

*Ulawulo Lomthetho/Ngokomthetho*  
*Puso ya Molao*  
*Oppegesag van die Reg*



**15 June 2018**

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

Attn: Pat Jayiya, Secretary: Constitutional Review Committee

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# 1. 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.

## 2. Free Market Foundation and Rule of Law Project

The Free Market Foundation (FMF)<sup>1</sup> 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 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.

## 3. 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,<sup>2</sup> and the interim Constitution<sup>3</sup> 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.<sup>4</sup> 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".<sup>5</sup> This 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.

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<sup>1</sup> [www.freemarketfoundation.com](http://www.freemarketfoundation.com).

<sup>2</sup> Henceforth "the Constitution".

<sup>3</sup> Constitution of the Republic of South Africa Act (200 of 1993).

<sup>4</sup> 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."

<sup>5</sup> *Sachs v Minister of Justice* 1934 AD 11 at par 37.

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.<sup>6</sup>

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.

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

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<sup>6</sup> Chapter 2 of the Constitution.

compensation is not only an inappropriate, but dangerous way to go about land reform, and it should as a consequence be abandoned.

## 4. Property rights

### 4.1 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, are oftentimes seen as clinical or merely ancillary. Indeed, while the property rights of individuals is arguably the most disregarded right<sup>7</sup> and the right treated with the most scorn,<sup>8</sup> it is the most fundamental right of all, and is the right on which all other rights depend.

Property rights enable us to pursue our other rights. Having freedom of expression would be useless if we were not allowed to own our own press media companies, our own computers or cell phones, or our own podiums. The rights to housing and dignity are undermined if we are perpetual tenants on the property of the State and thus unable to make our own improvements, investments, and changes without seeking permission from the bureaucracy first. The right to privacy presupposes property rights. Indeed, the list goes on.

Property rights are often misconstrued as protecting ‘white privilege’. They should rather be appreciated as one of the rights over which the struggle against Apartheid 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 how the legal means by which black land rights were violated can be so easily forgotten and Apartheid-style legislation be reconsidered.

The property rights of the individual are not merely a superficial medium by which an individual is able to exercise control over objects. Instead, property rights are foundational to various other rights, such as human dignity,<sup>9</sup> life,<sup>10</sup> trade,<sup>11</sup> and housing.<sup>12</sup>

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,

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<sup>7</sup> 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 to acknowledge that such programmes inevitably involve limiting the property rights of citizens. On the other hand, the same is not true for measures that violate, for example, the right to dignity or freedom of expression.

<sup>8</sup> See <http://www.sabc.co.za/news/a/ca61e500402f4d068001ebf8e0b8bbd7/EFF-calls-for-amendment-to-Property-Clause-20172402> and <https://www.pressreader.com/south-africa/business-day/20170306/281788513850731> as examples.

<sup>9</sup> 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.

<sup>10</sup> Section 11 of the Constitution. Life is a logical impossibility without accepting the premise of private property. See Hoppe H-H. *The Economics and Ethics of Private Property*. (2006, 2<sup>nd</sup> edition). Auburn: Ludwig von Mises Institute. 339-346. Available online: [https://mises.org/system/tdf/Economics%20and%20Ethics%20of%20Private%20Property%20Studies%20in%20Political%20Economy%20and%20Philosophy\\_3.pdf?file=1&type=document/](https://mises.org/system/tdf/Economics%20and%20Ethics%20of%20Private%20Property%20Studies%20in%20Political%20Economy%20and%20Philosophy_3.pdf?file=1&type=document/).

<sup>11</sup> Section 22 of the Constitution. Freedom of trade necessitates the ability to trade in one’s own property.

<sup>12</sup> 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.

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 their property. This is why deprivation of ownership is treated as a serious matter; indeed, the deprivation of black South 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 of ownership are:<sup>13</sup>

- The entitlement of control
- The entitlement of use
- The entitlement of enjoyment of the fruits of the property
- The entitlement of encumbrance<sup>14</sup>
- The entitlement of alienation<sup>15</sup>
- The entitlement of vindication<sup>16</sup>
- The entitlement of defence<sup>17</sup>

These entitlements are the vehicles by which property rights can emancipate the poor and give them dignity in their ownership. The entitlement to vindicate – that is, reclaim possession and control of one's own property after being deprived of such – is a key consideration for this submission.

#### 4.2 Conflict avoidance

The most crucial function of the property right is to avoid conflict. Once property rights over a thing are 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 wanted from each other, even if hurting one another was necessary. Property rights were 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*. According to Bastiat, the law came about as a consequence of human nature. Writes Bastiat:

"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."<sup>18</sup>

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<sup>13</sup> Van Schalkwyk LN and Van der Spuy P. *General Principles of the Law of Things*. (2012, 8<sup>th</sup> edition). 96.

<sup>14</sup> I.e. to encumber the property with limited real or personality rights, such as a bond.

<sup>15</sup> I.e. to sell, destroy, donate, or otherwise dispose of the property.

<sup>16</sup> I.e. to have the property returned to the true owner if someone else unlawfully controls it.

<sup>17</sup> I.e. to defend the property against unlawful infringement.

<sup>18</sup> Bastiat F. *The Law*. (2007 edition). Auburn: Ludwig von Mises Institute. Available online: <https://mises.org/system/tdf/thelaw.pdf?file=1&type=document/>. 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:

“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.”<sup>19</sup>

The people enter into an ‘agreement’ with the State to avoid this ‘plunder’. In exchange for protection of their persons and property, the people 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.”<sup>20</sup>

This social contract, however, has not been adhered to. Bastiat 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.”<sup>21</sup>

What Bastiat is referring to here is the law being used as a tool for ‘redistribution’ of property, which evidently 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.<sup>22</sup> Government must restore the property to its rightful owner. This principle applies to the descendants of true owners as well, which is a relevant consideration in post-colonial and post-Apartheid South Africa.

## 5. The lack of property rights under Apartheid

Section 1(1)(a) of the Natives Land Act<sup>23</sup> 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.

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<sup>19</sup> Bastiat (footnote above) 5.

<sup>20</sup> Bastiat (footnote above) 19.

<sup>21</sup> Bastiat (footnote above) 4.

<sup>22</sup> 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.

<sup>23</sup> Natives Land Act (27 of 1913).



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<sup>24</sup> 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 immovable property situated within a group area, regardless of whether it is in pursuance of any agreement or 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<sup>25</sup> 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.

## 6. 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.

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<sup>24</sup> Group Areas Act (41 of 1950).

<sup>25</sup> Subdivision of Agricultural Land Act (70 of 1970).

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 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.

## 7. Constitutionalism and the Rule of Law

### 7.1 Constitutionalism

A constitution, properly understood, is a special type of law that, unlike other laws, addresses itself to the government of a society, and lays out what that government may, and crucially, what it *may not* do. The core message of constitutionalism is *everything which is not allowed is forbidden*. Constitutions are one of those things a society cannot afford to get wrong, because they are not transient, and all future governments – not always of the same political party – will interpret them differently and according to their own ideological framework.

The Constitution of South Africa is not meant to be completely inflexible or completely flexible. Section 74 provides that section 1 of the Constitution may be amended with a 75% majority vote of the National Assembly and the support of six provinces in the National Council of Provinces, and the remainder of the Constitution may be amended with a two-thirds majority of the National Assembly and the support of six provinces in the National Council. The remainder of the section sets out various other procedures and considerations.

But if the Constitution is to be amended, the process must not simply amount to Parliament going through the constitutional procedure and adopting the amendment. There must be a drawn-out, years-long public consultation process to determine whether a national consensus exists. The Constitution says how an amendment must be processed, but a government cannot act without a mandate. And a mandate to amend the country’s highest law must be firm and far broader than a single political party’s core constituency. The amount of time allocated to considering an amendment adopting expropriation without compensation is not sufficient by any stretch of the imagination. Amending the Constitution based on less than a year’s discourse and consultation would be a grave injustice.

One must also bear in mind the nature of the Bill of Rights. Chapter 2 of the Constitution does not ‘create’ rights, but merely protects pre-existing rights. Indeed, 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.<sup>26</sup> South Africans have rights outside of the

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<sup>26</sup> See <https://dictionary.cambridge.org/dictionary/english/enshrine>.

Constitution, and if a provision in the Bill of Rights is repealed, that does not mean South 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. We are rights-bearing entities because we are humans with dignity and individuality, not because government has 'given' us those rights.

If the Bill of Rights is thus amended, the basic essence of the right in question must remain. If protection for human rights is removed from the Constitution, 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 protect them. This is not a situation South Africans would want to find themselves in. By implying that government can 'extinguish' a right by simply removing it from the Constitution, 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.

Any constitution is meant for the ages. The constitution of the US — a standard-setter for constitutionalism — has endured for 230 years and been amended only 27 times. South Africa's Constitution has been amended 17 times in 23 years, with most amendments being technical or procedural. Amending the Bill of Rights to enable expropriation without compensation would be the first substantive amendment.

Constitutionalism and the Rule of Law require long-term thinking, which recognises that the government of today is not the government of tomorrow, and that the outrage currently dominating public opinion will not always be around.

If our Constitution should lose its basic character as a shield for the South African people against undue government overreach within the period of only one political party's rule, there can be no doubt that tyranny is the rule and freedom has again slipped through our grasp.

## **7.2 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.”<sup>27</sup>

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.”<sup>28</sup>

The report also identifies four threats to the Rule of Law,<sup>29</sup> 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** [...]”

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.”<sup>30</sup>

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”.<sup>31</sup>

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”.<sup>32</sup> He continues, saying the Rule of Law means “the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary

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<sup>27</sup> *Van der Walt v Metcash Trading Ltd* 2002 (4) SA 317 (CC) at paras 65-66. Citations omitted.

<sup>28</sup> Good Law Project. *Principles of Good Law*. (2015). 14.

<sup>29</sup> Good Law Project (footnote above) 29.

<sup>30</sup> Von Hayek FA. *The Constitution of Liberty*. (1960). 206.

<sup>31</sup> Dicey AV. *Introduction to the Study of the Law of the Constitution*. (1959, 10<sup>th</sup> edition). 202-203.

<sup>32</sup> Dicey (footnote above) 184.

power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government”.<sup>33</sup>

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.<sup>34</sup>

### 7.3 Socio-economic impact assessments

The opposite of arbitrariness – the principal phenomenon the Rule of Law stands against – 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.<sup>35</sup> 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.<sup>36</sup> It has also been said that a third element, effectiveness, is a part of reasonableness.

It stands to reason that the requirement of rationality, read together with section 195(1)(g) of the Constitution, which 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. Section 195(1)(g) applies to all organs of State, including Parliament.

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

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<sup>33</sup> Dicey (footnote above) 198.

<sup>34</sup> Section 51 of the Basic Conditions of Employment Act (75 of 1997).

<sup>35</sup> Hoexter C. *Administrative Law in South Africa*. (2012, 2<sup>nd</sup> edition). Cape Town: Juta. 344.

<sup>36</sup> Hoexter (footnote above) 340.

the behaviour modifications likely to be promoted by the law and distortions that might flow from them.”<sup>37</sup>

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;
- 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.”<sup>38</sup>

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.”<sup>39</sup>

The DPME regards SEIA as more than a mere cost-benefit analysis. SEIA, 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.<sup>40</sup>

That regulations or legislation can lead to unintended consequences is acknowledged by government. It may happen as a result 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.<sup>41</sup>

The SEIA System applies to legislation and regulations, as well as policy proposals, like BBBEE codes.<sup>42</sup>

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<sup>37</sup> Good Law Project (footnote above) 34.

<sup>38</sup> Good Law Project (footnote above) 35.

<sup>39</sup> Department of Planning, Monitoring and Evaluation. “Socio-Economic Impact Assessment System (SEIAS): Guidelines.” (2015). 4.

<sup>40</sup> DPME (footnote above) 7.

<sup>41</sup> DPME (footnote above) 4.

<sup>42</sup> DPME (footnote above) 8.

A proposal of such magnitude as expropriation without compensation should, before further discussion is had on whether it must be pursued, be accompanied with an independent report on the socio-economic consequences that such an amendment will have for society. The DPME's SEIA System would obviously not apply to Parliament, but the constitutional requirements outlined above that apply to all organs of State must clearly be complied with.

#### **7.4 The existing constitutional right to property**

Section 25 of the Constitution currently provides as follows:

##### **“Property**

25. (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
- (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 either been agreed to by those affected or decided or approved by a court.
- (3) The amount of the compensation and the time and manner of payment 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, including—
- (a) the current use of the property;
  - (b) the history of the acquisition and use of the property;
  - (c) the market value of the property;
  - (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
  - (e) the purpose of the expropriation.
- (4) For the purposes of this section—
- (a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and
  - (b) property is not limited to land.
- (5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
- (6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.
- (7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.
- (8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination,

provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

(9) Parliament must enact the legislation referred to in subsection (6)."

In the case of *S v Makwanyane*, Chaskalson J held for a majority of the Constitutional Court, that a provision of the Constitution "must not be construed in isolation, but in its context, which includes the history and background to the adoption of the Constitution, other provisions of the Constitution itself and, in particular" other provisions in the chapter of which it is a part.<sup>43</sup> This supports the construction that the Constitution must be read holistically, bearing in mind the values and purpose of the entire text as well as the particular provisions.

Section 25 – the property rights provision – must therefore be construed holistically. Section 25(1), which provides that no person's property will be unreasonably deprived without compensation, cannot therefore be disregarded or treated as an afterthought.

Section 25(1) provides:

"No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

This is a 'negative' right in that it protects the people from government interference in their proprietary affairs. Sections 25(2) to 25(9) are mostly 'positive' in nature, meaning that they oblige the government to do something, rather than refrain from doing something. By these latter sections' nature, however, they depend upon section 25(1). Without the first subsection, none of the others would make sense or be enforceable. Thus, 25(1) cannot be extinguished by the application of 25(2) to 25(9).

But it is clear that the majority of section 25 is dedicated to land reform. Only section 25(1) is about protection. The remainder of the section is about giving those who previously lacked it, property rights, and recognising the property rights of those who have been denied such recognition because of Apartheid.

The 'general limitations' provision found in section 36 empowers the State to limit any right in the Bill of Rights, including section 25, if the limitation adheres to the criteria set out in that section. Even though government proposes to amend section 25, section 36 is useful nonetheless as a background to trying to limit the property rights of South Africans. Section 36 provides as follows:

"36. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including —

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

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<sup>43</sup> *S v Makwanyane* 1995 (3) SA 391 (CC) at par 10.



While the courts may take into account factors other than those listed in section 36(1)(a) to 36(1)(e), it has been customary for the courts to limit themselves to these five factors which appear in the text.

Laws which limit rights must be “reasonable and justifiable in an open and democratic society”.

The FMF was instrumental in having this portion of section 36 added to the Constitution, and thus we write with confidence when we say that the ‘open society’ is a concept developed by Karl Popper in his work *The Open Society and Its Enemies*.<sup>44</sup> The ‘open society’, according to Dr Alan Haworth, “is a society characterised by institutions which make it possible to exercise the same virtues in the pragmatic pursuit of solutions to social and political problems”. These ‘virtues’ which must be possible to exercise are “creativity and imagination in the formulation of theories and hypotheses, as well as in devising experiments with which to test them; critical rationality in the assessment of theories and other claims; the toleration required to recognise that other peoples’ theories could be rivals to your own”.<sup>45</sup> The FMF’s Michael O’Dowd wrote that the essence of the open society concept “is that each individual should to the greatest extent possible be free to make his or her own decision on the basis of his or her own judgement”.<sup>46</sup>

Therefore, for a limitation to be justifiable in an open society, the limitation must *still* allow individuals to exercise these aforementioned virtues in their daily lives. In other words, they must have the freedom to express themselves and manifest their own ‘experiments’ to arrive at certain conclusions.

The Constitution’s provision could have stopped at “open and democratic society”, but it goes further, and says “an open and democratic society based on human dignity, equality and freedom”. These values of dignity, equality, and freedom also appear in section 1 of the Constitution, meaning these are founding values for South Africa, and not simply filler text. These values also complement one another, in that no individual’s dignity is truly being respected if he has no substantive freedom. 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.

Furthermore, the factors listed in section 36(1)(a) to 36(1)(e) further narrow the scope of the limitation of rights and allow the courts to take other, unlisted factors into account, to decide whether or not the limitation is justifiable in an open and democratic society which is committed to the values of human dignity, equality, and freedom.

We will briefly discuss this right in relation to each of the factors listed in section 36(1)(a) to 36(1)(e):

(a) The nature of right.

The various elements of property rights constitute its nature. These elements were briefly considered above. Ownership and conflict avoidance form the basis of property rights, but these have various implications. One of these implications is that property rights are *exclusionary*, i.e. in its effort to avoid conflict between individuals and groups, it must, of necessity, exclude non-owners from the use, enjoyment, and alienation of the property without the wilful consent of the owner.

In South Africa, the historical status of property rights is also important to its nature. Prior to 1993, black South Africans were denied property rights. This injustice was remedied by section 25. Section 25 is thus not simply protective of property rights, but is itself also a redress measure. Its mere existence means that the vast majority of South Africans who were previously without property rights, now have them.

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<sup>44</sup> Popper K. *The Open Society and Its Enemies*. (1945). Oxfordshire: Routledge.

<sup>45</sup> Haworth A. “The Open Society Revisited”. (2002). Available online:  
[https://philosophynow.org/issues/38/The\\_Open\\_Society\\_Revisited/](https://philosophynow.org/issues/38/The_Open_Society_Revisited/).

<sup>46</sup> O’Dowd MC. *South Africa as an “Open Society”?* (1998). Available online:  
<https://www.freemarketfoundation.com/publications-view/south-africa-as-an-open-society/>.

(b) The importance of the purpose of the limitation.

This question relates directly to the notion of a *legitimate government purpose*. This means “that there must be a rational relationship between the scheme [government] adopts and the achievement of a legitimate governmental purpose” and that schemes cannot be “capriciously or arbitrarily” implemented.<sup>47</sup> Legitimate government purposes are determined by the mandate of government as specified within the various provisions of the Constitution, especially those of the Bill of Rights.

The limitation of a right in the Bill of Rights must thus be justified by some other thing that government is obliged to do in the Constitution. And courts will then consider the *importance* of that particular government purpose as compared to the importance of the right to be limited. Where there is no discernible constitutional basis for the government purpose being exercised, or that the government conduct in question is too far removed from the legitimate government purpose found in the Constitution, this leg of the test would be failed, and the limitation of the right would not be justified.

Expropriation is already permitted in terms of section 25. It remains unclear why government wishes to expropriate without compensation, and in particular, that types of property government have in mind. The whole motion for expropriation without compensation is thus undermined by the fact that its importance cannot be determined due to lack of clear communication from government.

(c) The nature and extent of the limitation.

The extent of the limitation has an undeniable effect on its justifiability. Limitations that, in reality, extinguish, rather than limit, the right, are never justified. This speaks back to the point made above that the Bill of Rights simply recognises existing rights, and that a right cannot, in fact, be “repealed”. The more severe the nature and extent of the limitation, the greater the chances of it being unjustifiable.

(d) The relation between the limitation and its purpose.<sup>48</sup>

This is simply the requirement of rationality restated in constitutional terms.

Rationality is one of the two legs of reasonableness. Reasonableness, in this context, means that a reasonable person will come to the conclusion that the limitation will achieve its purpose. As we already know, a limitation must be “reasonable and justifiable” to persist, in terms of the Constitution.

For the limitation to be justifiable, thus, it must be rational, meaning the limitation must be objectively capable of achieving the purpose. In other words, evidence must support the notion that the limitation will effectively combat the problem identified. The limitation cannot be a ‘shot in the dark’ or capricious.

(e) Less restrictive means to achieve the purpose.

This is the second leg of reasonableness and is a constitutional restatement of the requirement of proportionality. In *S v Manamela*<sup>49</sup> the Constitutional Court described proportionality as the notion that one ought not to use a sledgehammer to crack a nut.

If less restrictive means are available to the government to achieve the purpose, then it must exhaust those means before resorting to harsh action. In other words, the government intervention (i.e. the limitation of the right) must only solve the problem government has identified – it must do no more. There are certainly less

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<sup>47</sup> *New National Party v Government of the Republic of South Africa and Others* 1999 (3) SA 191 (CC) at par 19.

<sup>48</sup> We rely in large part on the following book for the following two sections:  
Hoexter (footnote above) 340.

<sup>49</sup> *S v Manamela* 2000 (3) SA 1 (CC).

restrictive means for achieve substantive land reform in South Africa, than adopting expropriation without compensation.

## **8. Fast-tracking substantive land reform**

### **8.1 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<sup>50</sup> (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,<sup>51</sup> 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.

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.

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<sup>50</sup> Upgrading of Land Tenure Rights Act (112 of 1991).

<sup>51</sup> Sections 2 and 3 of the Upgrading of Land Tenure Rights Act.

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.<sup>52</sup>

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?

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.

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<sup>52</sup> Clause 7 of the Housing Amendment Act (4 of 2001).

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.

## **8.2 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.

## **8.3 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.<sup>53</sup>

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.

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<sup>53</sup> Agri SA. “Land in black hands: The definitive report”. (2017). Available online: <http://www.politicsweb.co.za/documents/land-in-black-hands-the-definitive-report--agri-sa>.

## 10. 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.