PRIVATE PROPERTY PUBLIC INTEREST

ALTERNATIVES TO CONFISCATION AND NATIONALISATION

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This paper is dedicated to

Perry Feldman

who, in the last years of his life, committed himself to seeing South Africa's most disadvantaged share in the joys and security of private property rights.

Condolences to his wife Veronica, who stood by Perry in his hard work for Khaya Lam, and children Batya and Ari.

EXECUTIVE SUMMARY

In February 2018, South Africa's Parliament adopted a resolution providing that the Constitution should be amended to allow government to expropriate property without being required to pay compensation. At the time of writing, it was also proposed that the amendment provide for outright nationalisation of all fixed property ("land") in the country.

The Constitution Eighteenth Amendment Bill, whether in its current or in a different form, is likely to be adopted, and will change section 25 of the Constitution, to, at least, allow for no-compensation confiscation of property. The Expropriation Bill, an ordinary piece of legislation, is also likely to be adopted, and will spell out the precise procedure and requirements for when property may be so expropriated without compensation. This bill provides scant protection for property rights.

This paper discusses the dangers of government's proposed confiscation regime. Secondly, it explains why secure, entrenched private property rights serve, rather than undermine or hamstring, the public interest. Thirdly, the alternatives to confiscation and nationalisation will be discussed. These include the fact that government is financially capable of providing market-related compensation for expropriations; that restitution of land and property is achievable (indeed imperative) without destroying property rights; that urban land reform success is within grasp but underappreciated; and that much can be done about rural reform without threatening the economy or food security. Fourthly, a viable, pro-property rights alternative to government's proposed legislation is outlined.

To achieve a better life for all, including the poorest of the poor, freedoms and security of property must be respected and expanded. The *Economic Freedom of the World* report illustrates this by showing a strong correlation between GDP per capita and economic freedom, of which property rights is a precondition. This paper proposes that confiscation and nationalisation be abandoned in favour of viable, pr-property rights alternatives.

AUTHOR

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1. INTRODUCTION

An abridged version of this paper appears in the 2021 *Economic Freedom of the World* annual report published by the Fraser Institute.

In December 2017, South Africa's ruling party, the African National Congress (ANC), adopted into its policy programme the idea of expropriation without compensation as a means to achieving land reform. In February 2018, the Economic Freedom Fighters (EFF), South Africa's third largest political party, proposed a resolution in Parliament that the Constitution should be amended to allow government to expropriate property without being required to pay compensation. The EFF furthermore supports the outright nationalisation of fixed property ("land") in South Africa. The ANC moderated this resolution somewhat, but in principle supported it.

The result of the resolution and following vote was that Parliament resolved in favour of amending the Constitution, setting in motion a process that at the time of writing this paper was still ongoing.

The Constitution Eighteenth Amendment Bill, whether in its current or in a different form, is likely to be adopted, and will change section 25 of the Constitution to allow for expropriation without compensation – shortened to "EWC" in the discourse. At worst, the Amendment Bill might allow government to nationalise land. The Expropriation Bill, an ordinary piece of legislation, is also likely to be adopted, and will spell out the precise procedure and requirements for when property may be so expropriated without compensation.

The Fraser Institute's *Economic Freedom of the World* (EFW) index measures five areas of policy to determine a country's economic freedom ranking. One area, "Legal System and Property Rights", which this paper is concerned with, and is described as follows:

> "Protection of persons and their rightfully acquired property is a central element of both economic freedom and civil society. Indeed, it is the most important function of government." (Gwartney et al., 2020: ix)

It is furthermore written of this area:

> "The key ingredients of a legal system consistent with economic freedom are rule of law, security of property rights, an independent and unbiased judiciary, and impartial and effective enforcement of the law." (Gwartney et al., 2020: 3)

Much has been written by the present author and others about the dire implications of expropriation without compensation (Jonker and Van Staden, 2020; Van Staden, 2020a; Van Staden, 2020b). Even, for example, that expropriation "without compensation" is not, in fact, expropriation at all, but another form of arbitrary confiscation. For indeed expropriation (elsewhere known as *compulsory purchase*, *takings*, or *eminent domain*) and compensation are inseverable from one another, throughout history and around the world. International law requires compensation to be paid upon expropriation, as does every legal system in the open and democratic world (Van Staden, 2021c: 11-21; Moore, 2018).

This paper discusses the dangers of government's proposed confiscation regime. Secondly, it explains why secure, entrenched private property rights serve, rather than undermine or hamstring, the public interest. Thirdly, the alternatives to confiscation and nationalisation will be discussed. These include the fact that government is financially capable of providing market-related

compensation for expropriations; that restitution of land and property is achievable (indeed imperative) without destroying property rights; that urban land reform success is within grasp but underappreciated; and that much can be done about rural reform without threatening the economy or food security. Fourthly, a viable, pro-property rights alternative to government's proposed legislation is outlined.

2. THE DANGERS OF CONFISCATION

2.1 Undoing the Constitution

South Africa is presently considering two statutes that concern government's power to confiscate property, mainly from private persons.

The first is the Constitution Eighteenth Amendment Bill. In its present form, it provides that section 25 of the Constitution, which guarantees the right to property for all South Africans and requires that government pay "just and equitable" compensation whenever it expropriates such property, is to be amended to allow for cases of expropriation where "the amount of compensation is nil". It will also empower Parliament to determine, by legislation, under which circumstances compensation might be nil. It is quite likely that the final version of the Amendment Bill will include a reduced role for the courts in confiscation proceedings, and that a provision allowing government to nationalise land – without compensation – will also be present.

The second is the Expropriation Bill, which is the legislation that the Constitution Eighteenth Amendment Bill refers to. The bill, in its present form, in addition to ordinary provisions related to expropriation *with* compensation, furthermore provides government with a general power to confiscate property without compensation under open-ended circumstances.

While the Constitution Eighteenth Amendment Bill might on its face seem benign, the operationalisation of it in the Expropriation Bill is where the trouble lies.

2.2 Expropriation Bill

The bill replaces South Africa's existing Expropriation Act, from 1975, in the name of aligning it to South Africa's post-apartheid constitutional democratic dispensation. While it cannot be denied that bringing the country's expropriation regime in line with constitutional values and principles is necessary, the bill assuredly does not achieve that aim. Quite the contrary.

Among other things, the bill makes it significantly easier for government to engage in expropriation. Here one might point to the provisions that allow government to take possession of the property it wishes to expropriate before the legal proceedings arising out of the expropriation have been settled or decided in court.

Clause 12(2)(a) of the bill, significantly, removes the payment of *solatium* upon expropriation. *Solatium* is that additional amount of money an expropriated owner receives over and above the market value of their property to compensate for the emotional trauma, inconvenience, or financial hardship that the expropriation process itself may have caused. *Solatium* is one of the few institutions that are meant to characterise expropriation not as a tool of punishment, but as a vehicle for social improvement. In the absence of *solatium*, it becomes less clear whether government is simply confiscating property to punish owners, or whether it is truly interested in serving a public purpose.

However, the most concerning provisions are those related to so-called expropriation for "nil compensation" – colloquially known as "expropriation without compensation" – but most accurately described as "confiscation".[1]

The Expropriation Bill, taking its cue from the Constitution Eighteenth Amendment Bill to define those circumstances under which property may be confiscated without any payment from government, contains a list of six circumstances empowering the government to do just that. However, most notably, this list is not a closed list (*numerus clausus*), but an open list. This means that in addition to the listed six circumstances, government may in any other circumstance omit paying compensation upon confiscation if it deems that to be "just and equitable".

The uncertainty and dangers that come with such an awesome power cannot be overemphasised. There is no assurance to domestic or foreign property owners and investors that their assets are safe from an expropriating authority simply deciding to confiscate their property arbitrarily. Recourse to the courts remains, but such owners would in most circumstances have to give up possession of the property to government while the years-long legal battle is finalised. Most ordinary South African property owners do not have the resources to engage in such litigation, particularly if the property they are forced to concede in the meantime was the generator of their livelihoods.

The six circumstances the Expropriation Bill lists, found in clauses 12(3)(a)-(e) and clause 12(4), are:

- Land that is owned for speculative purposes;
- Land owned by State institutions;
- **Land over which the owner does not exercise control;**
- Land the market value of which is equivalent to or less than the value of State investment or subsidy of that land;
- ***Property*** **that "poses a health, safety or physical risk to persons or other property"**; and
- Land on which labour tenants are awarded a right to acquire at the expense of the owner in terms of sections 16 and 23 of the Land Reform (Labour Tenants) Act, 1996.

Notwithstanding the fact that this is an open list and that these are therefore simply examples of when the State is empowered to confiscate property without any compensation, some remarks on the highlighted items are appropriate.[2]

Clause 12(3)(c) provides that government may confiscate property without payment "where the owner has abandoned the land by failing to exercise control over it". This provision however does not refer to abandonment in law. Property is only abandoned according to South African property law if the owner no longer manifestly intends to own the property, and no longer exercises control over the property (*Reck v Mills & Another* [1990] 1 All SA 560 (A) at para 16). Abandonment, in other words, is usually intentional. This provision however takes away the requirement of intention and redefines the requirement of control, changing it from "not exercising control" to "failing to exercise control", thus strongly implying owners may still intend to own the property. The result is that if an owner is forcefully removed from their property by criminal trespassers – a relatively

[1] It is inappropriate to refer to what government is contemplating as "expropriation", as expropriation as a legal institution is inherently associated with compensation. "Confiscation" is the more apt term. However, given the ubiquity of the expression "expropriation without compensation" in the discourse, it will also be used throughout this paper.
[2] All the other items, but for the second, nonetheless also entail significant dangers for property rights in South Africa.

common occurrence in South Africa – the government may itself confiscate that property and leave the owner penniless.

It is noteworthy that the previous version of the same Expropriation Bill defined abandonment according to its conceptualisation in common law. One wonders why government removed that appropriate definition and replaced it with the present one.

Clause 12(3)(e) provides that property may be confiscated without payment "when the nature or condition of the property poses a health, safety or physical risk to persons or other property". The broad language in which this provision has been framed would empower government to confiscate factories, laboratories, and all manner of other property that by their nature pose a risk to people. Even a private, residential home, poses at least some risk, which under this provision would mean government may confiscate homes without paying compensation. This provision would have been more appropriate if it omitted reference to the "nature" of the property, and if it made reference to a "*serious* risk".

2.3 Government's sentimental shift against property rights

The broad powers the government interprets the constitutional amendment as giving it is concerning, as these powers effectively nullify any residual protection for private property rights. Had South Africa had a political culture of restraint and respect for private boundaries, the constitutional amendment might have been construed strictly and limited, truly, to only those circumstances in which expropriation without compensation on the face of it might be justified.[3] That is not the case.

It is important to understand that the Expropriation Bill will become ordinary legislation, meaning it can be changed on the whim of a simple majority of Parliament at any time and for any reason. The nominal protection it continues to offer private property owners is therefore precarious. But in any event, some of its provisions are framed so broadly that it would enable any new, abusive government, to victimise property owners. The seemingly benign rhetoric from the present ANC government must therefore be considered against the background that the ANC is not guaranteed perpetual political power, and that the present "faction" in control of the party is not guaranteed such control. Any future government will possess the same power today bestowed upon the ANC government.

While neither the Constitution Eighteenth Amendment Bill nor the confiscation provisions in the Expropriation Bill presently apply to intellectual property, these statutes do represent a significant shift in the political elite's approach (and sentiment) toward property in general. The government is currently considering intellectual property legislation that significantly weakens protection for intellectual property (Jonker and Van Staden, 2020: 12-13). The government has also noted that it seeks the power to prescribe to private pension fund managers where to invest the funds of their clients, particularly in struggling State-owned enterprises (Esau 2020). In other words, all these interventions must be seen within the broader context of a government wishing to significantly undermine protections for all sorts of property rights.

Finally, it is worth noting that government has proposed the creation of a special court, the Land Court, to deal with matters arising out of land reform in general and confiscation under the

[3] Here one might think of property under extreme debt to government, property that is owned by someone living abroad and is not used for any purpose, and has never generated any income or benefit for the owner, who has effectively all but abandoned the property. Such circumstances would be severely limited, and would, it is submitted, not justify the creation of an entirely new legal regime that legalises confiscation.

Expropriation Bill. This bill will not be focused on the protection of property rights but instead on the government's often perverted conceptualisation of social justice. For instance, the court will allow hearsay evidence in land claims processes to, for example, allow claimants to simply assert that at some past point they or their ancestors were dispossessed of the property they claim to be theirs. Such an intervention might have been necessary had real evidence not existed; however the colonial and apartheid governments, after 1910, were required by law to publish notices of the property they expropriated in terms of their racist legislation in *Government Gazettes*. All gazettes since 1910 are publicly available. Tangible evidence of dispossession therefore exists for restitution claims.

It is thus doubtful whether the Land Court will offer South Africans the necessary protection for their property, and whether it will take its role of oversight over abusive litigants and abusive government officials seriously. In fact, it might be an exemplary court. That does not mean there is no reason to be concerned, however.

Expropriation without compensation – confiscation – of property, threatens the public interest through its weakening of private property rights.

Most South Africans who own property today are black, and it has only been since 1993, when the interim Constitution was adopted with a constitutional property guarantee, that they have been able to do so without the constant worry of State confiscation that was endemic during apartheid. The post-apartheid environment should done more to unlock property rights for the previously dispossessed. While there has been some limited progress in the bestowing of title deeds in recent years, the expropriatory statutes that government is considering will undermine any such progress. These statutes represent a massive risk to all in South Africa and the poor, who unlike the wealthy will be unable to challenge confiscations in court or leave the country for being victimised, will ultimately pay the price.

The Constitution Eighteenth Amendment Bill and Expropriation Bill represent a departure from both international best practice and from practice in South Africa, where market-related compensation, including *solatium*, is the standard.

While advocacy for these statutes has been clad in the rhetoric of redress for the wrongs of apartheid, neither statute limits the general power of confiscation bestowed on government to such redress. While the constitutional amendment does provide that no-compensation expropriations must be for purposes related to land reform, the term "land reform" is not defined in the Constitution and will likely be construed generously by a court, thus making this provision quite ineffective as a limiting device. Indeed, it must be emphasised that this is effectively a new, *general power* of government. It may, therefore, if the statutes are adopted, confiscate property for any reason, without paying compensation, if it can somehow argue that it is "just and equitable" to do so.

3. SERVING THE PUBLIC INTEREST THROUGH PRIVATE PROPERTY RIGHTS

In South African legal discourse, it is often uncritically assumed that private property rights serve private interests, and State initiatives that might sometimes have to sacrifice private property rights, serve the public interest.[4] In other words, there is a division between private interests and the public interest, and private property rights fit neatly into the former whereas State initiatives that undermine it fit neatly into the latter. This is an erroneous assumption.

The recognition and protection of private property rights is in the public interest. Where there needs to be a balancing act between private interests and the public interest, it is crucial that private property rights be considered as part of the public interest in that balancing act, not private interests. As the authors of the 2019 *International Property Rights Index* write:

> "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 natural counterbalance to the exercise of power because they limit the power of the State and are fundamental for productive transformation in the knowledge society." (Levy-Carciente et al., 2019: 3)

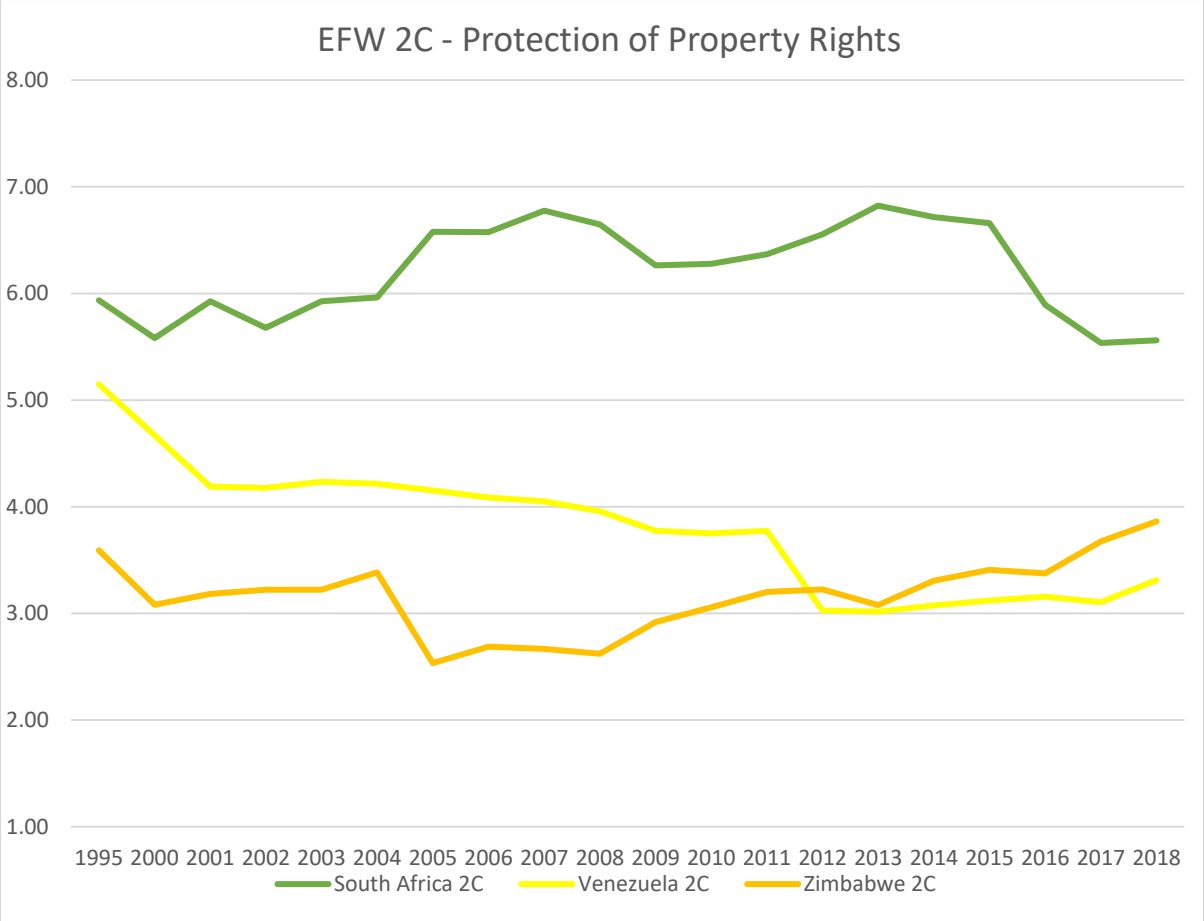
The countries where the freedom of the individual – including their right to own private property – is respected and protected, are the countries that consistently top the indices that measure human development and prosperity (Madan, 2002: 13-14).

Life expectancy is the highest and malnutrition lowest where liberty is prioritised. On the other hand, where the State and its ideological goals are placed front and centre as the organising principles of society, there is destitution. Most importantly, the EFW report shows that the poorest 10% of the people in countries in the top quarter of economic freedom have incomes nearly eight times higher ($12,293) than their counterparts ($1,558, PPP constant 2017, international$) in the lowest quarter economically free nations over the 2000-2018 period (Gwartney et al., 2020: xi).

Property rights are the *conditio sine qua non* for investment, development, and economic growth (Botero et al., 2020: 9, 14). None of these are private phenomena, but quintessentially serve the public interest.

The collapse of the Venezuelan and Zimbabwean economies is well-known today. The below graph, measuring the protection of property rights (Area 2C of the EFW) clearly shows that the drops in such protection in those countries. 1995-2000 and 2011-2012 in Venezuela, and 2003-2004 in Zimbabwe, correlates quite closely with the massive growth and development problems facing those states. While their respective protection of property scores might be increasing, the damage initially done to their economies – causing, for example, hyperinflation – still lingers.

[4] See for example Van der Merwe, 2016 and Roux, 2013: 46.2.



Credit to Prof Richard Grant for doing the research and constructing this graph.

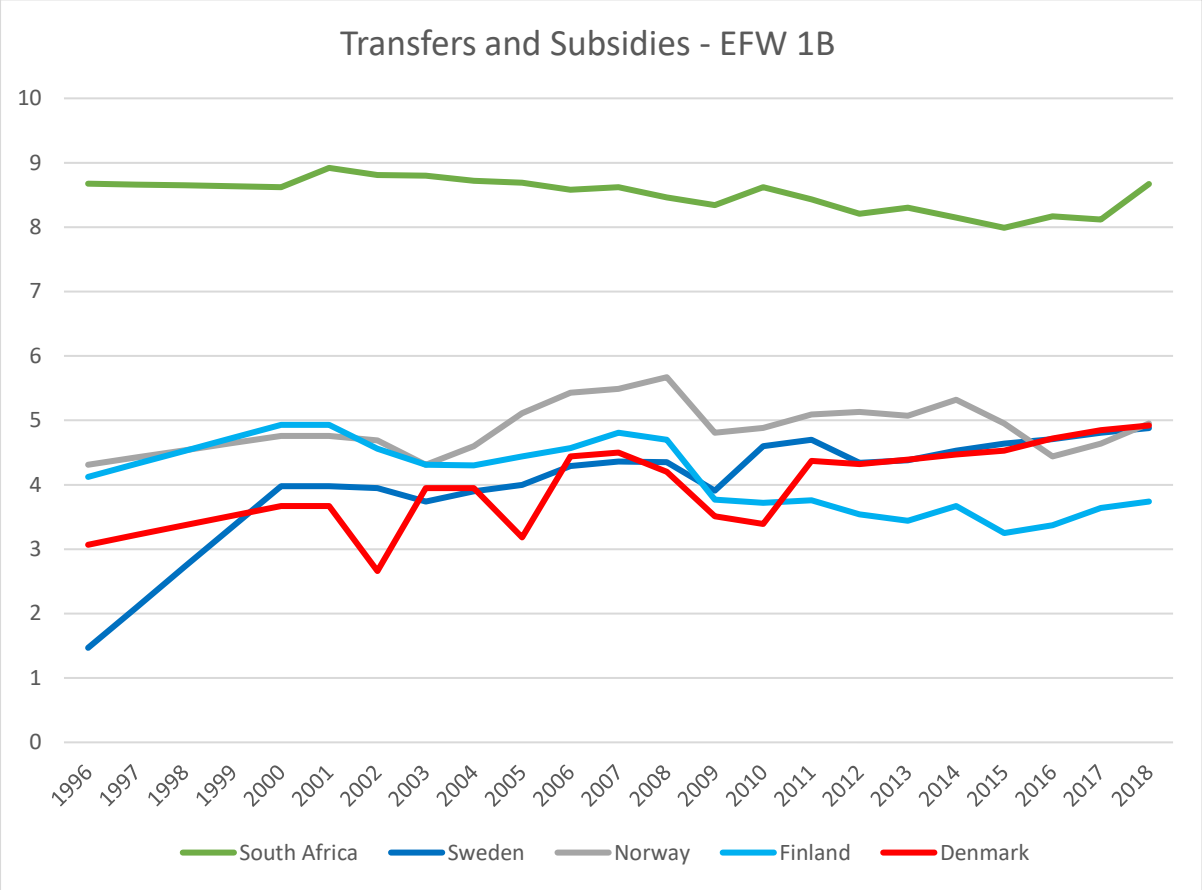
Indeed, aside from its political disenfranchisement of black, coloured, and South Africans of Indian descent, apartheid's greatest crime was its denial of the common law property rights protection enjoyed by whites. The poverty rampant throughout South Africa today is at least partly due to this denial.[5] According to the Liberal Party parliamentarian, Edgar Brookes, co-writing with JB MacAulay in 1958 (95), "[the economic life of] the African is almost entirely in the hands of officials […] possessed of very wide discretion."

Property rights also give substance to citizenship. Without being allowed to accumulate property and be secure in the knowledge that that property will be safe from arbitrary taking, and when it is taken, such a taking will be reasonable and subject to full market-related compensation including *solatium*, citizenship itself is robbed of its essence. For without such security of property rights, citizens are subject to the mercy and generosity of the State, and cannot provide meaningfully for their own sustenance. Where people are dependent on the State for leases, permissions to occupy, or have full ownership but which is subject to being taken at any time, there is a chilling effect summed up neatly by the saying: *One does not bite the hand that feeds you*. In other words, protests, petitions, criticisms, or challenges to government power will not happen, or will not happen easily, if government can rip the material foundation upon which citizens and civil society stand from under their feet (Malan, 2020: 6-7)

[5] See for instance Cameron (1991: 148), who explained at the end of apartheid that black areas were unable to sustain their own effective local governments because of the lack of freehold title in those areas, effectively meaning less local revenue.

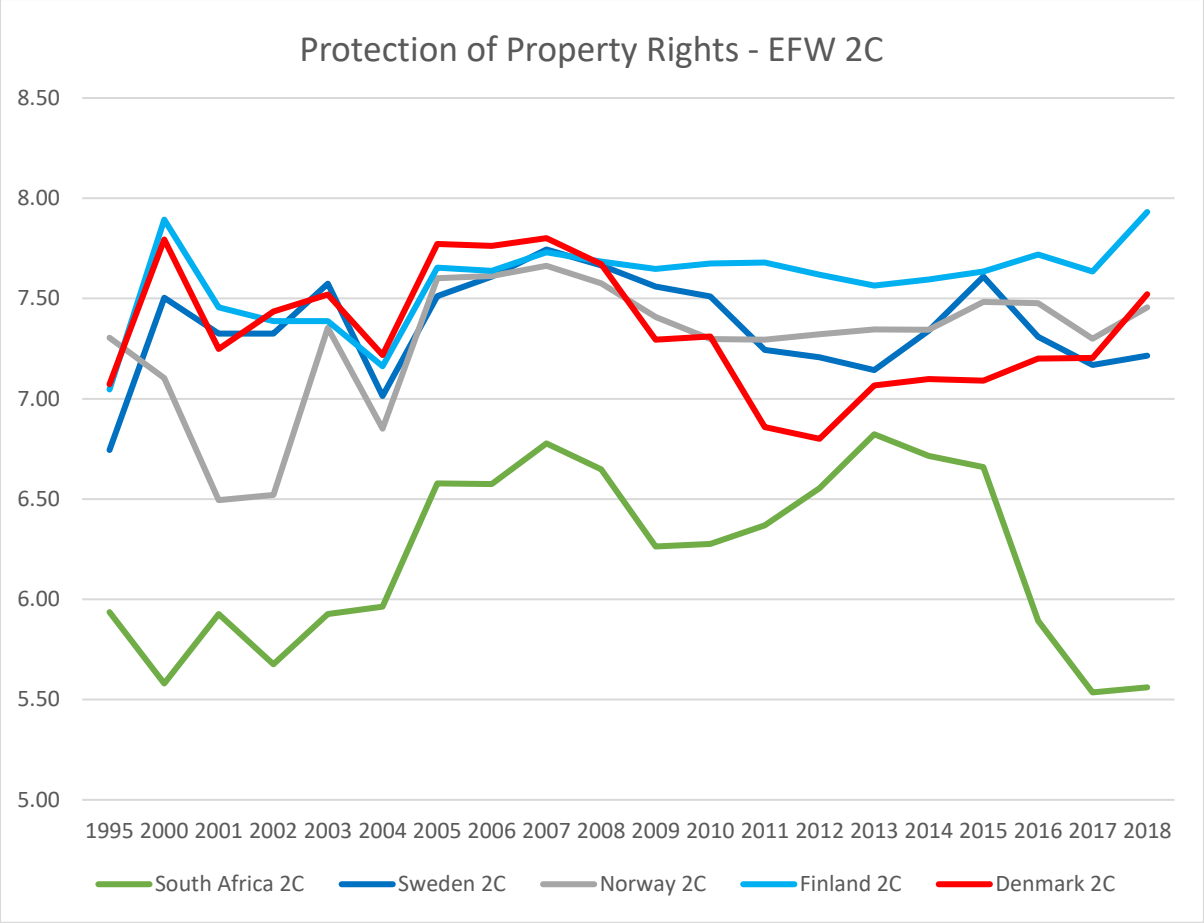
The uncritical assumption that property rights are simply about self-interested individuals protecting their profits and advantages from social programmes is far off the mark (Reese, 1976: 87). Government has an interest in marketing their social programmes as beneficial, but when they come at the expense of something as crucial as property rights, one must ask whether this is the case. Indeed, social programmes that complement a regime of strong property rights must in all cases be preferred over those programmes that do not.

See, for example, the generous and well-noted welfare states of the Scandinavian countries. Government transfers and subsidies, which includes social payments – Area 1B in the EFW – is higher in all these states than that of South Africa. In other words, they offer their citizens more generous welfare benefits, including free education.



Credit to Dr Fred McMahon for doing the research and constructing this graph.

Yet, at the same time, these states are all able to have a high degree of protection of private property rights (Area 2C in the EFW) whilst maintaining their social programmes. This leads to a higher economic freedom score, placing countries with an even more active welfare-oriented governments in a higher quartile than South Africa.



Credit to Prof Richard Grant for doing the research and constructing this graph.

In other words, generous social programmes need not come at the expense of property rights. And the far more likely case is that well-protected property rights, which lead to economic growth, investment, and development, in fact contribute in large part to the ability of the State to maintain their welfare programmes.

4. ALTERNATIVES TO CONFISCATION

With the rhetoric for property confiscation without the payment of compensation disguised in various appeals to the public interest and justice, there exist real alternatives to such a policy approach that in fact do serve the public interest.

4.1 Practicality of compensation

It has been said that government does not have the financial resources to provide market value-related compensation when it expropriates property, and this is part of the reason why unpaid confiscation of property must be an option available to government (Gladwin and Van Wijk, 2018).

However, in practice, government does not lack the ability to pay market-related compensation for property that it expropriates for land reform purposes.

Professor Sope Williams-Elegbe of Stellenbosch University writes that of the R800 billion (US$54,5 billion) annual public procurement spending in South Africa, about half might be lost to corruption (Williams-Elegbe, 2019).

The market value of most farms on sale according to cursory research is below R10 million (US$682,000), but we can assume that the average market value is as high as R20 million (US$1,3 million). If the R400 billion (US$27,3 billion) lost to corruption in public procurement alone every year were spent on acquiring large swathes of agricultural land, at market rate, government would be able to transfer more than 20,000 such plots every year.

According to Africa Check, in 2017 there were 40,122 farming units in total in South Africa (Mashishi, 2020). It would therefore take government two years to buy *all* the farms in South Africa at their market value and transfer them to its chosen beneficiaries. At the time of writing, it has already been three years since government's new confiscation policy was first proposed. In other words, in the time it has taken government to create the destructive uncertainty around its new policy, all in the name of acquiring property for the benefit of the poor, government could, in fact, already have acquired that property on behalf of the poor.

A far more conservative estimate from National Treasury from 2010 puts the number at R30 billion per year lost to corruption (Chiumia and Van Wyk, 2015). Assuming this is the case, with that money government can purchase and transfer over 1,500 farms every year.

Since 2018, therefore, if government had brought its own internal corruption under control, it could already have paid market compensation for 4,500 farms that could have been distributed, in ownership, to deserving aspirant farmers. Instead, by the beginning of the EWC process, no information existed about how many farms had been expropriated or purchased by government, and transferred to black ownership (Eloff, 2018). What we do know, is that by 2015, government itself still held ownership of about 4,000 farms that it had not yet distributed to beneficiaries (Hlomendlini and Makgolane, 2017). Indeed, government has made it relatively plain that it is more interested in leasing farms to beneficiaries, while it, the government, retains ownership (Kiewit, 2020).

Speaking of farms in the abstract is, of course, an oversimplification. Agricultural units differ wildly in size and usefulness. But it cannot be escaped that the taxpayer provides government with more than enough financial resources to undertake a substantive land reform programme aimed at transferring massive amounts of agricultural land to deserving beneficiaries. In this light, it is already clear that there is no need for government to confiscate anything without paying compensation.

4.2 Restitution of unjustly acquired property

Government's narrative in favour of confiscation is couched exclusively in the language of restitution. President Cyril Ramaphosa (2018), justifying government's adopted policy, spoke of an "original sin" – colonial seizure of land – that must be addressed. Other radical proponents of confiscation appeal endlessly to the justice of the matter: ill-begotten property must be taken and given back to those to whom it belongs. It is only in policy documents and high-level discourse that those who favour confiscation of property, while still narratively basing their agenda on restitution, reveal that they are also angling for *redistribution* and/or *nationalisation*.

The difference between restitution, redistribution, and nationalisation, speaks for itself.

Restitution is a concept known throughout history to every notable legal system in the world (Bell, 1992: 25-26), including and especially the customary African legal systems that were displaced in South Africa by European common and civil law. The latter legal system, too, has long known of restitution in, *inter alia*, its laws of property, torts, and delicts. Where someone has caused damage to another's legally recognised interests, or where someone has taken the property of another without a legally justifiable reason, the former must, in the first case, compensate the latter to place them substantively in the same position they would have been had the damage never been caused, and, in the latter case, must return the property – restitute it – to the true owner, or if this is not possible, compensate the owner with acceptable, equivalent restitution.

South Africa's common law recognises the imperative of restitution of property through actions such as the *rei vindicatio*, which enables dispossessed owners to regain possession of their property. Since 1994, special legislation has also made provision for this in the context of land reform. The Restitution of Land Rights Act already provides amply for restitution.

Restitution is, clearly, a matter of justice that is almost entirely impervious to challenge. That is why no notable participant in the land debate in South Africa has disputed the necessity of restitution. AfriForum, often (but incorrectly) regarded as a 'reactionary' guardian of 'white' interests, for instance, does not attempt to argue against restitution, nor does Sakeliga, a business group and federation of mainly Afrikaans chambers of commerce. Indeed, both submit that restitution is proper and necessary.

It is thus interesting that at the superficial, public-level of discourse, there is no real disagreement in the land debate. What is happening, in fact, is that the participants in the debate are arguing past one another. Those who favour confiscation argue, vociferously, that restitution is a matter of justice and must be pursued with haste. They find none who disagree. Those who favour private property rights, on the other hand, argue that redistribution and nationalisation are examples of State conduct that is uneconomic at best and oppressive at worst. The participants in the debate are not having the same conversation.

Those who favour confiscation, however, also favour redistribution and nationalisation, despite not using these as instruments in their narrative arsenal.[6]

It is important to note at this juncture that while restitution is required by the Constitution, in section 25(7), neither redistribution nor nationalisation are. Indeed, it can be argued that both the latter phenomena are incompatible with constitutional property rights in South Africa.[7]

Redistribution is concerned with the ostensible normalising of (generally) racial "patterns of ownership" of property in South Africa. Whereas in the case of restitution, a particular property is identified as having been taken from its true owner without their wilful cooperation and returned to that owner, in the case of redistribution, a random property is identified by the skin colour of its owner, seized from that owner, and transferred in ownership to someone else (who is also random but for their race) whose racial category, according to a political formula, owns a disproportionately small amount of land. This is the theory of redistribution. In practice, the beneficiary of redistribution is likely to be a politically connected person.

[6] When the term "redistribution" is used in the popular discourse, when one looks at the context it is clear that "restitution" is usually the intended meaning.

[7] The proposed Constitution Eighteenth Amendment Bill, if adopted in its current form, would not change this reality, as it does not purport to introduce the concepts of redistribution nor nationalisation into the constitutional text. The amendment might be changed to specifically provide for nationalisation.

It has been argued that section 25(5) of the Constitution authorises redistribution, but this argument is unconvincing. Subsection (5) provides:

> "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."

It cannot be honestly argued that redistribution is "reasonable". Political and demographic formulas that problematise "patterns of ownership" are academic endeavours unrelated to the lived reality of ordinary South Africans. Only academics, journalists, and politicians fret about the "problem" of the racial makeup of property owners – no ordinary South African lies awake at night worrying about the fact that people who belong to another race own a certain percentage of land. At best, they worry about the fact that ill-begotten land has not been returned to its true owners – restitution. Constitutional reasonableness requires the existence of a legitimate government purpose, which does not exist, at least, without a popular mandate.

The fostering of conditions, furthermore, cannot be regarded as akin to directly seizing property and distributing it. When government is enjoined to creative a conducive environment, or "foster conditions", that means through policy or law it must enable ordinary South Africans to participate in land ownership *themselves*. Indeed, the fostering of conditions necessarily implies a supportive role for government, not a direct role. An example of government fostering conditions for citizens to gain equitable access to land in this context, is to repeal the Subdivision of Agricultural Land Act of 1970 and allow owners of large agricultural properties to subdivide that land freely and sell it at affordable rates to aspiring agriculturalists. Or, as another alternative, it can reduce or eliminate property taxes related to rural land.

Finally, to construe "equitable basis" as meaning the Constitution is implicitly reviving the old Population Registration Act and requires of government to socially-engineer a new "pattern of ownership" of property would be an unreasonable, arguably unlawful construction of constitutional meaning. Section 1(b) of the Constitution provides that South Africa is *founded upon* the value of non-racialism. Section 25(5) cannot therefore be assumed to be animated by racial considerations. The far more reasonable and constitutional meaning of the reference to equity in this section, is that it requires the poor to have a shot at land ownership, and this is what government must create the conditions for. This is not within the nature of redistribution.

Nationalisation, on the other hand, currently has no discernible constitutional basis whatsoever. Nationalisation refers to the process where formerly private property is seized and becomes the property of government. Those who explicitly favour nationalisation wish to modify the Constitution Eighteenth Amendment Bill so that it may provide the State with the power to take ownership of all land in the country and lease it to qualifying persons.

This does not mean nationalisation of property has not happened before. As we have established above, government has in practice taken ownership of many of the properties it has purchased or expropriated over the years, and has omitted to transfer them in ownership to deserving beneficiaries. Instead, it leases those properties and reserves the power to terminate the lease. This inevitably means lessees and tenants on State property do not invest the same effort, time, or money into the development of the property – usually farms – as a private owner would. This is, arguably, the reason why so many government land reform projects have failed, with previously productive private land becoming unproductive at best and abandoned at worst (Politicsweb, 2010).

Where there are still plots of land which have not yet been returned to their true owners, or true owners who decided to opt for a cash payment and have not yet received all that money – restitution, in other words – work remains to be done. This falls entirely in government's court, and is a clear and viable alternative to confiscation. The power to confiscate property without compensation is not necessary to give effect to the principle of restitution. In fact, it undermines the very property rights of those who have received their dispossessed property back. Confiscation negates justice, and does not support it.

4.3 Urban titling of existing properties

Local governments throughout South Africa own millions of plots located in the so-called "townships" on the periphery of cities. As part of the National Party's apartheid policy, black people could not own property in those areas designated for whites or other racial groups. But black labour was nonetheless required in these areas. As a result, blacks, regarded as "temporary sojourners" from their own designated areas – called "homelands" – became tenants of (white) municipal councils in these periphery townships.

This reality has not yet been resolved, despite South Africa being 27 years out of apartheid.

Some people have lived in these township homes for their entire lives – indeed, it is their birth home. In many cases, they built the homes, brick by brick, themselves. Yet they remain, in practice, tenants, even though in law, they are properly owners.

In 1991, while the reformist faction of the National Party was in power, the Upgrading of Land Tenure Rights Act (ULTRA) was adopted. This Act provides that previously insecure leasehold tenure in formal townships were converted into full ownership when the Act commenced. The obligation to translate this legal reality into practical reality has not been fulfilled to the extent required by law.

While many have received the title deeds recognising their ownership, millions more remain without. It is within this context that the FMF established the Khaya Lam ("My Home") land reform project in 2013. The purpose of the project is to expedite the process of title deed transfers and encourage people from all walks of life to contribute to the realisation of property rights for the most marginalised members of South African society.

Khaya Lam embraces the idea that ownership does not only lead to immense economic benefits but also implies dignified living for the owner.

As such, Khaya Lam has successfully completed the transfer of 9,247 title deeds since 2013, with 8,530 more waiting to be processed and a further 16,739 pledged.[8] Each deed transferred represents a material transformation in the life and potential prosperity of a disadvantaged family. All of this has been done with the financial assistance of ordinary South Africans, businesspeople, and foreign philanthropists. Perhaps the most prominent contributors have been the business magnates Christo Wiese and Johann Rupert.

During June 2016, for example, Khaya Lam, with the assistance of Wiese and in cooperation with the City of Cape Town, was successful in having 100 plots of council-owned property in Cape Town recognised as the titled property of their occupiers. In 2015, Khaya Lam, with generous

[8] Pledged deeds are those for which funding has been secured but the technical implementation has not yet begun.

contributions from First National Bank, did the same in Tumahole in the Free State. Wiese was also a co-sponsor at this event.

Most recently, on during Human Rights Month 2021 (March), Khaya Lam, with sponsorship from Rupert and his wife Gaynor, transferred 50 title deeds to new homeowners in the Mooiwater community near Franschhoek in the Western Cape. The Ruperts have sponsored 1,000 deeds in the Stellenbosch area and 1,000 in Graaff-Reinet. About 700 of those have already been processed, and a pledge for a further 10,000 deeds has been secured.

It was also announced on 31 March 2021, that the businessman Vuyani Jarana would make a R100,000 charitable donation to Khaya Lam. This would transfer around 40 title deeds, thus making of 40 marginalised South African families owners of their property.

In 2017, Khaya Lam was awarded the Africa Liberty Award by the Atlas Network for the work done to help realise property rights for poor South Africans.

Khaya Lam is not able, nor does it wish to, monopolise the transferring of title deeds. This is, properly, government's responsibility. That is why urban titling is a workable, constructive alternative to the confiscation of property without compensation. It is within government's power to transfer title deeds in their millions to those South Africans who remain, in practice, tenants on government property, when they are, in fact and in law, owners.

If we wish to see townships become middle-class suburbs, we must address ownership. The experiment of State ownership has clearly failed and produced bland, poor, and unappealing areas where the government does not care to maintain the millions of plots and homes that it officially owns. Only private owners have a true incentive to maintain and develop their property.

4.4 Property rights in new State housing schemes

Since 1994, various schemes have been devised by the democratic government to combat urban poverty, but none of them have broached the source of the issue, insecure and uncertain property rights, in any significant way. One attempted answer was the Reconstruction and Development Programme's (RDP) housing project.

While the RDP has in practice ended, government-provided housing has been taken up into the popular discourse as "RDP houses".

These properties are allocated to previously disadvantaged individuals, as a clearly better alternative to unhygienic and unsafe tin shacks. However, beneficiaries do not immediately become the full owners of such properties. Included in RDP agreements, as mandated by the Housing Amendment Act of 2001, 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 (Pillay, 2018).

It is worth quoting from Law For All (no date) at length:

> "The law prohibits the sale of an RDP before the lapse of an 8-year occupancy without the permission of the Department of Housing. Should you want to 'sell' your house during this initial period, it must first be offered back to the State. Do note: you won't be paid for your house because low-cost housing isn't meant to be a profitable venture. However, you will be eligible for another RDP (if you still qualify).

> Once the 8-year period expires and you wish to sell your house, preference must be given to the State first. Your house can only be sold to another party with written consent from the Department of Housing.
>
> According to recent articles, the Department is working on what legal actions they will take against a beneficiary should they try and sell the house illegally."

Some 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 (Independent Online, 2019). "The goal of RDP housing, according to the Department," write the authors of Law For All, "is to keep these houses in the family." But a rationale such as this is clearly indicative of the patronising mindset at the heart of paternal statism. Other homeowners are able to sell, let, or sub-let their property – why not the poor?

One cannot refer to the RDP entitlement of the beneficiary as "ownership", as a key feature of ownership is the ability to sell or let one's property, or build on it as many dwellings as one desires. The ridiculousness introduced by the Housing Amendment Act into South Africa's common law of property – which emphasises the right of ownership – has spawned lawsuits and other drama that can easily be avoided were RDP properties subject to the ordinary law (Mhlanga, 2018).

A consequence of the lack of full ownership is that it does not encourage investment in the upkeep and development of the property. It also means that the property, besides simply providing a roof over the beneficiary's head, does not help to alleviate actual poverty. But perhaps the greatest concern is that, with beneficiaries essentially being tenants, their insecurity of tenure is abuseable by capricious or self-interested government officials. In January 2021 it was reported, for instance, that 91-year-old Elizabeth Ndlovu was evicted, forcefully, from her RDP house, which apparently had been sold to a prominent local leader of the ANC (Khoza, 2021).

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, turning a very simple contract of lease into a shadowy criminal enterprise that even the media reports on in a negative light (Ka-Nkosi, 2018).

In 2012, Johannesburg metro official, Bubu Xuba, spoke to 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 or let one's house land them 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 (whose applications, as reported in 2012, went back as far as 1996) to be moved to the top.

It is a travesty that 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 the Constitution. Nothing less than full ownership and transparent government, being the antithesis of apartheid, can lead to empowerment for the poor.

Reforming State housing schemes will go much further to normalising and equalising property relations than to bestow even more power on government to confiscate property without being required to pay compensation.

4.5 Allowing private land reform

On 27 March 2018, at the GIBS Land Forum, minerals minister Gwede Mantashe said that he owned a 500-hectare farm, but his smallest neighbour had a 4,000-hectare farm. He said South Africans must demystify the notion that small farms cannot be productive, and in so doing, he condemned the notion of "mega-farming". By mega-farming, I took him to have meant that larger and larger tracts of agricultural land are ending up in the hands of fewer and fewer big farmers.

Mantashe, however, is a noted proponent of expropriation without compensation, despite the fact that an easy and non-destructive solution to the problem he has identified is ready and available.

As has been mentioned above, section 25(5) of the Constitution mandates that government take reasonable legislative measures to enable citizens to gain access to land on an equitable basis.

The Subdivision of Agricultural Land Act, a piece of legislation government enforces to this day despite it being more than half a century old, undermines section 25(5) and government's own stated opposition to mega-farming.

The Act was adopted in 1970, at the height of apartheid, ostensibly to ensure that valuable agricultural land is not allocated for residential or purposes other than agriculture. A more nefarious potential reason for the Act was to prohibit farmers from selling off parts of their land to poor white labour tenants (or *bywoners*, as they were called), which might have competed with neighbouring big commercial farmers at the time.

Thus, the Act provides that owners of agricultural land may not subdivide their agricultural property without going through an elaborate bureaucratic maze to acquire permission from the agriculture department.

The Act allows the Minister, "in his discretion", to refuse any application for subdivision, or to grant an application subject to any conditions the Minister "deems fit". Those conditions may be varied at the government's discretion as well. This means the government has an absolute discretion – a power practically exempt from legal control.

The problem with the notion of having to get permission from government to subdivide one's land is that it is a fallacy to suppose that a group of central planners in Pretoria are at all qualified to decide what sizes of agricultural property are "viable" (Boykin, 2010: 20). In the Soviet Union, for instance, backyard private farms were often more productive than large State-owned public farms, because the profit motive and the incentive to develop one's own property is a powerful motivating force (Kranzberg and Hannan, 1999).

The proper place for the decision of when a farm is or is not viable, is the marketplace. Bureaucratic intervention is unnecessary. Indeed, it stands to reason that officials are less likely to make correct decisions than those whose livelihoods and assets are at stake.

The prohibition on subdivision means that no small, more affordable parcels of land can be sold to farmworkers or local communities, unless one applies to the Minister.

The Act, in other words, directly hinders the private sector from engaging in land reform, only for government to blame the private sector for not transforming quickly enough anyway.

If subdivision is permitted, existing landowners will be able to endow their tenant-farmers with land, in ownership, by mutual agreement. It is the law that victimises labour tenants, not the farmers.

For historically disadvantaged South Africans, a large supply of land in small and affordable units is urgently needed. Repealing the Subdivision Act would be a practical and cost-free way, for government, of making vast quantities of land rapidly accessible.

Should the Act persist in operation, its provisions entrench the phenomenon of mega-farming.

It also fundamentally destroys any notion of ownership of agricultural property. If one requires government's permission to subdivide and sell or lease portions of one's own property, one is not truly the owner in any real sense. But this is characteristic of most apartheid property laws, none of which respected private property rights.

There was reason for hope after apartheid ended that government would abandon this anti-property rights thinking.

In the government's first post-apartheid Land Policy Green Paper, the agriculture and land department made the following declarations about the Subdivision Act. It said:

- Subdivision restrictions "create rigidities that increase the cost of adapting to changing market conditions".
- Farms have areas that are less intensively used for agricultural purposes, and these areas have potential for resettlement and smaller, less intensive farms.
- The land market is inflexible, and landowners require "greater flexibility to dispose of less intensively used portions of farms". It said, "Laws prohibiting subdivision prevent the price of underused land from falling toward its low-use value, and prevent the realisation of 'low' prices through the land market".

Government tried to follow through with its policy to repeal the Act in 1998, when it passed the Subdivision of Agricultural Land Act Repeal Act through Parliament.

The Act, however, says that it will only become effective on a date proclaimed by the President – something that has never been done. While formally repealed, the Subdivision Act therefore remains in force.

Recent administrations have completely misinterpreted this state of affairs, however.

Parliament, as of 2021, is sitting on a bill that has been doing the rounds since 2013.

The Preservation and Development of Agricultural Land Bill, if finally enacted, intends to replace the Subdivision Act with an even more draconian subdivision regime. It is worse than the problem it seeks to fix.

In the late 1990s, government sought to repeal the Subdivision Act so as to allow market forces to operate freely and to the benefit of all rural communities; in other words, the Act was not to be replaced.

Between the current Subdivision Act and the proposed Preservation and Development of Agricultural Land Bill, South Africa is likely better off with the former rather than the latter. But the ideal would be for the Act to be repealed and not replaced.

Thus, there is another solution to the problem of rural, so-called "land hunger". The Subdivision Act must be got rid of to enable farmers to sell smaller portions of their land. How one deals with one's property is and must be a decision for the owner, not the government, hence why having the Subdivision Act replaced with an even worse statute should not be considered.

4.6 Distribution of State land

Government today still controls a substantial amount of the land area in South Africa. For most of the historically black areas – the so-called "homelands" – this remains especially true. In this regard, not much has changed since the end of apartheid.

In 2001, the Demographic Information Group and Population of South Africa found that a quarter of land in South Africa 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 (Groenewald, 2009).

By 2013, the total state ownership of land appears to have decreased to about 14% of all land in the country (De Wet, 2013). It remains unclear, however, for which departments, and what purposes, land is being held. Some organs of State have had to commission research to find land that belongs to them on deeds registries but of which they have no knowledge (Caister, 2016).

Rhetoric aside, the State seems to have an apparent lack of interest in land reform.

The proposed amendment of the Constitution and its accompanying Expropriation Bill exemplifies how the State seeks to avoid land reform in any meaningful sense. The lack of transparency about which departments own which land and for what purpose weakens the façade that the State is committed to equitable access to land. Rather than distribute property that belongs to our massive bureaucracy of a government to the people, the political class continues to engage in racial demagoguery on the issue of land.

In early March 2021, it was reported that several dozen farmers – most, if not all, of whom are black – in the Mpumalanga province have been served notices of eviction. They are successful tenant-farmers on State land – land that was acquired for redistribution purposes. The government has even had the temerity to direct the farmers to not remove the improvements they had made to the properties, which will benefit the next tenant – presumably allies of the ruling party. When some of the farmers refused to vacate the land, government victimised them by undermining their funding and crops sales operations. Nor is this new – the farmers report historical abuse by government, the official owner of their land, and the Black Farmers' Association as well as Legal Resources Centre report that these evictions are in fact common (Hosken, 2021).

Even the government's own Auditor-General reports that evictions are widespread and has led to billions of rands in legal claims against the Department of Agriculture, Rural Development, and Land Reform. Apparently, the land in question has been owned by government since 1994, when the transition out of apartheid reached its apex with the first democratic elections (Penny, 2021).

It would cost government very little to hand its idle property over to deserving, poor, previously disadvantaged individuals and families in ownership. The best way to start this process would be by giving title deeds to those individuals already occupying State land.

Property rights are a prerequisite for a prosperous society. No true investment or development takes place – ever, or anywhere – if potential investors or holders of property are uncertain about

the future or security of their property. After the recent evictions of productive tenant-farmers, a trend away from productivity should be expected.

The Independent Entrepreneurship Group (2015) recommends that land forcefully taken by the apartheid regime which remains in State ownership today, should be "returned to the disenfranchised under a system of property-titling and private ownership." Private ownership of property would be a sure way to propel the South African majority out of poverty.

Politicians assume that poor, landless South Africans want the State to own property on their behalf, rather than them owning it individually; almost as if the State and the citizen are in a parent-child relationship. The innate desire to own the property on which we live and the wealth-generating property with which we work, however, is a difficult thing to suppress, hence why deceptive rhetorical devices and fun slogans are employed – think "white monopoly capital", "expropriation without compensation", etc.

The political class and civil society continue to approach land reform through a State-centric lens, and this is the primary obstacle to meaningful empowerment for the landless poor. The focus in South Africa should be on empowering individuals and communities, not expanding government reach and power. These alternatives invariably improve society, safeguard the Constitution as the centrepiece of the legal system, and entrench property rights for the poor and marginalised. They, unlike expropriation without compensation, do not have any "side-effects" that could collapse an economy or flare up into civil strife, starvation, or a humanitarian disaster. They are also not pulled out of a hat – again, like expropriation without compensation – but instead based on international and historical best practice.

5. WHERE EXPROPRIATION WITHOUT COMPENSATION IS REASONABLE

Despite the existence of these and other alternatives to a policy of confiscation of private property, the South African government will have a particularly difficult time walking back its commitment to expropriation without compensation after years of championing it. Thankfully, then, there is a way for government to continue with its push for expropriation without compensation, without harming constitutional legitimacy, the prospects for prosperity, or the social fabric of South Africa.

This will, however, require important changes to both the Constitution Eighteenth Amendment Bill and the Expropriation Bill.

President Cyril Ramaphosa, after all, has repeatedly stated that government will ensure any amendment of this nature to the Constitution will not be harmful to investment potential, economic growth, or food security.

The parliamentary discretion in the Amendment Bill to determine in ordinary legislation under which circumstances government may confiscate property must be removed. This must be replaced by a *closed list* (a *numerus clausus*) of circumstances under which government may confiscate property.

It is proposed that this closed list provide that property may only be confiscated for the purpose of *restitution*, and restitution must be defined as it presently is in section 25(7) of the Constitution: "A person or community dispossessed of property after 19 June 1913 as a result of past racially

discriminatory laws or practices". Moreover, such property may only be confiscated without compensation if it is, 1) State-owned land, 2) abandoned land,[9] or 3) the confiscation strictly complies with all the requirements of section 36(1) of the Constitution, which contains a formula for how government may lawfully limit rights. Under all other circumstances, compensation must be paid.

Section 36(1) of the Constitution provides that a right in the Bill of Rights, for instance the right to property or its concomitant right to compensation upon expropriation, may be limited only if that limitation is reasonable and justifiable (determined by a court of law) in an open and democratic society that is founded on freedom, dignity, and equality. To determine whether this is the case, a court must inquire, *inter alia*, into the nature and importance of the right being limited, the purpose for which government seeks to limit that right, the nature and extent of the invasiveness of the limitation, the relationship between the limitation and that purpose government seeks to achieve, and whether there are any less restrictive means available to government to achieve that purpose without limiting the right. In other words, in the present context, this provision will allow a court to ask substantive questions about the nature of the confiscation and, specifically, why government does not wish to pay compensation. If government cannot provide a good reason – and it is quite unlikely that it can, because government in fact can afford to always pay compensation (Van Staden 2021b) – then the court would have to force the payment of compensation. Whereas ordinarily a court would defer to the executive without inquiring into so-called policy matters, section 36(1) enjoins the courts to ask these rightly intrusive questions that require substantive answers (Van Staden 2020c: 491-492).

Under all other circumstances – other than the three mentioned above – compensation must be paid.

Plans to change the constitutional amendment to provide for a reduced role for the courts and for nationalisation of all land, must be abandoned forthwith. The very suggestion itself is deleterious for investment and growth.

The Expropriation Bill, meanwhile, must be amended to remove the presently dangerous open list of circumstances Parliament has deemed to be appropriate for expropriation without compensation. No list must appear in this bill – it must simply utilise the above proposed list in the Constitution added by the amendment. Finally, the bill must make clear provision for how property that has been expropriated, with or without compensation, for land reform purposes, will become the property in title (ownership) of beneficiaries. In other words, the possibility of the State expropriating private property and becoming a landlord-owner in its own right for future tenants must be excluded entirely.

With these changes, privately-owned property, the backbone of the economy, will remain, at least theoretically and constitutionally safe, while answering the necessity of just restitution, and any nominal "hunger for land" with the redistribution of State property. Such an arrangement should satisfy all the *bona fide* participants in the land discourse.

[9] Abandonment must be understood as it is known in common law. The Expropriation Bill re-defines abandonment in a dangerous way, as discussed earlier. See Van Staden 2021a.

6. CONCLUSION

All the progress made since apartheid ended stands to be undone unless people recognise that a most fundamental human right is for people to have the ability to own and control property. This implies a market economy, where all people are at liberty to deal with their property and conduct their affairs according to their own needs and motivations.

Apartheid was a denial of this fundamental human right to the majority of South Africa's citizens. To be in favour of property rights today, therefore, is not to maintain so-called white privilege, but to ensure that the benefits of property ownership that whites had enjoyed be extended to everyone. If people of all races could have the security the white population had, we would see more suburbs and fewer townships, tar rather than dust, and prosperity rather than destitution.

When the current Constitution came into operation in 1996 with a relatively strong property rights provision, everyone finally had the right to property, and almost immediately black incomes which had plateaued during apartheid began rising steadily. This, of course, plateaued again around the time government started introducing draconian labour legislation (Van Staden 2019: 288).

Property rights are meaningless if the State is not under an obligation to provide compensation for expropriation. If one is not entitled to compensation, it means one's prior legitimate ownership is denied. Such a state of affairs will make the granting of credit in respect of mostly agricultural property a thing of the past. This is what destroyed the Zimbabwean economy in the 2000s.

White South Africans, for the most part, will survive expropriation without compensation. There are no majority-white shanty towns in Zimbabwe. Farmers either left Zimbabwe to farm in neighbouring states, moved to England, or moved into the cities where they are still, by far, more prosperous than the black Zimbabwean majority. Expropriation without compensation would be a significant inconvenience for white South Africans, but completely disastrous for most black South Africans, in particular, the poor. This not because black people cannot farm,[10] but because, as tenants on State-owned land, they will have no security of tenure or guaranteed entitlement to the land's produce.

South Africans wish to live in the cities, as do people across the world. They do not want to go out to the rural areas where government appears intent on driving them. But they are not being accommodated, because many township inhabitants continue to live on municipal land; a leftover of apartheid leasehold tenure that this government refuses to abolish.

Where government does try empowerment in the cities, it fails. RDP house title deeds come with pre-emptive clauses that, for the first eight years, prohibit owners from selling their property to others, but stipulate that they must sell to government at cost. These owners are not given a title deed when they move in but often only after several years' delay.

Restitution of property is an imperative recognised by South Africa's common law, and is a principle deeply entwined with property rights. It has a simple meaning: If one takes property without the consent of the owner, they are obliged to give that property back, and if that is physically impossible, pay compensation.

[10] This is a well-loved "strawman argument" employed by those who favour expropriation without compensation – that opponents apparently believe blacks cannot farm – when this is certainly not the argument being made by such opponents, which includes a great many black South Africans.

In South Africa, wherever someone can prove a claim to a piece of land that was taken from them or their ancestors by the apartheid regime, they are entitled to that property. But the current 'owner', who will almost universally be an innocent party who bought the property in good faith, should be compensated and, at the very least, get back what they paid for the property. They are blameless and in no system dedicated to constitutionalism will innocent parties be punished in the way envisioned by those who favour expropriation without compensation.

To achieve a better life for all, including the poorest of the poor, freedoms and security of property must be respected and expanded. The EFW report illustrates this by showing a strong correlation between GDP per capita and economic freedom, of which property rights is a precondition.

Every tyranny in the world today is noted for the absence of property rights. The Rule of Law, freedom, and property rights are a package deal. They do not exist in isolation from one another. None of the rights in the Bill of Rights exist without property rights. There is no freedom of expression without the ability to own one's cell phones and their art and clothing. There is no right to privacy when people live in State housing. And there is no right to human dignity without having a place to call one's own.

The ideal scenario in South Africa, therefore, is to leave the Constitution alone. Section 25 makes generous provision for land reform; something the government has not taken advantage of. Constitutionalism, as a doctrine dedicated to limiting the excesses of government power, is undermined when governments go about fiddling with their constitutive instruments, especially when they divest citizens of established rights such as the right to compensation.

Under apartheid, South Africans had very few rights to enforce against a sovereign parliament. Today, we must ensure we protect our supreme Constitution to avoid going back to that dark time of our history. If anything, section 25 must be strengthened. Any amendment to weaken it should be out of the question.

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