 10 provides that "[e]veryone has inherent dignity and the right to have their dignity respected and protected". According to the Department of Justice and Correctional Services, this means that "[n]o person should be perceived or treated merely as instruments or objects of the will of others. Every person is entitled to equal concern and to equal respect".[20]
- Section 12(1)(a) provides that everyone has the right "not to be deprived of freedom arbitrarily or without **just** cause" and section 12(1)(c) guarantees the right of everyone "to be free from all forms of violence from **either public or private sources**" (my emphasis).
- Section 14 guarantees the right to privacy, meaning private affairs should not be interfered with or monitored without consent.

Section 25 guarantees the right of everyone to be secure in their property unless the property is expropriated for a public purpose or in the public interest with compensation. No expropriation may be arbitrary.

Chapter 2 of the Constitution – the Bill of Rights – does not 'create' rights, but merely protects pre-existing rights from infringement. Section 7(1) states that the Bill of Rights "enshrines" the rights, not creates them. Enshrining something, in the constitutional sense, means to place that thing somewhere where it is protected, in this case, in a constitution.[21] South Africans have rights outside of the Constitution, and if a provision in the Bill of Rights is repealed, that does not mean South

[20] http://www.justice.gov.za/brochure/2014_ConstitutionRights.pdf/.
[21] https://dictionary.cambridge.org/dictionary/english/enshrine.

Africans 'lose' that right. If this were the case, there would be little use in referring to rights as 'human' rights, as section 1 and the Preamble of the Constitution do. South Africans are all rights-bearing entities because we are humans with dignity and individuality, not because government has 'given' us those rights.

The rights in the Bill of Rights can be limited by operation of section 36, but the basic essence of the right in question must remain. Indeed, if protection for human rights is removed from the Constitution or otherwise perverted through legislative 'limitation', South Africa's constitutional project will be severely undermined in that the highest law will continue to recognise the rights in question, but will not adequately protect them. This is not a situation South Africans would want to find themselves in.

By implying that government can extinguish rights simply by enacting legislation dressed in the garb of 'protecting' the people while undermining their freedom, the impression is created that rights are an idea owned by the State, and not the people. This would be faulty both according to human rights theory, but also according to the logic of the Constitution itself.

3.2 The Rule of Law

Section 1(c) of the Constitution provides that South Africa is founded upon the supremacy of the Constitution and the Rule of Law. Section 2 provides that any law or conduct that does not accord with this reality is invalid. This co-equal supremacy between the text of the Constitution and the doctrine of the Rule of Law remains underemphasised in South African jurisprudence, but it is important to note for the purposes of this submission.

One of the Constitutional Court's most comprehensive descriptions of what the Rule of Law means was in the case of *Van der Walt v Metcash Trading Ltd*. In that case, Madala J said the following:

> "[65] The doctrine of the rule of law is a fundamental postulate of our constitutional structure. This is not only explicitly stated in section 1 of the Constitution but it permeates the entire Constitution. The rule of law has as some of its basic tenets:
>
> > 1. the absence of arbitrary power – which encompasses the view that no person in authority enjoys wide unlimited discretionary or arbitrary powers;
> >
> > 2. equality before the law – which means that every person, whatever his/her station in life is subject to the ordinary law and jurisdiction of the ordinary courts.
> >
> > 3. the legal protection of certain basic human rights.
>
> [66] The concept of the rule of law has no fixed connotation but its broad sweep and emphasis is on the absence of arbitrary power. In the Indian context Justice Bhagwati stated that:
>
> > 'the rule of law excludes arbitrariness and unreasonableness.'

> I would also add that it excludes unpredictability. In the present case that unpredictability shows clearly in the fact that different outcomes resulted from an equal application of the law."[22]

The Rule of Law thus:

- Permeates the entire Constitution.
- Prohibits unlimited arbitrary or discretionary powers.
- Requires equality before the law.
- Excludes arbitrariness and unreasonableness.
- Excludes unpredictability.

The Good Law Project's *Principles of Good Law* report largely echoed this, saying:

> "The rule of law requires that laws should be certain, ascertainable in advance, predictable, unambiguous, not retrospective, not subject to constant change, and applied equally without unjustified differentiation."[23]

The report also identifies four threats to the Rule of Law, the most relevant of which, for purposes of this submission, is the following:

> "[The Rule of Law is threatened] when laws are such that it is impossible to comply with them, and so are applied by **arbitrary discretion** […]"[24]

Friedrich August von Hayek wrote:

> "The ultimate legislator can never limit his own powers by law, because he can always abrogate any law he has made. The rule of law is therefore not a rule of the law, but a rule concerning what the law ought to be, a meta-legal doctrine or a political ideal."[25]

What is profound in Von Hayek's quote is that he points out that *the* Rule of Law is not the same as *a* rule of *the* law. Indeed, any new Act of Parliament or municipal by-law creates and repeals multiple 'rules of law' on a regular basis – expropriation without compensation would be an example of 'a' rule of 'the' law. The Rule of Law is a doctrine, which, as the Constitutional Court implied in *Van der Walt*, permeates all law, including the Constitution itself.

Albert Venn Dicey, known for his *Introduction to the Study of the Law of the Constitution*, and considered a father of the concept of the Rule of Law, wrote that the Rule of Law is "the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even wide discretionary authority on the part of the government".[26]

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22 *Van der Walt v Metcash Trading Ltd* 2002 (4) SA 317 (CC) at paras 65-66. Citations omitted.
23 Good Law Project. *Principles of Good Law.* (2015). 14.
24 Good Law Project (footnote 23 above) 29.
25 Von Hayek FA. *The Constitution of Liberty.* (1960). 206.
26 Dicey AV. *Introduction to the Study of the Law of the Constitution.* (1959, 10th edition). 202-203.

Dicey writes "the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint".[27] He continues, saying the Rule of Law means "the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government".[28]

The opposition to arbitrary power should not be construed as opposition to discretion in and of itself. Officials use discretion to determine which rules to apply to which situation, and thus some discretionary power is a natural consequence of any system of legal rules. However, the discretion must be exercised per criteria which accord with the principles of the Rule of Law, and the decision itself must also accord with those principles.

A common example of arbitrary discretion is when a statute or regulation empowers an official to make a decision "in the public interest". What is and what is not "in the public interest" is a topic of much debate, and empowering officials to apply the force of law in such a manner bestows upon them near-absolute room for arbitrariness. The "public interest", however, can be one criterion among other, more specific and unambiguous criteria.

The fact that some discretion should be allowed is a truism; however, the principle that officials may not make decisions of a substantive nature still applies. Any decision by an official must be of an enforcement nature, i.e. they must do what the legislation *substantively* requires. For instance, an official cannot impose a sectoral minimum wage. The determination of a minimum wage is properly a legislative responsibility because it is of a substantive nature rather than mere enforcement. Unfortunately, the Basic Conditions of Employment Act gives the Minister of Labour the authority to make "sectoral determinations" – which includes determining a minimum wage – which is a clear violation of the Rule of Law and the separation of powers.[29]

3.3 The imperative of impact assessments

The most important tenet of the Rule of Law is its prohibition on arbitrariness. Arbitrariness is not only a symptom of unfair and bad governance, but is also very harmful to the economy, as it leads to uncertainty and means people and businesses cannot plan their affairs ahead of time.

The opposite of arbitrariness is reasonableness. Reasonableness consists of two elements, namely, rationality and proportionality. Proportionality means that there must not be an imbalance between the adverse consequences of a policy and the beneficial consequences.[30] Rationality means that evidence must support the policy. Stated differently, there must be a rational connection between the purpose of the policy and the solutions proposed.[31] It has also been said that a third element, effectiveness, is a part of reasonableness.

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27 Dicey (footnote 26 above) 184.
28 Dicey (footnote 26 above) 198.
29 Section 51 of the Basic Conditions of Employment Act (75 of 1997).
30 Hoexter C. *Administrative Law in South Africa*. (2012). 344.
31 Hoexter (footnote 30 above) 340.

It stands to reason that the requirement of rationality, read together with section 195(1)(g) of the Constitution, which states the principles according to which the public administration must function, provides that transparency "must be fostered by providing the public with timely, accessible and accurate information", requires that policy or legislative interventions must be supported by demonstrable evidence.

To determine whether a policy will have the consequence intended by the enacting authority, a study must be done as a matter of course, and must be publicly available to satisfy the principle of transparency. If a study is not conducted, it means the intervention is not supported by evidence, and is therefore irrational and unconstitutional, and if a study is not released to the public, government is failing to comply with section 195(1)(g), and thus, the process is unconstitutional. These studies are known as socio-economic impact assessments (SEIAs).

Without published SEIAs, government is called upon to *judge for itself* whether its *own* policies are reasonable. Such a state of affairs would make the Rule of Law a redundant concept.

For the people to have a say in the decisions that affect their lives, they must know how the decision was arrived at and on what basis, and their participation must be meaningful (in other words, government must engage in good faith) and not merely a façade. Without a SEIA, the public cannot participate in the policy-making and law-making processes as mandated by the Constitution.

In *Principles of Good Law*, the Good Law Project writes:

> "Although widely divergent, all the international assessment models amount ultimately to institutionalised procedures for determining the need for a law and its expected benefits. They are also concerned with the cost to government of implementation, as well as the capacity of government to police and enforce the law and the cost to the public of compliance. Other aspects considered are the economic and other likely impacts, the prospect of unexpected or unintended consequences; and the behaviour modifications likely to be promoted by the law and distortions that might flow from them."[32]

It goes on to describe what a SEIA would encompass:

> "2. Socio Economic Impact Assessment (SEIA). Multi-faceted analysis *and quantification* of:
>
> 2.1 The purposes of laws – precisely what "mischief" they are addressing;
>
> 2.2 Desired consequences;
>
> 2.3 Estimated secondary and unintended effects, including impacts on the economy or society in general;
>
> 2.4 Feasibility and efficacy – prospects in practice of the law being observed, and if not, enforced by officialdom, police and the courts;

[32] Good Law Project (footnote 23 above) 34.

2.5 Costs and benefits – accurate and comprehensive estimates of costs of administration and implementation, enforcement and policing, compliance and avoidance/evasion/resistance;

2.6 Inter-departmental considerations – the extent to which other departments are implicated;

2.7 Administration and budget – advance provision for all budgetary, staffing, training and related needs; diversion or dilution of resources and capacity."[33]

The Department of Planning, Monitoring and Evaluations' (DPME) SEIA System (SEIAS) guidelines describe the purpose of SEIA as follows:

"3. The role of SEIAS

SEIAS aims:

- To minimise unintended consequences from policy initiatives, regulations and legislation, including unnecessary costs from implementation and compliance as well as from unanticipated outcomes.
- To anticipate implementation risks and encourage measures to mitigate them."[34]

The DPME regards a SEIA as more than a mere cost-benefit analysis. SEIAs, instead, must contribute to improving policy, rather than measuring their net value. It must, furthermore, "help decision makers to understand and balance" the impact of policy on different groups within society.[35]

That regulations or legislation can lead to unintended consequences is acknowledged by government. They could occur because of inefficiency, excessive compliance costs, overestimation of the benefits associated with the regulation, or an underestimation of the risks involved with following through with the regulation.[36]

The SEIA System applies to legislation and regulations, as well as policy proposals.[37]

The Expropriation Bill does not appear to have a socio-economic impact assessment accompanying it.

33 Good Law Project (footnote 23 above) 35.
34 Department of Planning, Monitoring and Evaluation. "Socio-Economic Impact Assessment System (SEIAS): Guidelines." (2015). 4.
35 DPME (footnote 34 above) 7.
36 DPME (footnote 34 above) 4.
37 DPME (footnote 34 above) 8.

4. Expropriation Bill

4.1 Problematic definitions

(a) Expropriating authority

The Bill defines "expropriating authority" in section 1 as "an organ of state or person empowered by this Act or any other legislation to acquire property through expropriation". The implications of this are far-reaching.

It is not only functionaries at the national or Cabinet-level of government that have the power of expropriation, but municipal officials and employees of many State-owned enterprises also have this power. This means the President's assurances that expropriation without compensation will not be allowed to harm the economy or investment ring hollow; for the President cannot and does not constitutionally exercise any authority over the majority of civil servants across South Africa who do and theoretically can hold the power to expropriate for a multitude of different reasons.

As a result, and in light of the fact that this Bill seeks to introduce expropriation without compensation into South African law, the FMF proposes this provision be modified to define expropriating authority as **"an organ of state or person empowered by this Act or any other legislation to acquire property through expropriation, except for the provisions in section 12(3) and (4) of this Act."**

(b) Public interest

The "public interest" in the Bill is defined as "the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources in order to redress the results of past racial discriminatory laws or practices."

This definition is deeply problematic, as it does not go into specifics. The same language is used in section 25 of the Constitution with a view to Parliament enacting legislation to turn that general language into specifics. By keeping the definition of public interest this vague and ambiguous, South Africa's commitment to the Rule of Law, which demands specificity, clarity, and unambiguity, is undermined, and the door is opened for abuse.

As such, the FMF recommends that the definition of public interest be modified as follows:

> **"'public interest' can mean:**
>
> > **(a) Restitution of rights in specific property that were deprived as a result of past racial discriminatory laws or practices;**
> >
> > **(b) Rectification of inequitable and oppressive forms of tenure that were designed to, or have the consequence of, excluding people from the entitlements of ownership in property that, by reason of original acquisition or voluntary transfer, is rightfully theirs; or**

(c) Redistribution of property that has been abandoned by its owner, or is being unutilised or underutilised by organs of state."

(c) Public purpose

The same problem as identified with regard to the public interest above applies to the definition of "public purpose" – "any purposes connected with the administration of the provisions of any law by an organ of state". This, too, is too vague and general to satisfy the legality requirements of the Rule of Law imperative.

The FMF recommends defining public purpose as **"any purpose reasonably connected with the construction, development, or maintenance of public infrastructure by an organ of state."**

4.2 Unequal application of law

Clause 2(2) of the Bill provides that no property may be expropriated from a State-owned enterprise "without the concurrence of the executive authority responsible for that corporation or entity". The problem here should be immediately evident to constitutionalists.

South Africa, like most open and democratic societies around the world, has a constitutional dispensation based on the imperatives of the Rule of Law and of equal protection and application of the law. Equality is one of the core principles underlying constitutionalism. Indeed, equality at law is repeated throughout the Constitution, most importantly in section 1(a) and section 9(1).

Clause 2(2) shows no regard to this principle, as it makes expropriation – an inherently involuntary affair – voluntary for the members of the political class. Whereas ordinary South Africans need not "concur" with the expropriation of their property, this provision gives every entity in the executive government a veto over the application of this same law to them and property owned or under the control of State-owned enterprises or entities.

The FMF proposes that clause 2(2) be **removed** from the Bill, so as to re-entrench the principle of equality. Alternatively, we proposed clause 2(2) be amended to provide the following:

"(2) Despite the provisions of any law to the contrary, an expropriating authority may not expropriate the property of a state-owned corporation, state-owned entity, or owner, without the concurrence of the executive authority responsible for that corporation or entity, or the property owner, as the case may be."

4.3 Partial expropriation

Clause 3(4)(b) of the Bill empowers the Minister of Public Works and Infrastructure to expropriate the remainder of land if a partial expropriation had already taken place, if they are "satisfied" that "the use or potential use of the remainder of such land has become so impaired in consequence of the expropriation, that it would be just and equitable to the owner to expropriate it".

This removes agency from the owner of the property. Only the owners can decide whether the use or potential use of the land has been impaired. The Minister or their staff do not have the proximity nor expertise to make such a determination in the absence of the owner.

Furthermore, the Minister's "satisfaction" is not a proper legal standard. What does and does not satisfy the Minister must be irrelevant in a legal dispensation based on the Rule of Law as opposed to the rule of man.

The FMF recommends that this provision be changed by way of one of three options:

- **Remove** this provision from the Bill;
- Make necessary the **owner's consent** for further expropriation of their property; or
- Make the further expropriation of the property **obligatory at the instance of the owner** as provided for in clause 3(4)(a).

4.4 Factors in determining the amount of compensation

Clause 12(2)(a) of the Bill states that an expropriating authority must not take into account the fact that the property is being seized without the consent of the owner when determining the amount of compensation to be paid. This provision is an injustice.

Expropriation, as mentioned above, is inherently an involuntary affair. It can be described as a necessary evil in modern society. But it remains an evil, for it is coercive, and often robs victims of expropriation of their most intimate possessions or of their means of generating a livelihood.

This fact *must* be taken into account when property is being expropriated. Government is a servant of the people, not a ruler over them, which makes the notion that the consent of the owner must even be discounted during the compensation phase a grave attack on the accepted relationship between governor and governed.

The FMF recommends that clause 12(2)(a) be **removed** from the Bill.

4.5 Expropriation without compensation

(Extracts from the FMF's submission on the constitutional policy of expropriation without compensation are annexed to the end of this submission.)

Clause 12(3) provides for expropriation without compensation. It says that it may be just and equitable to pay zero compensation in certain circumstances. It lists five such potential circumstances, but leaves the door open to other "just and equitable" circumstances.

The five it lists are:

- Land held for speculative purposes;
- Land owned by an organ of State;
- Land that has been "abandoned";
- Land for which the State's subsidisation is greater or equal to its market value; and
- "Property" that poses a health, safety, or physical risk to others.

Clause 12(4) further provides that land may be expropriated for nil compensation if labour tenants have been granted a right in that land.

The only acceptable ground herein contained is land owned by organs of State.

The others, however, present a threat not only to security of property rights, but to employment and to the wellbeing of the economy.

One must bear in mind that these amount to prohibitions, not merely circumstances for expropriation without compensation. No rational person will engage in any of the listed activities if they know their land can be seized without compensation for that reason.

It is unjustifiable to expropriate a person's property simply because that property or a part of that property is settled by labour tenants. Labour tenancy simply means that labourers work on the land in exchange for housing. Such an agreement is entered into on mutually-beneficial terms, usually as an alternative to eviction. By including this provision, government could induce land owners to terminate the relationship with labour tenants, as they might prefer to go through an eviction process under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, rather than lose their property and not be paid compensation.

There is also no substantive reason for making the effective prohibition on speculating with land. Holding on to property and waiting for its price to rise is not an immoral economic activity. Indeed, this is what savings in fact amounts to: We keep our money, which could be used for so-called "productive" purposes, in the bank, waiting for it to grow. The same is the case with investments in shares or other types of funds. It contributes to capital formation, and in the long term, to economic growth and prosperity.

Some land owners might wish to keep a small portion of their property unused in the hopes that it could be sold in the future for a substantial profit to develop housing, a new university campus, or any number of possibilities. By prohibiting the holding of land for speculative purposes, much land will be put to immediate, and perhaps ineffective or inefficient use. Many productive urban areas today would not exist, and would have been rural villages or farms, had a provision of this nature applied decades ago.

The provision relating to "abandoned" land is also problematic, as it creates the impression that land would be abandoned simply because the owner is failing to exercise control over the land. This is not how abandonment functions in South African property law.

Finally, as mentioned above, the provision does state that these six circumstances are not the only circumstances under which property may be expropriated without compensation. It is our contention that this clause in the provision causes grave uncertainty and will in and of itself severely undermine the legitimacy of this law in the eyes of those who wish to invest in South Africa.

The FMF thus recommends that clause 12(3) be modified as follows, with a new subclause (4), with the present subclause (4) being removed:

"(3) It may be just and equitable for nil compensation to be paid where land is expropriated in the public interest under the following circumstances:

(a) Where the land is owned by a state-owned corporation or other state-owned entity;

(b) where the owner of the land has abandoned the land by manifesting their intention to no longer own the land; and

(c) where the market value of the land is less than the present value of direct state investment or subsidy in the acquisition and beneficial capital improvement of the land, provided the present owner was the owner at the time of the investment or subsidy.

(4) Only the Minister responsible for public works and infrastructure may give effect to subsection (3). All other expropriating authorities must presume that compensation is payable under all circumstances."

4.6 Payment of compensation

Clause 17(3) of the Bill provides that if there is a delay of payment for the compensation, this would "not prevent the passing of the right to possession to the expropriating authority" unless there is a contrary court order.

This provision is inequitable and, on its face, unjust. It follows that if compensation, which is legally required for lawful expropriation, is not paid, then the expropriation is no longer lawful, and as a result the right to possession cannot pass. By depriving owners of the enjoyment of their property without making good the loss they have suffered, government would be exacting tyranny upon the people it is expected to serve.

The FMF, as a result, proposes that this provision be **removed** from the Bill, so as to re-entrench the presumption that payment must be made before the passing of any right occurs.

4.7 Urgent expropriation

Chapter 7 of the Bill makes provision for urgent expropriation. This applies to public purpose expropriations and public interest expropriations.

However, it makes no sense to talk of an urgent expropriation in the public interest, at least not based on the vague and abstract definition of public interest provided for in the Bill.

The FMF recommends that the reference to public interest in this provision be **removed**, so that only public purpose expropriations may considered urgent in certain circumstances.

5. Conclusion

Secure property rights are a precondition for prosperity. The Expropriation Bill, if passed in its current form, strikes at the heart of private property rights and violates the principles underlying the Constitution and the Rule of Law.

One of the most heinous aspects of Apartheid was denial of property rights. Yet, instead of assurances that property rights will never be violated again, the Bill ensures that all South Africans, but especially black people, will never enjoy the rights for which many fought and died. While most white investors, suburban residents and farmers have resources with which to protect themselves, most victims will be poor blacks whose property will be misappropriated for dams, roads, airports, political projects, mines and the like. Like under Apartheid, the Expropriation Bill in this form will once again make the ownership of property dependent upon political whim.

The FMF has drawn attention to these problems throughout the Bill and recommended how these problems should be rectified to ensure constitutional compliance.

ANNEXURE:

SUBMISSION TO THE CONSTITUTIONAL REVIEW COMMITTEE ON THE RESOLUTION FOR EXPROPRIATION WITHOUT COMPENSATION, 2018

Executive summary

The Free Market Foundation (FMF) opposes the resolution to amend the Constitution on three grounds:

- Property rights are a hard-won victory after Apartheid.
- Constitutionalism and the Rule of Law.
- There are superior methods of land reform.

Apartheid's characterising feature was its denial of private property rights to black South Africans. This was the essence of statutes like the Natives Land Act and the Group Areas Acts, which dictated where people could and could not own or use their property, and even whether or not they may own property at all. The struggle against Apartheid, fundamentally, was about recognising property rights for all South Africans. Expropriation without compensation would undermine this hard-won victory over racist statism, as the obligation to pay compensation when property is expropriated is a significant barrier to depriving people of their justly-acquired property. Without needing to pay compensation, South Africans would in practice be deprived of property rights entirely.

The Constitution, which ended this racist denial of property rights, is a timeless statute meant for the ages. Changes to any constitutional instrument should be rare and narrow. Expropriation without compensation would be the first substantive amendment to the Constitution. This means that, instead of the current process that appears to want to change the Constitution in less than a year, there should be a thoughtful, years-long process to determine the national attitude toward the proposal. Only then should a process be undertaken. And when undertaken, the amendment must be rational, evidence-based, and must not negatively affect the substance of the right being amended. The Bill of Rights does not give us rights, but simply recognises and protects already-existing human rights, and it is for this reason that any amendment must respect the core essence of the right in question.

Expropriation without compensation would not easily adhere to this obligation. It is by its nature arbitrary, and government has not yet indicated why it wishes to expropriate without compensation, or which properties or types of properties it wishes to expropriate without compensation. This irrationality is further emphasised by the fact that there are other, quicker and more substantive methods for realising land reform.

The restitution process must continue apace. South Africans who were dispossessed of their property because of Apartheid must, and do have a right, to claim back that property. Redistribution, on the other hand, is arbitrary, and most redistribution land remains in the hands of government anyway, and is sometimes leased – that is, ownership is not transferred – to aspiring farmers.

Urban land reform is imperative. Millions of black South Africans continue to live as tenants on municipal land – an inheritance from Apartheid. These tenants should be given full and unambiguous ownership of the properties they have lived on for generations. Government must also repeal any laws that hinder equitable access to land, such as the Subdivision of Agricultural Land Act and certain town-planning laws. Government, too, owns vast swathes of land throughout South Africa, much of which is 'reserved' land that is considered to be private property (but is not private property), and is not in any productive use. This land can be transferred at virtually no cost to deserving, poor South Africans.

Without property rights, South Africa has no materially prosperous future. Expropriation without compensation would undermine property rights unjustifiably and must be abandoned if South Africa is to be a free, prosperous, constitutional, and transformed state.

Introduction

The characterising feature of Apartheid was its denial of property rights to black South Africans. Property rights have been widely recognised as prerequisites for material prosperity. Without secure property rights, most people would not invest in, expand, or maintain the things they possess because at any time these things can be taken away from them without consent. History has consistently shown this to be true. Monarchs lived in grand palaces and castles surrounded by walls and soldiers, whereas ordinary plebeians lived quite exposed to the realities of pre-property rights societies. The monarchs knew they could invest in, expand, and maintain their residences because they knew it was unlikely that they would be robbed of it. Ordinary people did not have this security and peace of mind. Only when property rights were conceived of and found expression in the Industrial Revolution, did the visible decline of poverty start on a global scale, expanding to each new society which chose to recognise the value of protecting private property.

In South Africa, the necessity of protecting private property was not recognised during the colonial era and during Apartheid for the vast majority of the population. Black South Africans' justly-acquired property was never secure, and to a lesser extent the same was true for white South Africans who too had to play along in the National Party's grand experiment of social engineering.

Both the Constitution of the Republic of South Africa, 1996,[38] and the interim Constitution[39] before it, signified a fundamental departure from this era of tyranny. During the previous constitutional dispensation, the legislature – Parliament – was sovereign, and could pass whatever laws it deemed appropriate.[40] Indeed, in the case of *Sachs v Minister of Justice* the Appellate Division of the Supreme Court said "Parliament may make any encroachment it chooses upon the life, liberty or property of any individual subject to its sway, and… it is the function of courts of law to enforce its will".[41] This

[38] Henceforth "the Constitution".

[39] Constitution of the Republic of South Africa Act (200 of 1993).

[40] This is made clear by the remarks of Didcott J in *Nxasana v Minister of Justice and Another* 1976 3 All SA 57 (D), where the Court said, "under a constitution like ours, Parliament is sovereign, and the Courts can no more assume a power which it has decreed that they shall lack, or set its enactments at naught, than can anyone else."

[41] *Sachs v Minister of Justice* 1934 AD 11 at par 37.

was the bedrock upon which the previous regime was able to construct Apartheid, as no court of law or civil rights association could challenge the rightfulness or legality of that system according to a set of principles which regulate governance.

The dawn of the constitutional era in 1993 meant a recognition of private property rights for all South Africans, regardless of their race. These constitutions also brought an end to parliamentary sovereignty. This means that all law and legal conduct must accord with the text, spirit, and purport of the Constitution, and especially the Bill of Rights.[42]

Section 1(c) of the Constitution provides that the Constitution itself, as well as the Rule of Law, is what the non-racial and non-sexist South African state shall be founded upon. The Rule of Law comprehends a society governed according to legal principles instead of arbitrary political considerations, and excludes law which is ambiguous, arbitrary, retrospective, unpredictable, value-subjective, applies unequally, violates the separation of powers, or violates basic human rights.

The reality and tyranny of Apartheid property law means that significant reform is required.

People and communities who had their land taken from them by the Apartheid regime should be entitled to claim restitution of that property, and, if this is not possible, they must be compensated for the loss. Restitution is a central part of property rights, and is even recognised as such by South Africa's Roman-Dutch common law tradition. Restitution should, however, not be confused with the unrelated notion of redistribution, where property is chosen arbitrarily by government and taken from some to theoretically give to others. In most cases, redistribution land remains in the hands of government. The notion of redistribution is avowedly anti-property rights, anti-progress, and unconstitutional.

The error of reading redistribution into the Constitution, when it is in fact not there, has been a worrying trend that stands to undermine constitutionalism in South Africa. Selective and biased readings of our highest law render the actual words of the Constitution redundant. This is true especially for section 25, which enables land reform on a massive scale, but which is described as a barrier to transformation and thus in need of change.

Any constitutional instrument is meant for the ages. It survives successive governments and does not only regulate the powers of the current government. It is timeless. This is why a supreme constitution is usually made inflexible: it can only be changed in rare circumstances and subject to various conditions. But even where these conditions are met, there should be a constitutional culture in society that veers away from enacting constitutional change for select issues, especially if such change is not truly required. In section 25's case, no amendment to the Constitution is necessary, and the proposed amendment does not carry popular support nor does it satisfy the requirements of legality: it is irrational, proposes to fix a non-existent problem, and will yield unintended consequences that will undermine South Africa for decades, if not centuries, to come.

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[42] Chapter 2 of the Constitution.

In this submission, the FMF will propose various alternatives to expropriation without compensation, and make an argument for why the Constitution should not be amended. Chief among these alternatives is the fact that the land reform discourse appears to be unduly fixated on rural land, instead of urban property. Most South Africans do and wish to live in urban areas, and land reform in these areas is easier than the emotional and complex debate raging about rural areas. Title deeds and unqualified ownership should be given to the victims of Apartheid property law and their descendants, who continue to live as tenants on government-owned property, even if they have been the inhabitants of those homes for a century or more.

The key question the reader of this submission should ponder is whether land reform is about ideology, or about prosperity and righting the wrongs of the past. If it is the former, this submission will not convince those who have bought into the ideological premises of expropriation without compensation. If, however, land reform is about the latter, then this submission intends to communicate how expropriation without compensation is not only an inappropriate, but dangerous way to go about land reform, and it should as a consequence be abandoned.

The lack of property rights under Apartheid

Section 1(1)(a) of the Natives Land Act[43] provided that "a native shall not enter into any agreement or transaction for the purchase, hire, or other acquisition from a person other than a native, of any such land or of any right thereto, interest therein, or servitude thereover". Section 1(1)(b) provided the same, but in reverse – nobody other than a native may enter into such transactions with a native.

Section 2 of the Act provided for the powers of the Governor-General to divide South Africa into areas where only natives would be permitted, and areas where natives would not be permitted.

Section 4 provided for the power of the Governor-General to expropriate land to bring about this division of land throughout the country. This Act was the cause of and precursor to the homeland system.

Section 3(1)(a) of the Group Areas Act[44] empowered the Governor-General to "declare that as from a date specified in the proclamation, which shall be a date not less than one year after the date of the publication thereof, the area defined in the proclamation shall be an area for occupation by members of the group specified therein" and to "declare that, as from a date specified in the proclamation, the area defined in the proclamation shall be an area for ownership by members of the group specified therein".

Section 4(1) provided that "no disqualified person shall occupy and no person shall allow any disqualified person to occupy any land or premises in any group area to which the proclamation relates, except under the authority of a permit".

Section 5(1)(a) disallowed "disqualified" persons or companies from acquiring any immoveable property situated within a group area, regardless of whether it is in pursuance of any agreement or

[43] Natives Land Act (27 of 1913).
[44] Group Areas Act (41 of 1950).

testamentary disposition entered into before the proclamation came into being. Such provisions are littered throughout the Act. This Act was the cause of the spatial inequality that today exists in South Africa's urban areas.

Section 3 of the Subdivision of Agricultural Land Act[45] prohibited the subdivision of agricultural land or the vesting of an undivided share in agricultural land in another person. This Act was, and remains, the cause of the concentration of increasingly larger farms in the hands of increasingly fewer people – what Minister Gwede Mantashe condemned as "mega-farming".

This is but a taste of the kinds of inroads the Apartheid government made on property rights and, as a consequence, on the human dignity and liberty of the majority of South Africans.

The imperative of restitution

The land debate in South Africa is intensely confused when it comes to *restitution* and *redistribution*. There is a mammoth conceptual difference between these two notions, as this submission has already alluded to.

Restitution means that if one's or one's ancestors owned land that was taken without informed consent, they are entitled to receive that property back (or compensation, if they so choose). And the individual who currently and unlawfully possesses that property, if they are innocent in that they didn't know the land was forcefully taken, must be fairly compensated. This is justice, and is an inherent part of private property rights. The Constitution makes ample, explicit provision for this.

Redistribution is something else. Property is selected, often at random and arbitrarily, to be taken without the consent of the owner whose family may have owned that property legitimately for centuries, and the property is likely, from then on, to be owned by the government – or (less likely) distributed to another citizen. It is the epitome of arbitrary governance and was a hallmark of Apartheid.

Redistribution is an injustice, is ideological, and amounts to naked robbery. It is what the Apartheid government did after the passage of the Natives Land Act – redistributed black-owned land to itself and to white South Africans, arbitrarily. The Constitution does not provide for redistribution, so to justify it, proponents of redistribution often have to come up with innovative interpretations of the words used in the constitutional text.

Bastiat wrote that it "is very evident, then, that the proper purpose of law is to use the power of its collective force to stop this fatal tendency to plunder instead of to work. All the measures of the law should protect property and punish plunder." South Africa's constitution is consistent with this proper aim of the law.

To justify the State's engagement in wealth redistribution, the equality (section 9) and property rights provisions of the Constitution are referred to the most frequently. This is erroneous, and a perverted interpretation of the centuries' worth of jurisprudence and development that went into the concept

[45] Subdivision of Agricultural Land Act (70 of 1970).

of constitutionalism. Indeed, section 1(c) of the Constitution and the wording of section 25 makes it clear that redistribution is not part of the constitutional project nor is it a legitimate way to pursue transformation.

The equality provision provides, firstly, that all are equal before the law, and secondly, that legislative measures may be taken to promote the achievement of the "equal enjoyment of all rights and freedoms" in the Bill of Rights. The property rights provision not only protects private ownership of property, but also provides that the results of Apartheid must be redressed, that security of tenure must be implemented, and that restitution of property must take place.

None of these provisions call for, or imply, blanket redistribution of wealth and property legitimately acquired by owners. On the contrary; these provisions protect individuals and communities from oppressive meddling by the State, and enable the State to correct its own past misdeeds while respecting existing rights.

Fast-tracking substantive land reform

Urban tenure reform

In 1991, the Apartheid government admitted its gravest violation of human rights: denying black South Africans ownership of land. How did it do this? It passed the Upgrading of Land Tenure Rights Act[46] (ULTRA). ULTRA's objective was to upgrade lesser forms of tenure in townships to full ownership and to incorporate the registration of these upgraded rights in the formal deeds registry system.

It established a mechanism whereby the new owners of an estimated 5 million properties could submit documents proving their ownership and have that fact documented in the deeds registry. At the same time, government repealed the Natives Land Act. In one fell swoop, it abolished the Act that had prohibited black South Africans for 78 years from owning property in over 80% of South Africa and performed a mass transfer of ownership of all properties in formalised and surveyed townships.

ULTRA also provided, at the same time, that upon completion of further surveys and establishment of formal townships, the same rules would apply. Yet, despite ULTRA and the repeal of the Natives Land Act, many black South Africans remain tenants on their own property. The reason for this is simple: The owners of these urban township plots were not told about their upgraded tenure.

ULTRA was passed and filed away, like a mere formality. Some municipalities took notice, but the mass of townships remain unupgraded. Deeds offices were either uninformed or neglected to document the massive shift in ownership from the State to the people. Those who live on the properties concerned are, by law, true and full owners,[47] but this fact has not been recorded in any registry nor do they possess title deeds. This makes their ownership almost useless and places them under virtual house arrest.

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46 Upgrading of Land Tenure Rights Act (112 of 1991).

47 Sections 2 and 3 of the Upgrading of Land Tenure Rights Act.

They cannot sell or let their properties without producing proof of ownership and so are compelled to stay where they are. The choices of parents wanting to move closer to their children and families wishing to take up job opportunities elsewhere are severely limited by not being in possession of that important document – a title deed to their property. They also cannot borrow against their property. Most worrying is that a future government may repeal ULTRA after which it becomes an open question as to whether township inhabitants retain the ownership previously granted to them but not recorded on a plot-by-plot basis.

These problems would be avoided if their ownership was recorded and their title deeds transferred to them on an expedited basis. The FMF's Khaya Lam (My Home) Land Reform Project, with the support of generous donors and cooperation from some municipalities, is chipping away at this task. It sees not only to having ownership rights recorded but also the registration of transfers and the presentation to owners of the title deeds to their properties.

Titles presented and transfers in progress currently total 5,100. The estimated total number of properties is five million. The essence of the property rights story as far as black South Africans are concerned can thus be reduced to:

1. They were denied the right to own property in land for 78 years (between 1913 and 1991).
2. An estimated 5 million households were given ownership of the houses they occupied, but they were not informed of their rights.
3. Those who have title deeds to properties have had full secure property rights protection for 27 years (between 1991 and the 2018 announcement of expropriation without compensation).
4. The removal of secure property rights by the proposed constitutional change will once again return black South Africans to the insecurity they had during the Apartheid years.

Since 1994, various schemes have been devised by the democratic government to 'solve' poverty, but none of them have really broached the source of the issue, insecure and uncertain property rights. One scheme was the Reconstruction and Development Programme's (RDP) housing project.

RDP properties are allocated to previously disadvantaged individuals – clearly, a better alternative to unhygienic shacks. However, beneficiaries do not immediately become the full owners of such properties. Included in RDP agreements, there are 'pre-emptive clauses', which often prohibit beneficiaries from selling or letting the property for several years, or provide that there may be only one residence on the property. These clauses were introduced in the Housing Amendment Act.[48]

Many claim that these conditions are in place for good reason; for example, to ensure that the beneficiaries do not immediately sell the house for the money. But a rationale such as this is indicative of the patronising mindset that was at the heart of Apartheid statism. Other home owners are able to sell, let, or sub-let their property – why not the poor?

[48] Clause 7 of the Housing Amendment Act (4 of 2001).

What matters here, is that we cannot call the RDP entitlement of the beneficiary 'ownership', because a central feature of ownership is the ability to sell or let your property, or build on it as many dwellings as you desire.

Many RDP house beneficiaries have decided, in contravention of the law, to use 'their' properties as income generating resources anyway. They are letting them out to other desperate families while they go elsewhere, say, to where they can find employment. Being unable to legally sell the property to pursue employment opportunities in other cities, forces them to do so illegally. And because it is illegal, they 'sell' the home at a much lower value than its true worth.

In 2012, Johannesburg metro official, Bubu Xuba, spoke with Corruption Watch and told them that beneficiaries have to remain in their allocated houses for at least eight years, and then, if they wished to sell, first preference had to be given to the State. If they try to sell before the period has elapsed or give preference to someone besides the State, it "can be regarded as fraud and the beneficiary can be charged with committing a criminal act".

Only when dealing with the government, can a harmless action such as deciding to sell your house put you in jail.

Furthermore, the allocation process itself is not transparent and has led to reports of corruption. Some municipal officials have accepted bribes from applicants low on the allocation list to be moved to the top.

Clearly, this is not how transformation should occur. Poor, mostly black South Africans are still being subjected to the discretionary whim of the executive government and are still being denied property rights under our Constitution.

The urban township continues to exist today in much the same form as during Apartheid. Municipalities own the land upon which townships and the inhabitants are unable to legally sell, let or mortgage the property they occupy. They cannot regard 'their' properties in the same way as other South Africans do in the suburbs.

This deprivation of ownership leads directly to a lack of investment in these properties by inhabitants and the absence of a property market. If we wish to see townships become middle-class suburbs, ownership must be extended to the deprived millions; not threatened under a regime of expropriation.

The experiment of State ownership – or State 'custodianship' – has clearly failed and produced bland, poor and unappealing areas where the government does not care to maintain the plots and homes it officially owns. Only private owners have the incentive to put time and effort into and develop their own property. It is unthinkable that, for some, "land reform" in South Africa seems to mean more of what we had during Apartheid, and not the extension and strengthening of property rights for the poor and vulnerable.

If government is serious about land reform, it must shelve its plans to amend the Constitution and start doing what the Constitution obligates it to do: Secure the tenure of those who have insecure

tenure because of past racial discrimination. Land reform is meaningless if there is an absence of private property rights.

Megafarming

The Subdivision of Agricultural Land Act is an Apartheid law and a problem few people know about. It has contributed to the unnecessary concentration of property ownership in a small number of hands because it disallows owners of agricultural land from subdividing their property and selling those subdivided plots to others without the permission of the Minister of Agriculture.

The justification behind this Act is to prevent land that is agriculturally useful from being used for other forms of development or being divided into portions so small that they are no longer agriculturally viable.

This is problematic for two reasons. Firstly, having to obtain someone's "permission" to subdivide one's own property is insulting and implies that one is not truly the owner of that property. Secondly, this law has stood in the way of affordable pieces of agricultural property being "redistributed" on the open market by, for instance, prohibiting farmers from selling parts of their farm to their farm workers.

If South Africa is to take ownership seriously – as a departure from Apartheid thinking – then government must stand back and allow nature and commerce to take their course.

State-owned land

In 2001, the Demographic Information Group and Population of SA (Popsa) found that a quarter of land in SA was owned by municipal government. According to the Department of Land Affairs, in 2009 national and provincial governments owned about 25-million hectares of land.

According to some, by 2013, the total State ownership of land appears to have decreased to about 14% of all land in the country. By contrast, in 2017 another report revealed that government owned around 25% of the surface of South Africa.[49]

It also remains unclear for which departments and for what purposes land is being held. As recently as 2007, some departments did not know they had been allotted land as reflected in the deeds registry. This can be partly attributed to the complex and confusing nature of Apartheid land law inherited by the government.

Giving State land to the poor is the surest, cheapest, and fastest way for government to realise its constitutional obligation to bring about equitable access to land.

It would cost the government very little to hand over its idle property to deserving, poor, previously disadvantaged individuals and families.

[49] Agri SA. “Land in black hands: The definitive report”. (2017). http://www.politicsweb.co.za/documents/land-in-black-hands-the-definitive-report--agri-sa. Accessed: 18 February 2019.

Conclusion

Since its founding in 1975, the FMF has been involved in trying to extend property rights as widely as possible, to all South Africans. Property rights are the bedrock of a free market and are one of the best vehicles for material empowerment that mankind has discovered. Apartheid denied this crucial institution to the majority of South Africans, and subjected them, instead, to insecure, precarious, and useless leasehold tenure, which often depended on the arbitrary whims of officials.

The enactment of the Constitution brought this injustice to an end, by recognising and protecting the property rights of all South Africans regardless of race. It went further, and obliged government to do what the FMF had tried to do – extend property rights to those who were denied it. Land reform occupies the majority of section 25. Far from standing in the way of transformation, section 25 makes transformation an imperative. Constitutionalism and the Rule of Law, furthermore, require that the process surrounding amending the Constitution should be rational, evidence-based, well-considered and, crucially, not rushed.

Expropriation without compensation, if adopted, will in practice extinguish property rights as a whole, even if section 25(1) is retained without change. If government is entitled to take property by force without being obliged to pay compensation – an obligation that has existed since formalised governments came about – property rights would be meaningless. While many may think these instances will be limited to large farms, section 25 protects all property, meaning that without a requirement to pay compensation, any property, including pensions, intellectual property, houses, heirlooms, etc. can be taken on a whim without paying a cent. This would reverse the biggest gain that resulted from the struggle against Apartheid.

It is unnecessary to consider expropriation in general and expropriation without compensation in particular as a vehicle for land reform. The FMF has recommended quick, substantive, and inexpensive methods by which land reform can be done.

South Africans who were deprived of property under Apartheid have a clear entitlement to claim that property back. Restitution is a common law and constitutional imperative. Restitution and redistribution are, however, distinct. Individuals and communities can claim property which was taken from them back, but government cannot arbitrarily pick and choose property, often on a racial basis, and expropriate it either to keep it to itself or lease it to random, similarly-arbitrarily picked members of society.

Firstly, and most importantly, South Africans who today still live with leasehold tenure on municipal land should be given full and unambiguous ownership, accompanied by a title deed. Secondly, laws and regulations that hinder equitable access to land, like some town-planning laws that make it difficult for informal settlements to eventually become suburban townships, or the Subdivision of Agricultural Land Act, which makes it very onerous for farmers to subdivide their land and sell those divisions, at a competitive rate, to smaller farmers or communities, should be repealed. Thirdly, all spheres of government own vast swathes of land throughout South Africa, much of which is

‘reserved’ land that is recorded on deeds registries as private property. This property can be transferred to deserving, poor South Africans virtually free of charge.

There are ways of achieving transformation in South Africa without sacrificing property rights in the process. Without property rights, the struggle against Apartheid and its legacy are undermined.