IRR SUBMISSION on
THE DRAFT CONSTITUTION EIGHTEENTH AMENDMENT BILL OF 2019

SYNOPSIS

1. Introduction

The Draft Constitution Eighteenth Amendment Bill of 2019 ('the Draft Bill') will empower the government to pay 'nil' compensation on the expropriation of land as well as all 'improvements' on it. Such improvements would include homes, offices, factories, shopping centres, and hospitals.

The Draft Bill will also empower Parliament to enact any number of new statutes setting out 'the specific circumstances' in which nil compensation will apply. This will allow the Expropriation Bill of 2019, with its 'nil' compensation provisions, to be enacted. But it will also allow Parliament to adopt a statute vesting all land and improvements in the custodianship of the government – and stating that this vesting falls within 'the specific circumstances' where nil compensation may be paid.

The Draft Bill thus profoundly threatens the property rights of all South Africans, including:

- the 1m white families who own homes;
- the 8.5m black, 'coloured', and Indian families who also own homes (though often without the formal title deeds the government should by now have provided)
- the 17.5m or so black people with customary plots; and
- the thousands of black South Africans who have bought more than 6 million hectares of land in both urban and rural areas since 1991.

The Draft Bill will also hurt the struggling economy. It will torpedo business confidence, deter fixed investment, undermine the banking sector, and prompt a flight of capital and skills. This will cripple growth, curtail tax revenues, increase public debt, push up borrowing costs, trigger additional ratings downgrades, and cost tens of thousands of people their jobs.

In addition, the Draft Bill will not 'return' the land to 'the people', as the ANC has claimed. Rather, both land and improvements will be kept in the ownership or custodianship of the government. Instead of helping to provide redress for past wrongs, the state will use its control over land as a patronage tool and to deepen dependency on the ruling party. This is the fraud at the heart of the Draft Bill.

2. What the Draft Bill says

The Draft Bill has two main provisions:

2.1 Allowing 'nil' compensation for both land and improvements

The Draft Bill proposes that sub-section 25(2) of the Constitution be amended to include the underlined words. It will then state: [Clause 1(a), Bill]

> Section 25(2): Property may be expropriated only in terms of law of general application –
> (a) for a public purpose or in the public interest; and
> '(b) subject to compensation, the amount of which and the time and manner of payment of which have been agreed to by those affected or decided or approved by a court: Provided that in accordance with subsection (3A) a court may, where land and any improvements thereon are expropriated for the purposes of land reform, determine that the amount of compensation is nil'.

This makes it clear that both land and 'any improvements thereon' may be subject to expropriation without compensation (EWC). However, the EWC amendment to Section 25 is supposed to deal with land alone. Instead, this wording will allow EWC to extend to improvements such as houses, office blocks, shopping centres, hotels, hospitals, and factories. These buildings naturally accede to the land on which they stand, but their additional value can always be calculated. At the very least, appropriate compensation must be paid for these structures to achieve a 'just and equitable' outcome.

2.2 Allowing Parliament to decide when 'nil' compensation should apply

Under a new sub-section 25(3A), Parliament will be empowered to adopt 'national legislation' setting out 'the specific circumstances where a court may determine that the amount of compensation is nil'. [Clause 1 (c), Bill] Such national legislation will need only a simple or 51% majority in the National Assembly to be passed.

This sub-section vastly extends the circumstances in which 'nil' compensation could be paid. In fact, it opens up a potentially endless vista of EWC takings.

If the Draft Bill is enacted into law, at least three possible statutes could be adopted under the sub-section 25(3A). First, Parliament could enact the current Expropriation Bill of 2019, which has a vague and easily expandable list of six instances (already up from the original five) in which nil compensation may be paid.

Second, in keeping with proposals put forward by the Presidential Advisory Panel on Land Reform and Agriculture, the current Expropriation Bill could be changed to include a new clause. This clause would state that 'nil' compensation may be paid whenever a local municipality has identified land as suitable for redistribution but its owner has refused either to donate it, or to sell it to the municipality at a 'minimal' price.

Third, Parliament could enact an additional statute, also by 51% majority, which vests the custodianship of all land and improvements in the government – and states that this vesting falls within 'the specific circumstances where a court may determine that the amount of

compensation is nil'. Under such legislation, title deeds would 'mean nothing' (as the EFF has put it) and every individual and business would need a revocable land-use licence from the government for the homes or buildings in which they live or work.

3. The Draft Bill will empower the state, not ordinary people

The ANC has repeatedly claimed that EWC will 'return' the land to 'the people'. However, this is fundamentally misleading. Land expropriated without compensation will be owned by the state, not by individual black South Africans. Nor will it be transferred to them thereafter, for the ANC's policy is to keep land in government ownership under the State Land Lease and Disposal Policy of 2013 (the 2013 policy).

This is illustrated by the case of David Rakgase, an experienced black farmer in Limpopo whose 2003 contract with the land department for the purchase of the state land he had been farming for decades was effectively ignored and then repudiated. After the 2013 policy took effect, he was told he would have to lease for 30 years, and then for other 20 years, before the government would 'consider transferring ownership' to him. (In September 2019 the Pretoria high court ordered the Land Department to honour its 2003 sale agreement, but the department has yet to do so. Instead, it is insisting that Mr Rakgase pay R5.5m for the land, rather than the R620 000 earlier agreed.)

The state's determination to keep all redistribution land for itself sets black farmers up for frustration and failure. Because they have no title to the land, they cannot borrow working capital from the banks. Their leases can be cancelled at bureaucratic whim, while any fixed improvements they have made (new fences, for example) become vested in the state. In addition, very few are ever granted the long leases that are supposedly on offer.

In practice, many land reform beneficiaries end up with three-month 'caretaker' agreements, which can be terminated at any time, particularly after the initial term expires and no new agreement is concluded. In one instance, a family was granted permission to occupy a state farm without a lease – but was also asked by the department to deliver an informal eviction notice to those already occupying it.

Such tenure insecurity is crippling and stymies attempts at commercial production. Its benefits the ANC, however, by consolidating state control and leaving people entirely dependent on the goodwill of the ruling party and its cadres.

South Africans are being misled into believing that the Bill will see millions of black people take ownership of land. This implicit promise has been widely fostered but will not be fulfilled. Instead, the land and buildings acquired for 'nil' compensation under the Draft Bill will be held by the state as a patronage tool and used by the ruling party to deepen dependency on it. This is the fraud at the heart of the Draft Bill.

4. The Draft Bill cannot cure land reform failures or housing bottlenecks

The Constitution is not the reason for either land reform failures or bottlenecks in the state's delivery of RDP houses. Changing Section 25 to allow EWC will therefore not address these failures.

In the land reform context, the High Level Panel of Parliament said in its 2017 report: 'The…panel is reporting at a time when some are proposing that the Constitution be amended to allow for expropriation without compensation to address the slow and ineffective pace of land reform. This at a time when the budget for land reform is at an all-time low at less than 0.4% of the national budget, with less than 0.1% set aside for land redistribution. Moreover, those who do receive redistributed land are made tenants of the state, rather than owners of the land. Experts advise that the need to pay compensation is not the most serious constraint on land reform in South Africa to date – other constraints, including increasing evidence of corruption by officials, the diversion of the land reform budget to elites, lack of political will, and lack of training and capacity, have proved far more serious stumbling blocks to land reform.'

The Constitutional Court has effectively agreed, finding in the *Mwelase* case in August 2019 that massive administrative inefficiency is the key obstacle. Said the court: 'The [land] department's failure to practically manage and expedite land reform measures in accordance with constitutional and statutory promises has profoundly exacerbated the intensity and bitterness of our national debate about land reform. It is not the Constitution, nor the courts, nor the laws of the country that are at fault. It is the institutional incapacity of the department to do what the statute and the Constitution require of it that lies at the heart of this colossal crisis.'

In the urban context, EWC will not address the inefficiency, corruption, and poor policy choices that underpin failures in housing delivery. Municipalities lack the engineering and administrative skills needed to service vacant land, while the allocation of building contracts and completed houses is often riddled with corruption. The state's delivery of 'free' RDP houses has also slowed sharply, dropping from a peak of 248 000 in 1998 to fewer than 64 000 in 2016. In addition, most RDP houses are so small, poorly located and badly built that people have been saying for years that the government should transfer the housing subsidy directly to them, as they could do a better job of meeting their housing needs.

The Draft Bill will not increase the pace or quality of state provision. Nor will it overcome the massive inefficiencies in municipal administration. In addition, people need employment as well as homes – whereas the uncompensated expropriation of land, houses, and business premises will cripple the economy and curtail jobs, rather than creating them.

Much more effective ways of turning land reform from failure to success can easily be found – as set out, for example, in the IRR's *Ipulazi* proposals for people wanting land to farm. In urban areas, housing backlogs can be overcome by changing present policies and directly empowering the people most in need, as outlined in the IRR's *Indlu* proposal. If these

sensible and pragmatic policies are to succeed, however, then EWC must be jettisoned before it causes still more economic harm.

5. Impoverishing the people

Even without the Draft Bill, South Africa's economy is already reeling. The growth rate in 2020 is likely to be a paltry 0.8% of GDP, well below the population growth rate of 1.6%. Public debt already stands at some R3.2 trillion (61% of GDP) and is set to rise to R4.5 trillion (71% of GDP) by 2022. The budget deficit is likely to average 6.2% over this period, while tax revenues will be R250bn lower than projected. Business confidence is at a 35-year low, and capital and skills are fleeing.

Fixed capital investment (capital formation) is the life blood of every economy, but already such investment in South Africa lags far behind international norms. Yet capital formation is likely to shrink still further – probably by 10% – once EWC is introduced. (In seven other countries, including Venezuela and Zimbabwe, where EWC-style policies have been applied, the average reduction in capital formation has been even greater, at 14% on average.) Macro-economic modeling, based on official data, indicates that a 10% reduction in capital formation will tip South Africa into lengthy recession, further reduce tax revenues, increase public debt, trigger additional ratings downgrades, push up interest rates, and cost tens of thousands of jobs.

Interest payments on state debt could then rise from 12% of budgeted expenditure to 20%, making it difficult to sustain state spending even on social grants and the public sector wage bill. At the same time, reduced agricultural production on expropriated farms will push up food prices and worsen hunger.

State power will grow enormously, allowing a narrow group of the most senior ANC/SACP cadres to reap enormous rents from EWC. By contrast, the great majority of South Africans – including many people now working for the public service and state-owned enterprises (SOEs) – will find themselves shorn of their jobs, bereft of regular income, and increasingly impoverished as the economy shrinks, unemployment grows, inflation pushes up prices, and essential goods vanish from shops.

6. No SEIAS assessment

Despite the enormous damage likely to result from the Draft Bill, its economic ramifications have yet to be assessed under the Guidelines for the Socio-Economic Impact Assessment System (SEIAS) developed by the Department of Planning, Monitoring, and Evaluation in May 2015.

According to the Guidelines, SEIAS has to be applied at various stages in the policy process. Once new legislation has been proposed, 'an initial assessment' must be conducted to identify different 'options for addressing the problem' and making 'a rough evaluation' of their respective costs and benefits.

Once the best of these different options has been identified, a 'final impact assessment' must be developed that 'provides a detailed evaluation of the likely effects of the [proposed law] in terms of implementation and compliance costs as well as the anticipated outcome'. This final assessment, with its comprehensive assessment of likely economic and other costs, must be attached to the bill when it is published 'for public comment and consultation with stakeholders'.

According to the Guidelines, it is particularly important that the final SEIAS report should 'identify' and caution against proposed legislation where 'the burdens of change loom so large that they could lead to excessive costs to society, for instance through disinvestment by business or a loss of skills to emigration'.

The Draft Bill is likely to trigger precisely such 'excessive costs', in the form of both disinvestment and emigration. Changing the Constitution to allow EWC is also inordinately risky when (as earlier outlined) the economic growth rate is so low, the tax base is so small, public debt is so high, and the government's capacity to sustain its spending on infrastructure and other essential needs is already in doubt.

However, no SEIAS assessment of the Draft Bill has been carried out. Nor has a final SEIAS report been appended to the Draft Bill to help inform the public and so empower it to 'know about' the issues and have a reasonable opportunity to influence the decisions to be made. This is a major shortcoming which fundamentally erodes the constitutional right to proper public participation in the legislative process.

7. Too little time for proper public consultation

The Ad Hoc Committee responsible for drawing up the measure gazetted the Draft Bill on 13th December 2019, for public comment by 31st January 2020. The time thus allowed exceeds the 30-day minimum specified in Section 74(5) of the Constitution. However, it overlooks the fact that the country largely shuts down for the festive period from the middle of December until the middle of January in every year. Many people were thus away from work and home over from 13th December 2019 to 12th January 2020 and could not reasonably be expected during this period to give adequate attention to the contents of the Draft Bill.

The Draft Bill is also an extraordinarily important one. It is the first proposed amendment to the Bill of Rights since 1996. In addition, the changes it seeks to make to Section 25 of the Constitution will fundamentally undermine the property rights of all South Africans, both black and white.

The Draft Bill will also undermine confidence in an already fragile economy hovering on the brink of recession and damaging additional ratings downgrades. Consideration of a measure with such major ramifications should not be rushed in this way.

Moreover, the committee has a constitutional obligation to 'facilitate public involvement' in the legislative process. Instead, it seems to have brushed aside its duty to give citizens (in the

words of the Constitutional Court) 'a reasonable opportunity to know about the issues and to have an adequate say'.

8. Still more damaging changes now in the pipeline

Though the Draft Bill is still open for public comment, the ANC has unexpectedly announced that it wants to change the measure. Its plan is to strip the courts of the power to decide on the compensation to be paid, and to give this power to the executive instead.

If this change is made, the courts will no longer be able to adjudicate on the 'nil' (or other) compensation to be paid. They will instead be confined to reviewing the administrative decisions made by the executive and setting these aside if administrative justice requirements have not been met.

However, the courts will not be able to replace any flawed administrative decisions with their own rulings as to what the compensation should be. If the executive's initial decision on compensation is set aside on review, the executive will simply decide on a different amount – and the aggrieved owner will then have to return to court to have this new decision reviewed and, if possible, set aside. This will be a particularly time-consuming and costly process.

If the Draft Bill is changed in this way, it will take the country back to what the 2008 Expropriation Bill had sought to provide. Under that Bill, the courts could approve or disapprove the quantum of compensation decided by the executive, but could never decide for themselves what amount would be appropriate.

Back then, the 2008 Expropriation Bill had to be withdrawn because ousting the jurisdiction of the courts to decide on compensation was contrary to Section 25 of the Constitution. Now the ANC's plan is to change Section 25 so that this objection can no longer be raised.

If this change to the Draft Bill is made, it will profoundly undermine the doctrine of the separation of powers. It will also confirm the ANC's determination to keep chipping away at property rights until it has secured comprehensive state control over land and most other property.

The ANC's sudden demand for this change to the Draft Bill is integral to its long-standing policy of building up state power one incremental policy shift at a time. For the ruling party to raise the spectre of this profound change at this juncture – a week before public comments on the Draft Bill are to close – is calculated to promote public frustration and engender a sense of alienation and despair. Why bother with putting in written submissions when no one knows how long the current wording of the Draft Bill will last? This is the opposite of what a reasonable process of public participation requires.

9. The way ahead

The Draft Bill must be abandoned, the sanctity of property rights must be strongly reaffirmed, and the government must start developing sound and practical proposals to counter the problems in land reform and housing that the Draft Bill will never rectify.

The ANC must also abandon the socialist goals that underpin the National Democratic Revolution (NDR) to which it has been committed for the last 50 years. If it has any regard for the welfare of the country and its people, it must withdraw all NDR policies, clamp down on corruption, improve public sector efficiency, strengthen law and order, uphold the rule of law – and strongly embrace the market-friendly reforms that are supposed to be the hallmark of President Cyril Ramaphosa's bright 'new dawn'.