

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



August 2021

**SUBMISSION TO THE
AD HOC COMMITTEE TO AMEND
SECTION 25 OF THE CONSTITUTION
ON THE
REVISED CONSTITUTION
EIGHTEENTH AMENDMENT BILL, 2021**

Attn: section25@parliament.gov.za

BOARD OF ADVISORS Former Judge Rex van Schalkwyk (Chairman) | Adv Norman M Davis SC
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Position of the Free Market Foundation

To the members of the Ad Hoc Committee to Initiate and Introduce Legislation Amending Section 25 of the Constitution,

The Free Market Foundation **strongly opposes** the revised Constitution Eighteenth Amendment Bill, 2021.

Below you will find a submission by Professor Robert Vivian on the revised Amendment Bill, as well as the Free Market Foundation's comprehensive submission on the previous version of the Constitution Eighteenth Amendment Bill prepared in 2020. We strongly encourage you to consider both comments and that the committee will decide not to table the Amendment Bill to Parliament.

Sincerely,

Executive Committee

Free Market Foundation

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 Project² 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 www.freemarketfoundation.com.

² www.ruleoflaw.org.za.

Expropriation without compensation – new proposals – delegation of responsibility and state custodianship

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Friday, 13 August 2021

1. A revised bill to amend section 25 of the Constitution was published.
2. Comments on the bill opened on 16 July 2021 and close on 13 August 2021.
3. Two significant changes in the revision include the proposed section 4A:

“(4A) The land is the common heritage of all citizens that the state must safeguard for future generations.”

And section (5) introduces the notion of **state custodianship of certain land**:

“The state must take reasonable legislative and other measures, within its available resources, to foster conditions which **enable state custodianship of certain land** in order for citizens to gain access to land on an equitable basis.”.

4. The Free Market Foundation has made two prior submissions on the phenomenon of expropriation without compensation (EWC) in constitutional law. These are:
 - 4.1. “Submission to the Constitutional Review Committee on the Resolution for Expropriation without Compensation 2018” June 15, 2018 under the auspicious of the *Rule of Law Project*
 - 4.2. “Submission to Parliament on the Draft Constitution Eighteenth Amendment Bill, 2019” February 7, 2020; again under the auspicious of the *Rule of Law Project*

Closely allied to the amendments to section 25 of the Constitution is the appropriate item of the national legislation, *viz.*, the Expropriation Bill. The FMF made two submissions with reference to the Expropriation Bill *viz*:

- 4.3. “Submission to the Portfolio Committee on Public Works and Infrastructure on the Expropriation Bill 2020” February 2021 again under the auspicious of the *Rule of Law Project*.

And:

Leon Louw (2021) “Public Participation and the Expropriation Bill 2021 [B23-2020]” March 18, 2021.

5. These submissions deal individually and in total comprehensively with these issues and it is thus unnecessary to repeat what has already been submitted in any further detail. The submission on the previous version the amendment under consideration (4.2 above) is added to this submission.
6. This submission will thus deal with the matter in broader context, leaving the detail to the other submissions.
7. Expropriation is about infringing on existing rights to property. It is not about granting new rights. So in this case the person who has property, say land, has an estate which includes property which has a determinable value. Expropriation thus involves taking that property and not paying to value of what has been taken. That is impoverishing the owner who had the rights to property.
8. So where does this problem fit in within the constitutional setup?
9. Taking of property without compensation is a well-known phenomenon. If society did not have laws, police, courts, and so on, it would be more common.
10. The role of the state thus is to protect property.
11. The purpose of the Constitution is to set out the rare cases where the state can take property. The right to own property does not flow from the Constitution but is protected by it.
12. This can be seen from the American constitutional system. The American Constitution does not confer the right of ownership on anyone. The right of ownership is an unalienable right, a concept dealt with in the Declaration of Independence, not the Constitution itself. The circumstance in terms of which property can be taken is set out in the Fifth Amendment of what is known as the Bill of Rights:

“No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

13. The Bill of Rights indicates clearly that property can only be taken, if taken, for public use and then on the payment of just compensation. The role of the state to provide public works, public use of land was established when the Declaration of Independence was signed (Smith 1776).
14. No provision of the South African Constitution claims that the Bill of Rights confers rights. The Bill of Rights is an exercise in recognition and protection. Section 39(3) of the Constitution of South Africa further recognises that rights can exist outside of the Constitution, but may not contradict it.
15. With this background the draft amendment to section 25 can be examined.
16. Section 25 reads as follows, with the draft amendment’s additions underlined:

“(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: court: Provided that where land and any improvements thereon are expropriated for purposes of land reform as contemplated in subsection (8), the amount of compensation may be nil.”;
- (3) The amount of the compensation as contemplated in subsection (2)(b), and the time and manner of any 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.

“(3A) For the furtherance of land reform, national legislation must, subject to subsections (2) and (3), set out circumstances where the amount of compensation is nil.”;

- (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.

“(4A) The land is the common heritage of all citizens that the state must safeguard for future generations.”;

- (5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable state custodianship of certain land in order for citizens to gain access to land on an equitable basis.”.
- (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).

17. The amendment creates a number of problems.

17.1. The amendment set out in section 3A is in particularly problematic, delegating to Parliament the right to determine when no compensation is payable. As indicated, the purpose of the Constitution is to set out the grounds upon which rights may be violated. Further, as also pointed out, it is a well-established principle that if property is to be taken then compensation must be paid. The American Fifth Amendment is merely the articulation of this principle which predates even the American Constitution. As a result, the grounds upon which compensation is not payable can only be set out *in the Constitution itself*. As currently contemplated by virtue of the insertion of section 3A, the grounds are to be determined by Parliament when it enacts national legislation. The purpose

of the Constitution is to limit the power of Parliament to enact laws which violate unalienable rights. It is not possible for the Constitution to delegate back to Parliament the right to violate rights that it cannot violate. The extent to which rights can be violated can only exist in the Constitution itself. Thus, the ability to determine when no compensation is payable can only appear in the Constitution itself.

17.2. Other revisions are equally problematic, including the idea of state custodianship. As indicated, the only acceptable basis for expropriation is when the property is to be utilised for a public use and then only when compensation is paid. To this the South African Constitution added “public interest,” the rectification of past injustices, then “land reform”. And now in terms of this proposed amendment a further ground is added, that of “state custodianship.” Public use is fairly clearly defined, aided by centuries of jurisprudence. The other grounds are not. The wider the grounds become, the more arbitrary it becomes. Expropriation is tending thus to be arbitrary and now especially if without compensation. Expropriation for state custodianship is arbitrary. Of course, convincing economic arguments against state ownership can also be advanced but that is not pursued in this comment.

To understand the problems associated with the expropriation legislation, national legislation, the Free Market Foundation submissions with regard to the Expropriation Bill should be consulted.

18. Conclusion

The central problem with expropriation has been that it is intended to do so without paying compensation. To achieve this, it is proposed to amend section 25 of the Constitution. However, the amendment does not achieve this. It does not specify the grounds upon which expropriation without compensation is permitted in the Constitution. Instead, it purports to delegate that responsibility to yet-to-be-enacted legislation. This cannot be done. To understand this Sir Leslie Stephen’s great constitutional conundrum can be evoked, when he asked, if Parliament is sovereign, is a law which puts blue-eyed babies to death a valid law (Stephen 1882)? The answer to that question to those who subscribed to the view that Parliament was sovereign is “yes”, the law is valid. In a constitutional democracy, the answer would be “no it is not”, since Parliament is no longer a sovereign law-making body. In a constitutional democracy, blue-eyed babies cannot be put to death by placing the provision in the Constitution itself. If a constitution did that, it would violate a fundamental principle of constitutionalism. In the same vein, a constitution cannot delegate to Parliament the authority to make laws to murder blue-eyed babies. That too would be a violation of a fundamental principle of constitutionalism.

Thus firstly, the Constitution cannot delegate to Parliament the power to define when property can be taken without compensation. Secondly the only recognized ground to expropriate property is for public use and then only if compensation is paid. The addition of other grounds is problematic and now the addition of yet another ground “state custodianship” tends toward arbitrary expropriation and worse than that, where it is without compensation.

References

- Smith, Adam. 1776. *An Enquiry into the Nature and Causes of the Wealth of Nations*. Chicago: University of Chicago Press.
- Stephen, Leslie. 1882. *Science of Ethics*. London, England: Ballantyne Press.

7 February 2020

**SUBMISSION TO PARLIAMENT
ON THE DRAFT
CONSTITUTION EIGHTEENTH AMENDMENT BILL, 2019**

Attn: V Ramaano, Secretary: Committee to Initiate and Introduce
Legislation Amending Section 25 of the Constitution

Foreword by Temba A Nolutshungu

The classic, historical book titled *Native Life in South Africa* is most relevant to the South African parliamentary resolution to constitutionally mandate or make permissible for government to expropriate any land without compensation just as it was able to do under the pernicious Natives Land Act of 1913, which resulted in black property rights being abrogated at the stroke of a pen. Sol T Plaatje, author of this seminal work (observing the legislative process that culminated in the enactment of the Natives Land Act), had these words to say:

“Look at the weighty arguments delivered inside and outside Parliament against the Natives’ Land Act. Surely no legislature with a sense of responsibility could have passed that law after hearing arguments of such force or weight against it but the South African legislature passed that Act and seems to glory in the wretched result of its operation.”

Elsewhere, in the same book, he states that, “Mr [J.W.] Sauer carried his Bill less by reason than by sheer force of numbers”.

Plaatje’s comments are easily relevant to the legislative process pertaining to the current EWC issue in South Africa. If one studies the EWC resolution, one will understand that Plaatje, the most prominent critic of the Natives Land Act, would have rigorously opposed the proposal. At the prospect of history being repeated, the chilling words of the late philosopher George Santayana (1863-1952), “Those who cannot remember the past are condemned to repeat it”, must be leaving Plaatje bewilderedly tossing and turning in his grave at what the South African Parliament is contemplating.

It is proper and fitting to conclude with a statement made in September 1993 by none other than Nelson Rolihlahla Mandela on his ascendancy to become the President of South Africa and one of the greatest statesmen of all time, who said, “There is no danger of us dispossessing people of property, no danger at all.”

Temba A Nolutshungu
Director
Free Market Foundation

Executive summary

The *ad hoc* committee gazetted the draft Constitution Eighteenth Amendment Bill, 2019 on 13 December 2019 with a view to concluding public comments first by 31 January 2020, then by the end of February. The Amendment Bill has as its stated intention the objective of amending section 25 of the Constitution of the Republic of South Africa, 1996 to allow government to expropriate private property without being required to pay compensation.

The Free Market Foundation welcomes the opportunity to tender its submission on this matter.

Public participation

The public participation process that has brought South Africa to this point where an amendment to the Constitution seems imminent, has been flawed in both substance and procedure. This is particularly the case in light of the inadequate time period allowed by the *ad hoc* committee for the public to provide comments on the Amendment Bill, and in light of the foregone conclusion reached by the Constitutional Review Committee before it even set out to invite public comments.

Good faith public participation is a prerequisite for the validity of any new legislation, policy, or regulation. If this is not done, government lacks a mandate to continue. In the case of the present constitutional amendment, no national consensus has been reached on the apparent necessity of changing the Constitution, and if it has, this has certainly not been evident from the public participation process. As a result, government is acting without a mandate.

Defects in the Amendment Bill

While this submission does point out the flaws in the Amendment Bill and suggest how they might be rectified, it must be made clear that the Free Market Foundation opposes this enterprise of amending the Constitution *per se*. The Constitution already makes ample provision for substantive land reform, and amending the Bill of Rights to satisfy (ostensible) passing political passions sets an incredibly dangerous precedent for future generations. The notion of expropriation without compensation offends the doctrine of constitutionalism. **Our primary submission to Parliament, then, is that the Amendment Bill ought to be abandoned, along with any plans to make changes to South Africa's constitutional law.**

In summary, this submission elaborates several contextual and environmental problems surrounding the Amendment Bill, as well as problems in the suggested amendment text itself.

The environmental problems are, firstly, the notion that the Constitution should be amended because little has been done to redress the wrongs of Apartheid. This is fallacious reasoning, as section 25 deals mainly with land reform and obliges government to take positive action in expanding and entrenching property ownership for the previously disadvantaged. Blaming the inanimate Constitution for the failure of government to act is inappropriate, when the success of the constitutional project depends on compliance and adherence from government.

Secondly, the notion that the Amendment Bill simply makes explicit what is already implicit in section 25, is incorrect. Expropriation without compensation is not possible under the Constitution as it now stands, and neither is it in any open and democratic society around the world. But even if it were already possible, the Amendment Bill does not merely clarify the text, but introduces new, undesirable elements into the

Constitution, like the parliamentary discretion to whimsically determine under which circumstances property may be expropriated without payment.

Thirdly, the rhetoric surrounding the Amendment Bill and government's campaign to bring about an amendment to the Constitution has been almost exclusively focused on restitution. Restitution means property that was illegitimately taken from its owner in the past, is returned to that owner or their descendant. This is a matter of justice, hence why much of government's rhetoric is not impeachable. The problem is that the rhetoric surrounding the Amendment Bill conceals the reality of the amendment. To date, government has had a policy preference for redistribution and nationalisation (as opposed to restitution), meaning that should the Amendment Bill be adopted, it is likely to be utilised to take land from often-legitimate owners, and give it to persons unrelated to that land. Alternatively, government itself is simply going to assume ownership or 'custodianship' of the property, and lease it to ordinary South Africans. Both these situations are unacceptable. *Restitution is a moral and constitutional imperative, but redistribution and nationalisation offend against the idea of property ownership.* Government's rhetoric must match its actual intentions, otherwise the public is deceived.

Fourthly, the preamble to the Amendment Bill emphasises the fundamental importance of property ownership, but the amendment itself will drastically undermine the institution of ownership. The requirement to pay compensation when property is expropriated is an essential safeguard for the human dignity, economic interests, and personal liberty of property owners, not to mention for the economy as a whole. In the absence of this requirement, security of ownership becomes precarious, because of government's newfound power to seize property without having to pay for it. As a post-Apartheid society, we should be engaged in the strengthening of ownership, not weakening it.

Fifthly, the *ad hoc* committee accepts the recommendations of the Constitutional Review Committee as a matter of faith, despite the aforementioned defects in the process of that committee to reach its conclusions and make its recommendations. The *ad hoc* committee should be more critical, given the sensitive nature of the work and responsibilities it has been tasked with.

Finally, the *ad hoc* committee notes that the financial consequences for the State of adopting the Amendment Bill will be "none". This is a profound and shocking statement. Despite being required to do so, the *ad hoc* committee did not publish a socio-economic impact assessment on its proposed Amendment Bill, and this is at least a *prima facie* indication that an assessment was not conducted. There is therefore no reason to believe that there will be no financial consequences for the State. Indeed, the opposite has been shown to be true, given the economic downturn in the agricultural sector and the seemingly unbreakable resistance of foreign and often local investors to invest in the South African economy. This has led to a marked reduction in revenue collection, and will continue to do so unless the Amendment Bill is shelved.

The problems with the Amendment Bill itself are, firstly, the very idea of introducing a notion of 'expropriation without compensation' into South Africa's constitutional law. Expropriation without compensation is a contradiction in terms, as compensation has been conceptually married to expropriation since the time when the doctrine of expropriation was developed. By revoking the right to compensation, government denies the prior ownership (in the case of legitimate owners whose property is being nationalised or redistributed) or holdership (in the case of *bona fide* holders whose property is being restituted to the legitimate owners) of those who held the property. They are therefore liable to losing their livelihoods and having their human dignity ignored. The economy, too, will not survive such a perversion of constitutionalism, as no rational

investor or developer will in future wish to acquire or invest in real property in South Africa, when their ownership is being denied by government.

Secondly, the Amendment Bill offends international law in that it will treat owners and holders of expropriated property unequally from others whose property is not expropriated, and this unequal treatment will be of an arbitrary nature.

Thirdly, as alluded to above, expropriation without compensation is unheard of among the open and democratic societies (a standard to which our Constitution strives) around the world, and every country that has attempted to implement it, has become a poor, repressive society. The only universally recognised instance of expropriation without compensation, is where the property of persons who have been convicted of an offence, and the property was used in the commissioning of that offence, is seized by government. The Amendment Bill will place property owners and holders on the same level as white-collar criminals as far as security of ownership is concerned.

Finally, and most importantly, the Amendment Bill, in its current form, delegates to Parliament an unrestrained discretionary power to determine the circumstances under which no compensation need be paid in expropriation cases. In those circumstances, the courts may decide whether it is just and equitable for no compensation to be paid. It has however come to pass that the Amendment Bill may be changed to empower the executive, not the courts, to make such determination. Both possibilities, however, are unacceptable. This clause in the Amendment Bill makes it evident that it does not merely confirm what the constitutional text already implies, but introduces a detrimental, anti-constitutional, regime into the text. To allow Parliament, invariably the dominant parties in Parliament, to decide whimsically which circumstances might justify expropriation without compensation, is remarkably dangerous. Should the Amendment Bill proceed, it must include a closed list of such circumstances.

Alternatives to the Amendment Bill

The Amendment Bill is not only dangerous to South Africa's constitutional order and potential for prosperity, but it is unnecessary. Government already has the means to bring about far-reaching, substantive land reform that will benefit the economy in general, and those most disadvantaged by Apartheid in particular.

The greatest number of victims of Apartheid land law are inhabitants of the peripheral townships located outside urban areas. They are characterised by underdevelopment and low levels of service delivery. Their suburban counterparts – of which they should rightly be considered part – are developed and receive adequate service delivery. The reason for this underdevelopment is the lack of property rights, moreover ownership. During Apartheid, so-called migrant workers from the homelands settled here, but because of racially discriminatory law, could not own the property. They had to rent it from the local municipality. Twenty-six years after the end of Apartheid, it is unjust that this state of affairs continues unabated. Government has it within its immediate power to effect the transfer of title deeds to those who are entitled to them in townships, without weakening property rights.

Government has also made repeated reference to so-called “megafarming”, whereby an increasingly small number of wealthy farmers are gaining control of an increasingly large area of agricultural land. This, it is argued, drives up the price of land and makes it difficult for emerging, mostly black, farmers to own agricultural land. However, government's own policies are partly to blame for the megafarming phenomenon. The Subdivision of Agricultural Land Act, and its potential successor the Preservation and Development of Agricultural Land Bill, both disallow agriculturalists from subdividing their land into smaller, more affordable

plots, and selling them, without going through a complex bureaucratic process of obtaining permission. Instead of weakening the constitutional property rights provision, government can instead repeal the Subdivision Act and make it easier for potential and emerging farmers to purchase land.

It has been well-documented that all three spheres of South Africa's government, including State-owned enterprises themselves, are in possession of vast quantities of land throughout the country. Much of this land is either unused (often in the case of reserved municipal land) or underutilised (invariably the case in farms owned by the State). Rather than interfering with private property rights, discouraging investment and undermining human dignity, government could freely distribute this land to deserving families and entrepreneurs.

Another initiative by government that is commendable is an online platform that would allow agriculturalists to make their property available to others. Such voluntary schemes ensure that coercion is avoided, ensuring peaceful coexistence, and interdependent development.

It is evident that government has many tools at its disposal. Expropriation without compensation is offensive to constitutionalism, and should not be considered a valid route to a prosperous future.

1. Introduction

The Committee to Initiate and Introduce Legislation Amending Section 25 of the Constitution (“the *ad hoc* committee”) gazetted the draft Constitution Eighteenth Amendment Bill, 2019 (“the Amendment Bill”, “the amendment”) on 13 December 2019 with a view to concluding public comments first by 31 January 2020, and later by the end of February. The Amendment Bill has as its stated intention the objective of amending section 25 of the Constitution of the Republic of South Africa, 1996 (“the Constitution”), to allow government to expropriate private property without being required to pay compensation.

The FMF welcomes the opportunity to submit its comments on the proposed draft Constitution Eighteenth Amendment Bill, gazetted for public comment on 13 December 2019. The FMF has a long history of constitutional engagement in South Africa, and was one of the prime movers of the inclusion of section 25, the right to property, in the current, 1996 Constitution. It is in the spirit of defending the integrity of the Constitution and the Rule of Law against political whims that this comment is submitted.

The FMF has identified various problems in the Amendment Bill and in the discourse surrounding it, and these are contained in this submission. The first part of this submission concerns the Amendment Bill itself, and the second part concerns the background and theory, mostly of property rights and constitutionalism.

Amending the Constitution is unnecessary and dangerous. Unnecessary because there already exists ample room for government to engage in substantive and empowering land reform, and dangerous because it undermines the very institution the Amendment Bill ostensibly seeks to expand: Ownership. Without the requirement to pay compensation when property is expropriated, a significant safeguard against arbitrary exercises of government power is removed, and the incentives that ownership generates – investment, development – not to mention the human dignity of the owner, are undermined. It furthermore sets a dangerous precedent which would allow future governments to amend away entrenched rights in the Bill of Rights on the back of passing political expediencies.

The Bill of Rights must be the closest thing to a legal holy cow in South Africa that should only be changed where there is a national consensus. For expropriation without compensation, there is nothing resembling a national consensus. We amend the Constitution at our own peril.

2. Constitution Eighteenth Amendment Bill, 2019 – Flaws and concerns

It must be emphasised again that the FMF, in no uncertain terms, regards amendment of the Constitution as unnecessary and dangerous. As such, we strongly recommend that the Amendment Bill be abandoned forthwith, and no constitutional amendment take place.

With that in mind, we will nevertheless deal here with the specific flaws and concerns that we have identified in the Amendment Bill.

It is important to note at the outset, however, that the public participation process has thus far been riddled with problems that potentially undermine the entire amendment enterprise.³

³ For more information on the process, see October A. “Land expropriation shambles highlights how public participation at Parliament is not working”. (2018). *Daily Maverick*. <https://www.dailymaverick.co.za/article/2018-11-29-land-expropriation-shambles-highlights-how-public-participation-at-parliament-is-not-working/>, Van Staden

The most pertinent of these problems is that the two predecessors of the *ad hoc* committee, namely the Constitutional Review Committee and the President's Advisory Panel on Land Reform, engaged the public while already having decided upon a foregone conclusion. In other words, both these bodies assumed as a matter of fact, from the very beginning, firstly, that the Constitution must and will be amended, and secondly, that the amendment must and will make provision for expropriation without compensation. Contributions from the public and civil society were not allowed to change this direction.

Whilst Parliament set the frame of reference for the Constitutional Review Committee, and the President for the Advisory Panel on Land Reform, it makes no sense for these institutions to have invited public engagement (and engagement by dissident experts in the case of the latter) only for that engagement to be disregarded because they are inconsistent with the foregone conclusions. If this is correct, the public participation was undertaken in bad faith, and this taints the entire process up to now.

We trust that the present *ad hoc* committee is not guilty of having the same foregone conclusions as its predecessors, and is open to either abandoning the amendment of the Constitution entirely, or amending it in such a way that it does not legitimise the ill-considered notion of expropriation without compensation.

The latest significant problem in the public participation process was the hopelessly short period for public comment on the Amendment Bill itself, which spanned from 13 December 2019 to 31 January 2020. The extension to the end of February is welcome.

It is nonetheless imperative that when the next draft of the present Amendment Bill is formulated in light of the comments received, Parliament must give at least three full months' opportunity for interested parties to engage with the text, think through their submissions, and send them to the relevant committee.

Good faith public participation is a prerequisite for the validity of any new legislation, policy, or regulation. If this is not done, government lacks a mandate to continue. In the case of the present constitutional amendment, no national consensus has been reached on the apparent necessity of changing the Constitution, and if it has, this has certainly not been evident from the public participation process. As a result, government is acting without a mandate.

Much of what is said hereunder relies on the background and theory enunciated under the headings that follow from heading 3 onward. We recommend that the reader familiarise themselves with that background and theory first, although that would not be necessary for readers who already have a basic conceptual understanding of property rights and constitutionalism, as well as an understanding of South African history.

2.1 Remarks about the preamble

The preamble of the Amendment Bill will not form part of the amended text of the Constitution, nor would it have any legal force or effect. But it does provide some indication of government's flawed thinking on expropriation without compensation, and forms part of the public relations campaign conducted in support of the amendment. It is therefore worth commenting on.

M. "Amending the Constitution on shaky grounds will cause illegitimacy". (2018). *Business Brief*. <https://www.bbrief.co.za/2018/11/19/amending-the-constitution-on-shaky-grounds-will-cause-illegitimacy/>, and Corrigan T. "Constitutional committee fails public participation test on EWC". (2018). *BizNews*. <https://www.biznews.com/thought-leaders/2018/12/13/ewc-ong-difficult-path-lies-ahead>.

2.1.1 *Little being done to redress land injustices*

The preamble notes that dispossessed South Africans have become despondent about the lack of progress in achieving land reform since the Constitution was adopted, and that this is partly why the Constitution is being amended.

We take issue with this line of reasoning. Section 25 of the Constitution makes ample provision for wide-ranging, substantive land reform. All that is required is for government to fulfil its constitutional obligations under that section. There is no necessity for government to amend the Constitution nor is there any necessity for expropriation without compensation to be recognised in our law.

Much more can be done with the resources government already has at its disposal, as discussed comprehensively in the background and theory below. For instance, government can at the stroke of a pen expedite the transfer of municipally-owned land to the inhabitants who have lived on it for generations. Government can transfer superfluous State land to deserving families and entrepreneurs. Finally, any number of laws and regulations can be repealed to make the purchasing or transfer of land easier, more affordable, and more accessible.

In other words, the Constitution has been identified, incorrectly, as an impediment to effective land reform, when the real problem has been a lack of implementation of what the Constitution already provides for. Amending the Constitution is grossly inappropriate where no constitutional problem that needs fixing exists.

2.1.2 *Make explicit that which is implicit*

The preamble regards it as resolved that the Constitution, in its current, pre-amended form, already allows for expropriation without compensation, and that the Amendment Bill is simply clarifying what the highest law already provides for. There are two problems with this line of reasoning.

Firstly, we are unconvinced that the Constitution already allows for expropriation without compensation. Sections 25(2)(b) and (3) of the Constitution provide that the just and equitable “amount” of compensation is to be determined by a court. “Amount”, in this context, cannot be regarded as nil. Whilst zero is certainly a number in the mathematical sense, “none”, akin to “nothing”, cannot be regarded as an amount, as it is specifically the *absence* of an amount. In other words, the Constitution contemplates the giving of *something*, as opposed to *nothing*, as compensation when property is expropriated.

Secondly, even *if* the Constitution already allows for expropriation without compensation, the Amendment Bill is not simply clarifying it, but rather introducing new, unacceptable elements into the Bill of Rights. The most important of these elements, as will be discussed below, is parliamentary discretion to determine the circumstances under which compensation may be waived.

2.1.3 *Restitutionary rhetoric with nationalisational outcomes*

The rhetoric and rhetorical tone of the preamble are both explicitly and implicitly concerned with restitution. Restitution, simply, means that the property one was dispossessed of must be returned. In other words, an objective link of some sort exists between the person receiving the property, and the property itself. Perhaps they themselves were the owners when the Apartheid government seized the property, or their direct ancestors were the owners. Restitution is akin to justice and is recognised as an imperative of property law in all three components of South Africa’s trijuridical legal system: Roman-Dutch civil law, English common law, and African customary law.

Regrettably, the Amendment Bill can, and in all likelihood will, be used not for restitution, but for redistribution at best and nationalisation at worst. Redistribution, unlike restitution, is the process whereby property is taken from one person (likely the legitimate owner who did not come about the property as a result of Apartheid discrimination) and given to another who has no prior relationship with the property. Nationalisation is the process whereby private property is forcefully converted into *de facto* property of the State. This is not to say that the current government has any such aims or aspirations, but the nature of a constitutional amendment means that the new legal regime will outlive the current government by many years.

The Constitution already provides for the imperative of restitution in section 25(7). Furthermore, the restitution programme under the Restitution of Land Rights Act of 1995 has been successful. Since 1995, over 95% of land claims have been resolved, with almost 2 million individuals having received their land back or chosen financial compensation instead.⁴ If even this pace appears too slow, the solution lies in providing further resources and support to the Land Claims Court, rather than unnecessarily amending the Constitution.

2.1.4 Importance of ownership

Somewhat ironically, the preamble emphasises the importance of property ownership. It states that there is a “skewed land **ownership** pattern”, evidently implying that ownership is an important institution that must be equitably enjoyed. It’s further stated that the amendment will empower South Africans to become “productive participants in **ownership**”. The unfortunate irony is that the Amendment Bill significantly undermines ownership, by removing one of the most important institutional protections (the requirement of compensation) from the doctrine of ownership.

The regimes that presided over South Africa between 1910 and 1994 had as their explicit aim the denial of ownership to South Africa’s black majority in mostly urban areas. Blacks were expected to own property and live in the so-called “reserves” or “homelands”, far away from the opportunities in the so-called “white” cities. Those blacks who were allowed to live in the cities had to live on municipally-owned rental property. Their descendants still live on those properties today, continuing to rent from the local government, when they should properly be given ownership.

It is therefore undeniable that respecting and expanding ownership in our post-Apartheid society is an imperative. However, amending the Constitution to weaken ownership is assuredly not the way to do this, as it places the property of those who only recently became owners in jeopardy in the same way long-term owners’ property is in jeopardy.

2.2 Clauses 1(a) and (b): Nil compensation

Hugo Grotius, one of the pioneers of South Africa’s common law tradition and international law, wrote in *De Jure Belli et Pacis* in 1525 – one of the first jurisprudential mentions of expropriation – that when property is taken by government, “the State is bound to make good the loss to those who lose their property”.

Evidently, the concepts of “expropriation” and “compensation” have been linked since the notion of expropriation was first mooted. But this is not simply a juridical matter, but a matter of common sense. It stands to reason that if a *bona fide* holder, usually the owner, of property has that property seized, they must be compensated, otherwise their prior ownership is rendered meaningless. Ownership is a crucial phenomenon in society that enables human development and prosperity, and secures human dignity, as

⁴ Oppenheimer M. “Six myths about land reform”. (2018). *Politicsweb*. <https://www.politicsweb.co.za/opinion/six-myths-about-land-reform>.

discussed in the background and theory below, and legitimising zero-compensation expropriation would undermine ownership, perhaps irrevocably.

The Amendment Bill's provisions will likely also contravene the International Covenant on Civil and Political Rights. In article 26, the Covenant declares that laws must guarantee equal protection against discrimination. Attorney Gary Moore opines as follows:

“To deny compensation for land-reform expropriations yet pay compensation for other expropriations would violate this equality requirement. And expropriations without compensation would operate unequally: Owners who had paid their mortgage or paid the full purchase price would suffer more prejudice from expropriation without compensation than owners who had paid only part.”⁵

In other words, the Amendment Bill would be a piece of constitutional law that inherently operates unequally, when a central postulate of constitutionalism is that the law must apply equally. Bluntly, then, the amendment would amount to a perversion of constitutional law.

It is furthermore worth considering that the only area of law in which expropriation without compensation is universally recognised and applied, is when the property of convicted criminals is seized. A judicial process, proving complicity in an existing crime beyond a reasonable doubt, is therefore followed before the private property of the accused is taken. Juridically, it would make a mockery of the South African constitutional property law regime if all private property owners were now to be treated as criminals, in the absence of a conviction. There can be no doubt about the fact that expropriation without compensation amounts to a type of punishing measure, given that no value is returned for property lost. It is on its face unfair and inequitable.

To conclude, compensation is nothing more than simple justice for those cases where the State interferes in private rights. To attempt to constitutionalise the notion of “nil compensation” is problematic in practically every discipline, from philosophy, to jurisprudence, and certainly in economics.

2.3 Clause 1(c): National legislation and circumstances of nil compensation

The Constitution, and particularly the Bill of Rights, are expected to guarantee legal certainty. Rights protect legally-recognised interests and codifying these rights in the Bill of Rights ensures that legal subjects know their rights won't be interfered with unless the interference complies with the strict limitations provision in section 36(1).

Up to now, South Africans were certain that if their property is expropriated, compensation would need to be paid. This allowed them the freedom to invest in and develop their property. It allowed foreigners, too, to invest in the South African economy without fear of being treated unfairly. Should the Amendment Bill be adopted, however, this will change, because no longer will compensation be strictly necessary, but will be entirely up to the whims of Parliament.

By empowering Parliament to determine the circumstances under which property may be expropriated without compensation, the certainty that comes with the entrenched section 25 right to property is eliminated and replaced with uncertainty. With an amended constitution, any future government may whimsically decide to change the circumstances for nil compensation. It might have an ulterior purpose when it does this, such

⁵ Moore G. “Whether expropriation without compensation would violate SA’s treaty or international law obligations”. (2018). Rule of Law Project. <https://ruleoflaw.org.za/2018/05/21/whether-expropriation-without-compensation-would-violate-sas-treaty-or-international-law-obligations/>.

as targeting political opponents and their supporters, targeting the property of particular foreign nations, and/or targeting religious and/or ethnic minorities.

It is furthermore deeply concerning that President Cyril Ramaphosa, and many others in high political office, believes the ultimate determiner of the amount of compensation should be the executive.⁶ This is an endorsement of what will no doubt be a discretionary power in the national legislation referred to in the Amendment Bill. It is, furthermore, extremely short-sighted, as the executive branch of government is highly fluid: The well-intentioned officials who work there today might not be the same people who work there in five years time. It is also not appreciated that the power to expropriate is not limited to the President and Cabinet, but is borne by officials throughout the executive government, in all three spheres of government: National, provincial, and local. The room for arbitrary or capricious exercise of this power is immense.

Discretionary powers should be avoided where possible, particularly when it concerns the executive, where unelected, nameless and faceless officials go about day-to-day governance. The expropriation of private property is too serious a matter to leave up to these officials, and should the Amendment Bill be adopted, it must be the courts that make this determination.

The FMF objects to expropriation without compensation being taken up into the Constitution *per se*, but should Parliament feel obliged to adopt an amendment, we strongly recommend that the circumstances under which compensation can be nil, be spelled out in a closed list (that means it does not include the words “including, but not limited to” or “such as”, or similar phraseology) in the Constitution itself. These, we recommend, be limited to the following categories:

- Property owned by any sphere of government;
- Property that has been abandoned by the owner, and every reasonable opportunity has been made to find such owner;
- Property that was used in the commissioning of an offence and has no co-owners other than those convicted of the offence;
- Property of which the market value is less than the debt owed by the owner to government, and there are no reasonable prospects of the owner being able to repay the debt in the near future; and
- Property that was dispossessed from its legitimate owner by operation of racially-discriminatory legislation and the present holder of the property knows this to have been the case.

In each case, the determination that compensation not be paid must be just and equitable, in the circumstances, having regard to all the relevant facts. The expropriation must be exclusively for land reform purposes, where the intention is for ownership to pass to a private natural or juristic person, excluding the State or any person associated with the State.

2.4 Remarks about the memorandum

The memorandum does not form part of the amendment to the Constitution, but, like the preamble, it does provide a context to government’s misdirected thinking on the topic.

⁶ Ramaphosa C. “Cyril Ramaphosa’s remarks on the ANC NEC Lekgotla”. (2020). *Politicsweb*. <https://www.politicsweb.co.za/documents/cyril-ramaphosas-remarks-on-anc-nec-lekgotla>.

2.4.1 *Constitutional Review Committee recommendations*

It is now a trite matter of public record that the Constitutional Review Committee (CRC)'s public participation process was marred by procedural improprieties, as discussed above. It was evident from the beginning that the CRC began the process with a foregone conclusion, and all the actions it took during the process was to further motivate and support the conclusion it had prematurely reached. The CRC's recommendations, which are not supported by public opinion, must be considered in that light. They cannot be accepted uncritically as the *ad hoc* committee appears to do in the memorandum.

2.4.2 *Financial implications*

One major area of concern is found under heading 4, "Financial implications for the State", where it is averred that there will be no such implications for the State. This is a grave misunderstanding of the consequences that expropriation without compensation hold.

The State has already started to experience the financial consequences of this policy, where tax collection is not keeping up with increases in necessary government spending. Many South Africans have left South Africa in anticipation of a policy being adopted that will leave their property rights unprotected, taking their wealth with them. Certainly, many companies have disinvested to some extent, and absolutely, many foreign companies have elected to not invest in South Africa due to this policy. For example, the number of taxpayers between 2017-2018 dropped from 5.4 million to 4.9 million, while the number of social grant recipients increased. Economists have noted that South Africa is either approaching, or already, over the Laffer curve.⁷

This ungrounded statement in the memorandum is the gravest indication in the Amendment Bill that government undertook no socio-economic impact assessment on expropriation without compensation, despite it being a requirement that such assessments be conducted on all legislative proposals. The imperative of these assessments is discussed below in the background and theory. It is therefore illustrative of what can happen in the absence of properly-considered studies and research: Government believes that there will be few or no detrimental consequences to its intervention, when the reality is very much the opposite.

A proper socio-economic impact assessment on the Amendment Bill will show that immense harm will be done to the economy, particularly to the poor, should law of this nature be adopted.

⁷ See <https://businesstech.co.za/news/finance/370470/south-africans-are-leaving-the-country-in-big-numbers-heres-why-thats-not-good/> and <https://www.africanliberty.org/2019/12/13/new-or-higher-taxes-wouldnt-work-for-south-africa/>.

3. Property rights and the lack thereof under Apartheid

3.1 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 are arguably the most disregarded right⁸ and the right treated with the most scorn,⁹ 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.

The 2019 *International Property Rights Index* avers that:

“Property rights are a decisive institution of the rule of law that maintains an unavoidable link with freedom. They are a complex legal institution that allows owners to use parts of nature and limit their use by others. They are a condition for the exercise of other rights and freedoms. Property rights are a fundamental counterbalance to the exercise of power because they limit the power of the State and are fundamental for productive transformation in the knowledge society. In short, property rights are an essential element for a free society based on the foundation of citizenship to control their own lives and build their own destiny.”¹⁰

In 2019, South Africa had the third highest relative decrease (-4.37%) in the protection of property rights, no doubt inter alia due to the threat of expropriation without compensation.¹¹

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.

⁸ 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.

⁹ 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.

¹⁰ Levy-Carciente S and Montanari L. *International Property Rights Index 2019: Full Report*. (2019). Property Rights Alliance. https://atr-ipri2017.s3.amazonaws.com/uploads/IPRI_2019_FullReport.pdf. 3.

¹¹ Levy-Carciente and Montanari (footnote 10 above) 24.

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,¹² life,¹³ trade,¹⁴ and housing.¹⁵

The essence of 'property' lies in *ownership* – the foundational right in property. 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.

While different societies throughout history have had different conceptions and locations of ownership, most, if not all, of them did have a conception of ownership *per se*: What's mine/ours is mine/ours, and what is yours/theirs is yours/theirs. This division of property, and particularly land, had the important consequence of avoiding conflict. By demarcating the extent of the owner's jurisdiction, all the parties involved knew where the line was before crossing into tension at best and violent confrontation at worst. Ownership cut away much of the uncertainty that characterises situations where nobody or everybody is thought to own everything.

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:¹⁶

- The entitlement of control;
- The entitlement of use;
- The entitlement of enjoyment of the fruits of the property;
- The entitlement of encumbrance;¹⁷
- The entitlement of alienation;¹⁸
- The entitlement of vindication;¹⁹ and

¹² 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.

¹³ 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, 2nd edition). Auburn: Ludwig von Mises Institute. 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/.

¹⁴ Section 22 of the Constitution. Freedom of trade necessitates the ability to trade in one's own property.

¹⁵ 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.

¹⁶ Van Schalkwyk LN and Van der Spuy P. *General Principles of the Law of Things*. (2012, 8th edition). 96.

¹⁷ I.e., to encumber the property with limited real or personality rights, such as a bond.

¹⁸ I.e., to sell, destroy, donate, or otherwise dispose of the property.

¹⁹ I.e. to have the property returned to the true owner if someone else unlawfully controls it.

- The entitlement of defence.²⁰

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.

3.2 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.”²¹

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.”²²

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,

²⁰ I.e. to defend the property against unlawful infringement.

²¹ Bastiat F. *The Law*. (2007 edition). Auburn: Ludwig von Mises Institute. <https://mises.org/system/tdf/thelaw.pdf?file=1&type=document/>. 2.

²² Bastiat (footnote 21 above) 5.

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.”²³

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.”²⁴

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 their property deprived from them by someone else, be it a criminal or government, they do not lose ownership.²⁵ 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.

3.3 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.

²³ Bastiat (footnote 21 above) 19.

²⁴ Bastiat (footnote 21 above) 4.

²⁵ 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.

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.

4. Constitutionalism and the Rule of Law

4.1 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 idea of constitutionalism is that *everything which government is not explicitly allowed to do, is forbidden*. Constitutions are one of those things a society cannot afford to get wrong, because they are not transient. All future governments – not always of the same political party – will interpret them differently and according to their own ideological frameworks.

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 slightly more 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. Sir Thomas More once aptly noted:

“Some men think the Earth is round, others think it flat. But if it is flat, will the King’s command, or an Act of Parliament, make it round? And if it is round, will the King’s command, or an Act of Parliament, flatten it?”

Enshrining something, in the constitutional sense, means to place that thing somewhere where it is protected, in this case, in a constitution.²⁶ But legislation cannot change reality, in this case being the reality of rights: South Africans have rights outside of the 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 (such as that to compensation) 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. As respected constitutional scholars Herman Schwartz and Richard A Epstein have noted, “Constitutions are written to supply a long term institutional framework, which by design imposes some limitations on the power of any given [parliamentary] majority to implement its will”.²⁷ The constitution of the United States — 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, and if it includes a provision giving discretion to Parliament to determine circumstances in which expropriation may take place, it would not satisfy the requirement that constitutions set limits on parliamentary-majoritarian action.

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.

4.2 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.

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

²⁷ Epstein RA. “Drafting a constitution: A friendly warning to South Africa”. (1993). 8 *American University Journal of International Law and Policy*. 567.

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."²⁸

The Rule of Law thus:

- Permeates the entire Constitution;
- Prohibits unlimited arbitrary or discretionary powers;
- Requires equality before the law;
- Excludes arbitrariness and unreasonableness; and
- 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."²⁹

The report also identifies four threats to the Rule of Law,³⁰ the most relevant of which, for purposes of this submission, is the following:

²⁸ *Van der Walt v Metcash Trading Ltd* 2002 (4) SA 317 (CC) at paras 65-66. Citations omitted.

²⁹ Good Law Project. *Principles of Good Law*. (2015). Johannesburg: Law Review Project. 14.

³⁰ Good Law Project (footnote 29 above) 29.

“[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.”³¹

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”.³²

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”.³³ 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”.³⁴

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.³⁵

³¹ Von Hayek FA. *The Constitution of Liberty*. (1960). 206.

³² Dicey AV. *Introduction to the Study of the Law of the Constitution*. (1959, 10th edition). 202-203.

³³ Dicey (footnote 32 above) 184.

³⁴ Dicey (footnote 32 above) 198.

³⁵ Section 51 of the Basic Conditions of Employment Act (75 of 1997) is therefore evidently unconstitutional.

4.3 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.³⁶ 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.³⁷ 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 the behaviour modifications likely to be promoted by the law and distortions that might flow from them.”³⁸

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;

³⁶ Hoexter C. *Administrative Law in South Africa*. (2012, 2nd edition). Cape Town: Juta. 344.

³⁷ Hoexter (footnote 36 above) 340.

³⁸ Good Law Project (footnote 29 above) 34.

2.7 Administration and budget – advance provision for all budgetary, staffing, training and related needs; diversion or dilution of resources and capacity.”³⁹

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.”⁴⁰

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.⁴¹

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.⁴²

The SEIA System applies to legislation and regulations, as well as policy proposals, like BBBEE codes.⁴³

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.

4.4 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.

³⁹ Good Law Project (footnote 29 above) 35.

⁴⁰ Department of Planning, Monitoring and Evaluation (DPME). “Socio-Economic Impact Assessment System (SEIAS): Guidelines.” (2015). 4.

⁴¹ DPME (footnote 40 above) 7.

⁴² DPME (footnote 40 above) 4.

⁴³ DPME (footnote 40 above) 8.

(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.⁴⁴ 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

⁴⁴ *S v Makwanyane* 1995 (3) SA 391 (CC) at par 10.

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.”

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*.⁴⁵ 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

⁴⁵ Popper K. *The Open Society and Its Enemies*. (1945). Oxfordshire: Routledge.

recognise that other peoples' theories could be rivals to your own".⁴⁶ 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".⁴⁷

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 recognition and protection of their 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.

(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.⁴⁸ 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.

⁴⁶ Haworth A. "The Open Society Revisited". (2002).

https://philosophynow.org/issues/38/The_Open_Society_Revisited/.

⁴⁷ O'Dowd MC. *South Africa as an "Open Society"?* (1998). <https://www.freemarketfoundation.com/publications-view/south-africa-as-an-open-society/>.

⁴⁸ *New National Party v Government of the Republic of South Africa and Others* 1999 (3) SA 191 (CC) at par 19.

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, what types of property government have in mind. The notion of 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, purport to 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. The Amendment Bill extinguishes the right to compensation by giving the power to determine whether it should be paid entirely over to discretionary forces.

(d) The relation between the limitation and its purpose⁴⁹

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*⁵⁰ 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 restrictive means to achieve substantive land reform in South Africa than adopting expropriation without compensation, which are discussed below.

⁴⁹ We rely in large part on the following book for the following two sections: Hoexter (footnote 36 above) 340.

⁵⁰ *S v Manamela* 2000 (3) SA 1 (CC).

5. Fast-tracking substantive land reform

5.1 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 (ULTRA).⁵¹ 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 five 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,⁵² 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).

⁵¹ Upgrading of Land Tenure Rights Act (112 of 1991).

⁵² Sections 2 and 3 of the Upgrading of Land Tenure Rights Act.

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.⁵³

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.

⁵³ Clause 7 of the Housing Amendment Act (4 of 2001).

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, mostly white, 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.

5.2 Megafarming

The Subdivision of Agricultural Land Act⁵⁴ 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 employees.

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.

5.3 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.

⁵⁴ Subdivision of Agricultural Land Act (70 of 1970).

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.⁵⁵

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, disadvantaged individuals and families.

5.4 Voluntary schemes

Government has revealed plans to enable farmers to voluntarily donate or sell property for land reform purposes online.⁵⁶ This is a commendable course of action, but should be considered an alternative rather than an addition to expropriation without compensation. The donating or selling of land from a single farm could lead to joint ventures where the established farmer, still secure in their property rights, would assist and develop the emerging farmer, leading to shared prosperity.

Other voluntary measures government could take is to provide tax incentives for agriculturalists who indeed cede land for land reform purposes. This could be done by, for instance, significantly reducing or eliminating property taxes or relaxing certain regulations that apply to agricultural businesses. Full exemptions from the national minimum wage are another such example.

These alternatives respect the integrity and sanctity of private property while also making land reform a desirable and achievable programme that ordinary South Africans can participate in.

6. Conclusion

The historic negotiated settlement reached at the Convention for a Democratic South Africa (CODESA) and later in the Constitutional Assembly in the 1990s was not, contrary to the beliefs of some, a settlement between far-right white racists and far-left black communists. The reality is far more nuanced.

The National Party, by the middle of the 1980s, had almost entirely abandoned Apartheid ideologically. When the Conservative Party split with the Nationalists in 1982, it took virtually all the ideological adherents of Apartheid with them. The Nationalists retained their authoritarian spirit, however, and continued to insist on South Africans obeying many of the unjust laws that were on the books. Toward the end of that decade, however, in both principle and policy, the Nationalists had adopted practically every major tenet of liberal democracy that had been advocated by anti-racists in the African National Congress, the Liberal Party, the United Democratic Front, and the Progressive Party, since the beginning of the century. This came as an upset to the liberals, as the Progressive Party lost some representation in Parliament in 1987 and was almost entirely

⁵⁵ 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>.

⁵⁶ <https://www.businessinsider.co.za/department-of-rural-development-and-land-reform-draft-national-policy-for-beneficiary-selection-and-land-allocation-south-african-farmers-donate-land-through-online-portal-2020-1>

wiped out politically, as the Democratic Party, in 1994. But the pragmatic reorientation of the National Party was very beneficial to South Africa, given that in the economic sphere, at least, it had ceased the enforcement of certain Apartheid regulations whilst repealing others. The African National Congress (ANC), in turn, had been in favour of the entrenchment of individual and property rights in a supreme constitution since its establishment. The ANC's proposed bills of rights in 1943⁵⁷ and 1945⁵⁸ were inspired by the Atlantic Charter, thereby seeking, according to Janet Robertson, "freedoms which democrats outside South Africa regarded as inalienable rights".⁵⁹ Importantly, the ANC wanted protection for the right to land ownership. Both the ANC's 1923 and 1943/1945 bills of rights sought the entrenchment of property rights as an individual right founded in the British common law tradition.⁶⁰ The Nationalists and ANC thus met one another where they were inevitably going to meet: Constitutionalism and liberal democracy.

The Constitution we have today is not a confusing text with unbridgeable ideological contradictions, but one that balances a multitude of complementary considerations. Section 25 of the Constitution, the right to property, is unique in the world, and consists of several elements: The protection of existing property rights, the expansion of property rights to those who do not yet have them, and the restitution of property rights that have been dispossessed.

This is precisely what the FMF advocated for at the time. The injustices of the past as they regard property rights had to be redressed, and this could only be done through restitution and securing insecure rights. The Constitution recognises this and obliges government to do exactly that. Amending the supreme law is unnecessary, and that is reason enough to abandon the Amendment Bill. Constitutions are meant for the ages and engaging in unnecessary amendment processes undermines constitutional legitimacy and constitutionalism. The content of the Amendment Bill is itself incredibly dangerous, and makes ownership more insecure than it already is.

It is an imperative for the *ad hoc* committee to abandon the Amendment Bill.

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⁵⁷ Nthai SA. "A Bill of Rights for South Africa: An Historical Overview." (1998). 11(2) *Consultus*. 142.

⁵⁸ Robertson J. *Liberalism in South Africa, 1948–1963*. (1971). Oxford: Clarendon Press. 31.

⁵⁹ Robertson (footnote 58 above) 31.

⁶⁰ Nthai (footnote 57 above) 142-143.