

South African Institute of Race Relations NPC (IRR)

SUBMISSION

to the Joint Constitutional Review Committee

regarding its

‘review of Section 25 of the Constitution and other sections where necessary,

to make it possible for the state to

expropriate land in the public interest without compensation’

Johannesburg, 14th June 2018

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1 Introduction

The Joint Constitutional Review Committee (the committee) has invited written public submissions on its ‘review of Section 25 of the Constitution and other sections where necessary to make it possible for the state to expropriate land in the public interest without compensation’.

This submission is made by the South African Institute of Race Relations NPC (IRR), a non-profit organisation formed in 1929 to oppose racial discrimination and promote racial goodwill. Its current objects are to promote democracy, human rights, development, and reconciliation between the peoples of South Africa.

The committee’s review stems from a motion which was adopted by the National Assembly, in concurrence with the National Council of Provinces, on 27th February 2018. According to the motion, the committee must obtain the views of ordinary South Africans and other people regarding ‘the necessity of...expropriating land without compensation’. The committee must also ‘propose [any] necessary constitutional amendments’ regarding ‘the kind of future land tenure regime needed’.

The committee has called for written public submissions on this review of Section 25 and other constitutional clauses. The deadline for such submissions, which was initially set at 31st May 2018, has been extended by roughly a fortnight to 15th June 2018. However, even with this extension, the period allowed for written public submissions is too short to allow proper consultation on these crucial issues.

2 The importance of proper public consultation

The constitutional amendments the committee is considering will fundamentally undermine the negotiated settlement of the mid-1990s. They will also erode the rule of law, the supremacy of which is guaranteed in Section 1 of the Constitution. In addition, they are likely to have a negative impact on the economy and South Africa’s capacity to generate the investment, growth, and jobs vital to the upward mobility of millions of people.

Consideration of possible constitutional amendments with such major ramifications should not be rushed in this way.

In addition, the Constitutional Court has repeatedly stressed that proper public participation in the law-making process is a vital aspect of South Africa's democracy. Relevant rulings here include *Matatiele Municipality and others v President of the Republic of South Africa and others*; [(2006) ZACC 12] *Doctors for Life International v Speaker of the National Assembly and others*; [2006 (6) SA 416 (CC)] and *Land Access Movement of South Africa and others v Chairperson of the National Council of Provinces and others*. [(2016) ZACC 22]

In these judgments, the Constitutional Court has elaborated on what is needed for proper public consultation. According to the court, citizens must be given 'a meaningful opportunity to be heard in the making of laws that will govern them'. They must also be given 'a reasonable opportunity to know about the issues and to have an adequate say'.¹

The court has also stressed that adequate time must be allowed for the public consultation process. In the *Land Access* case, for instance, it stated that 'a truncated timeline' for the adoption of legislation may itself be 'inherently unreasonable'. If the period allowed is too short – as it was in the *Land Access* case, when roughly a month was allowed for the Restitution of Land Rights Amendment Bill of 2014 to proceed through the National Council of Provinces (NCOP) – then 'it is simply impossible...to afford the public a meaningful opportunity to participate'.²

In the *Doctors for Life* case, where the timeline for the adoption of the relevant Bill was also short, the court made it clear that legislative timetables cannot be allowed to trump constitutional rights. Said the court: 'The timetable must be subordinated to the rights guaranteed in the Constitution, and not the rights to the timetable.'³

In the *Land Access* case, the court cited this passage with approval and went on to say: 'In drawing a timetable that includes allowing the public to participate in the legislative process, the NCOP cannot act perfunctorily. It must apply its mind taking into account: whether there is real – and not merely assumed – urgency; the time truly required to complete the process; and the magnitude of the right at issue'.⁴

These comments apply with even more force to the possible constitutional amendments the committee has been charged with reviewing. Hence, in imposing 'a truncated timeline' for written submissions (15th June 2018), the committee is at risk of acting 'unreasonably'. It is also at risk of 'subordinating' constitutionally guaranteed rights to an arbitrary timetable.

Moreover, there is little to suggest that the committee has:

- 'applied its mind...to whether there is real – and not merely assumed – urgency';
- given adequate consideration to 'the time truly required' for the public to 'know about the issues and have an adequate say'; or
- properly weighed 'the magnitude' of the guaranteed rights here in issue.

More time is essential if the public consultation process on these vital matters is to comply with constitutional imperatives.

The IRR wrote to the secretary of the committee on 5th June 2018 to urge it to reconsider its ‘truncated timeline’ and extend the deadline for written public submissions. As the IRR pointed out, an extension until 15th July 2018 would have allowed ‘a more suitable period for research, the gathering of evidence from other countries, and the formulation of arguments’.⁵

The Constitutional Court has also made it clear that proper public participation requires not only adequate time and information but also a real opportunity for the public to bring their influence to bear on the issues under consideration. As the court stressed in the *Land Access* case, the public must be given an opportunity to be heard which is ‘capable of influencing the decision to be taken’.⁶

In this instance, however, the co-chairman of the committee, Vincent Smith, has made it clear that the committee has already decided that expropriation without compensation is to be introduced. This decision, he told a colloquium convened by the committee earlier this month, was ‘a done deal’.⁷ Hence, the only question the committee is willing to entertain is whether the Constitution needs to be changed for this purpose, or whether EWC can be achieved in other ways. This indicates that the committee has already made up its mind on a crucial issue and that the public has been denied any capacity to ‘influence the decision to be taken’. This too underscores the fact that no proper public consultation has been allowed.

3 Background to this review

The property clause (Section 25) in South Africa’s Constitution prohibits any ‘arbitrary deprivation’ of property. It also says that any expropriation must be accompanied by ‘just and equitable compensation’, which must be based on market value along with factors such as ‘the current use’ of the property and ‘the history of its acquisition’. Expropriation is allowed not only ‘for public purposes’ (the standard rationale in most countries), but also ‘in the public interest’. This is defined as including ‘the nation’s interest in land reform’ and ‘equitable access to natural resources’.⁸

Section 25 has other important features. It requires the state to take ‘reasonable’ measures to increase ‘access to land’, and entitles those who were ‘dispossessed of property’ under relevant racial laws (those adopted in 1913 or thereafter) to restitution or other ‘equitable redress’. It also states that ‘property is not limited to land’.⁹

Since 1994, the ANC government has been pursuing a land reform programme with three key prongs: the restitution of land to the dispossessed, the redistribution of 30% of commercial farming land to black South Africans, and the granting of secure title to land to those lacking this. However, progress has been slow, while production has collapsed on at least 70% of restored land and sometimes on as much as 90% of transferred land.¹⁰

Since 2005, the ANC and many land activists have repeatedly blamed the failures of land reform on the inflated prices the state has ostensibly been forced to pay in buying up land for restitution or redistribution. To overcome this problem, the government has developed new

expropriation legislation – the Expropriation Bill of 2015 – which is currently before Parliament for adoption. This measure generally provides for the payment of compensation on expropriation, though the amount (in line with the Section 25 formula outlined above) could often be less than market value. The Expropriation Bill also defines expropriation in a narrow way, which could be used to exclude compensation for both custodial takings and regulatory expropriations (see *Sections 7* and *8*, below).

Current demands for expropriation without compensation (EWC) can be traced back to 2009, when the ANC Youth League, under its then president, Julius Malema, began stepping up demands for the nationalisation of land, mines, banks, and major corporations or ‘monopoly industry’. When Mr Malema was expelled from the youth league in 2012 (after clashing with the then president, Jacob Zuma), he formed an opposition party, the Economic Freedom Fighters (EFF), which won 6% of the vote in the 2014 general elections and has continued to press for extensive nationalisation. In February 2017 the EFF tabled a parliamentary motion calling for the Constitution to be amended to allow EWC, but the ANC rejected this, saying this was not the ruling party’s policy.¹¹ However, in December 2017, at its national conference held at Nasrec in Johannesburg, the ANC changed its stance.

The Nasrec conference resolved that EWC should be one of the mechanisms available to the government to speed up land reform, provided this was done in a way that did not harm the economy, agricultural production, or food security.¹² This decision – made by the organisation’s highest decision-making body – is binding on all ANC members and structures.

The Nasrec conference also elected Cyril Ramaphosa as the ANC’s new president. This outcome generated a heady sense of euphoria within South Africa, as Mr Ramaphosa – a former trade union leader turned billionaire black economic empowerment (BEE) businessman – is generally portrayed as a moderate with a compelling ‘new vision’ to stamp out corruption and boost investment, growth, and jobs. In February 2018 President Jacob Zuma was persuaded to resign, paving the way for Mr Ramaphosa to assume the national presidency.¹³

Soon afterwards, the EFF demanded that the ANC, in line with its Nasrec resolution, should vote with it on a motion to amend the Constitution to allow EWC. This motion (having been amended in several ways by the ANC) was adopted by the National Assembly by 241 votes to 83. It ‘instructs’ a parliamentary committee, the Joint Constitutional Review Committee, to ‘review Section 25 of the Constitution and other clauses where necessary to make it possible for the state to expropriate land in the public interest without compensation’. The committee is inviting public submissions on the issue and will make its recommendations in September 2018 (see *Section 11*, below).¹⁴

4 The historical land injustice

The ANC’s call for EWC is ostensibly aimed at speeding up land reform and correcting what Mr Ramaphosa has repeatedly called the ‘original sin’ of land dispossession in South Africa.¹⁵ However, the way in which land was acquired in the colonial era, from 1652 (when

Jan van Riebeeck arrived at the Cape to establish a trading station for the Dutch East India Company) to 1910 (when South Africa became independent from Britain), is far more complex than the simple narrative now being advanced.

In this period, there were forcible land acquisitions not only by whites from blacks, but also by the Xhosa (King Hintsa) from the Khoi and the San; by the Hurutshe from the Tswana; by the Zulu (King Shaka) from the Hlubi, the Ngwane and the Swazi; by the Ndebele (King Mzilikazi) from the Tswana; by the Kgatla from the Po; by the Tswana in the Kalahari area from the Khoi, the San, the Kgalagadi, and the Yei; and by many other groups against their weaker rivals. In addition, after the discovery of gold on the Witwatersrand in 1886, the independent Voortrekker republics in the Orange Free State and Transvaal were defeated by Britain in the second Anglo-Boer War (1899-1902). They were then incorporated, together with Britain's existing colonies in the Cape and Natal, into the Union of South Africa.¹⁶

The historical record is thus complex and often inadequately documented. The land acquired from the 17th to the 19th centuries – not only by force, but often also by treaty¹⁷ – also had far less value than the mining, commercial, industrial, residential, and farming land which has since been developed. The drafters of the Constitution thus agreed that the right to restitution should apply solely to dispossessions carried out in 1913 and thereafter. However, this agreement may now be overturned by the mooted EWC amendment.

The period after 1913 was marked by one of apartheid's greatest injustices – the forced removal of some 2.1m black, so-called 'coloured', and Indian people from their rural land or urban homes during the 1960s and 1970s. These forced removals were intended either to buttress residential racial segregation, or to advance National Party (NP) government's 'separate development' strategy. In terms of this strategy, all blacks were expected to move to supposedly 'independent' ethnic homelands, where they would live, work, and vote. In time, there would then be no more blacks to accommodate politically in 'white' South Africa, as they would all have been stripped of their South African citizenship and given homeland citizenship instead.¹⁸

Other land injustices were also acute. Under the Natives Land Act of 1913 (the 1913 Land Act), the black population, then numbering 4 million, was barred, except with state consent, from purchasing rural land outside the 'reserves' set aside for them. These reserves made up some 7% of the country's total land area, whereas the land then occupied by blacks constituted 12.5% of the total. Under the Native Land and Trust Act of 1936 (the 1936 Land Act), the reserves were gradually increased to 13% of the total land area and incorporated into the ten homelands. By then, however, the black population had increased to 20 million – and overcrowding in the homelands was acute.¹⁹

However, blacks could not easily move to urban areas, as they were barred from owning homes or other land in supposedly 'white' towns and cities and needed permits or 'passes' to live and work there. These harsh restrictions were aimed at encouraging them to move to the homelands. However, after the Soweto Revolt in 1976 the NP government began embarking on various reforms. The prohibition on black urban home ownership was lifted during the late

1970s and early 1980s, when the NP government launched ‘a great housing sale’, first in Soweto and then in other townships. The pass laws were abolished in 1986.²⁰

These land injustices are quite bad enough in their own right, without being exaggerated in any way. Yet the ANC is now distorting the historical record, so as to whip up popular anger and buttress its call for EWC. Whites are now repeatedly being accused of having ‘stolen’ the land during the colonial period (see *Section 6*, below), when in fact many black groups were then equally intent on acquiring land by conquest and treaty. These were also the established and generally accepted means of land acquisition at the time.

Moreover, the 1913 Land Act did not result in ‘white settlers’ expropriating more than 90% of the land’, as the ANC often asserts, for the statute did not take away the ownership rights that blacks already had. (Many had been buying up farms from Afrikaners ruined in the Anglo Boer War, and they were able to keep the land they owned until the ‘black-spot’ forced removals of the 1960s and 1970s.) In addition, recent research shows that blacks bought more than 3 200 farms and other plots under the 1913 Act, which allowed such purchases to proceed with state consent. The number of people who suffered the great pain of forced removals – some of them more than once – is also inaccurately being pushed up, from 2 million to 7.5 million.²¹

The Land Acts of 1913 and 1936 were repealed by the NP government in 1991. The following year, in a further mark of how white attitudes had changed, some 67% of whites voted for the continuation of a reform process sure to result in their loss of power. When the Constitution was being negotiated, moreover, the need for land reform was broadly endorsed, as reflected in the wording of Section 25. However, land reform to date has been tardy, inept, and generally ineffective in helping its supposed beneficiaries. The ANC government is to blame for these failures, but generally declines to acknowledge this. It also overlooks the fact that EWC will not overcome these challenges and will often make them worse.

5 Failures of land reform

As earlier indicated, the government’s objectives regarding land reform have been to restore land to those dispossessed of it under racial laws from 1913 onwards; redistribute 30% of commercial farmland, amounting to some 25 million hectares; and grant secure title to land to those without it. Some progress has been made towards these goals, but:

- tens of thousands of land restitution claims have remained unresolved for some 20 years;
- only some 8.2 million hectares of land have been restored or redistributed;²²
- some 21 million Africans with informal rights to customary plots in the former homelands have yet to obtain secure tenure;²³ and
- most of the 8 million blacks who own formal houses still lack title deeds to them.²⁴

In addition, as the government has itself acknowledged, between 70% and 90% of all land reform projects have failed. Once thriving farms no longer produce and have often reverted to subsistence farming. What this means, as journalist Stephan Hofstatter notes, is that the

government, 'by its own admission, has spent billions of rands in taxpayers' money to take hundreds of farms out of production, costing thousands of jobs and billions more in lost revenue'.²⁵

Though the reasons for these failures are many and complex, five common factors can be discerned. The salience of these issues has recently been reinforced by a government-appointed 'High Level Panel', which reported in November 2017 on the impact of various post-1994 laws, including land reform ones.

5.1 *Miniscule land reform budgets*

In recent years the government has repeatedly claimed that skewed land ownership is the most important of all reasons for persistent poverty and inequality in the country. Yet the budget for land reform has long been set at less than 1% of total budgeted expenditure. The budget for land reform has long been set at only some 1% of total budgeted expenditure. In the current financial year, for instance, R3.4bn has been allocated to land redistribution, but this is only 10% of the R30bn budget set aside for both agriculture and land reform. It also far less than the R12bn allocated to the salaries of officials in these departments. The amount set aside for land restitution is also only 0.2% of total budgeted expenditure of R1.67 trillion in the 2018/19 financial year.²⁶ If land reform is so important, the government could and should have allocated greater revenues to it.

5.2 *Collective or state ownership of transferred land*

Land bought by the government for restitution is transferred, not to individuals within the claimant community, but rather to traditional authorities or communal property association (CPAs). These CPAs, as owners, are supposed to decide how the land is to be used. But the views of community members often differ sharply, resulting in massive conflict within CPAs and paralysing decision-making. In addition, CPA trustees sometimes seem more intent on lining their own pockets than on acting for the benefit of their communities.²⁷

Since 2006, land bought for redistribution has generally been retained by the government, which refuses to transfer it into the individual ownership of emerging black farmers. Instead, under the *State Land Lease and Disposal Policy (SLDDP)* of 2013, small black subsistence farmers are barred from ever obtaining title and must remain perpetual tenants of the government. Bigger farmers, with some capacity for commercial production, must lease their farms for 30 years, and then for another two decades. Only after 50 years have passed may these farmers purchase these farms. In the interim, their leases may be terminated at any time for what the *SLLDP* describes as a lack of 'production discipline'. Any fixed improvements made on the land may then go to the government without any compensation being payable.²⁸

Emerging black farmers thus generally lack title to the land they work. Hence, they cannot use this land as collateral and battle to raise working capital. They are also reluctant to put up fences or otherwise invest in their land because their leases can be terminated at any time. In practice, moreover, many never receive any written agreement at all, making them still more vulnerable to eviction.²⁹

5.3 *Inadequate support for emerging farmers*

The government seems to assume that access to land is sufficient in itself for success in farming. However, land is only the first within a long list of requirements. No less important are experience and entrepreneurship, along with ‘working capital, know-how, machinery, labour, fuel, electricity, seed, chemicals, feed for livestock, security, and water’.³⁰

Many of the people to whom land has been transferred have little knowledge of agriculture, and have simply been dumped on farms with little effective support from the state.

Agricultural extension services are still provided – South Africa, in fact, spends three times the global average on these – but extension officers have little relevant knowledge and manage to visit only 13% to 14% of small farmers, according to the government’s Agricultural Policy Action Plan (APAP) 2015-2019 and other official assessments.³¹

According to Salam Abram, an ANC MP who is himself a farmer and who served on the parliamentary committee for agriculture for twelve years, land reform has been a ‘dismal failure’ because no proper ‘after-settlement’ support has been provided to beneficiaries. Says Mr Abram: ‘The best mentors in South Africa are commercial farmers, but their support, which they have freely offered, has never really been accepted by the government.’ The support provided by commercial farmers has nevertheless been considerable, amounting to some R332m in 2016/17 alone.³²

Also relevant is the fact that small farmers cannot rely on economies of scale and find it particularly difficult to cope with rapidly rising input costs. Labour costs have doubled in the past decade, and so too have transport fees and tariffs for electricity, diesel, and water. Small farmers also battle to find markets, as agro-processors and supermarkets generally prefer to deal with a limited number of big producers with high yields and a consistent capacity to meet their exacting quality standards. Moreover, farming infrastructure is often poor, even for commercial farmers. Stock theft and other crimes have also reached levels that are crippling, especially for small farmers.³³

5.4 *Gross bureaucratic inefficiency*

The restitution process has been dogged by so much inefficiency that officials do not even know how many claims they have received, how many they have gazetted, how many have been wrongly gazetted (and should thus be delisted), and how many have yet to be resolved.

Conflicting figures about land claims abound. In March 2011, for example, the Land Restitution Commission reported that it had settled some 76 200 claims out of the roughly 79 700 it had received by the stipulated deadline of 31st December 1998. This suggested that it had only about 3 500 still needing to be resolved. In 2014, by contrast, the Commission put the number of claims still needing to be resolved at more than 8 500. More recent estimates are higher still, putting the number at 13 000 or 20 500. In November 2017, the report of the High Level Panel said that more than 7 000 claims still needed to be settled, while more than 19 000 had still to be finalised through the provision of agreed land or compensation.³⁴

In addition, officials have often gazetted claims without adequate proof of their validity, or have inflated the claims received. (The most notable example is perhaps in Magoebaskloof in Limpopo, where the six claims in fact lodged by local communities spiralled to more than 600 as gazetted by bureaucrats.) Partly because of such mistakes, land claims have expanded to embrace 70% of Limpopo, half of all sugar farms, and between 30% and 40% of all land under timber. According to the Legal Resources Centre (LRC), a civil society organisation, the Commission has made ‘colossal errors’ in the claims verification process, which need urgently to be fixed. However, little progress has been made in degazetting invalid claims.³⁵

The processing of claims has also been dogged by long delays and gross inefficiency. Writes journalist Stephan Hofstatter: ‘A community leader who had to wait eight years for a reply to a [letter] sums it up for me.’ These long delays have greatly harmed the rural economy, as farmers cannot easily borrow working capital for land which is under claim. They also have little incentive to invest in it. Hence, many farms under claim are no longer worked, and large areas of productive farmland have effectively been frozen. The upshot, says the Centre for Development and Enterprise, a civil society organisation, is that some ‘rural areas are dying from a lack of investment and a lack of economic activity’.³⁶

According to Dr Theo de Jager, a former deputy president of Agri SA (the voice of commercial agriculture in the country): ‘The way the restitution process has been handled has probably done more damage to commercial agriculture in South Africa than the Anglo-Boer War. It has created massive uncertainty, with thousands of farms (often whole districts or industries) caught up in the grip of unfinished claims. No one – neither the current owner nor the claimants – knows who will own the farm in a year from now. So for years no further investment or development takes place.’³⁷

5.5 *Fraud, corruption, and elite capture*

Some officials have also acted fraudulently, inflating the prices which farmers are in fact prepared to accept for their land and then, when the state pays out the larger sums, pocketing the difference. (In one instance, the difference amounted to R12m, for the farmer’s asking price was R8m while the inflated claim put forward by officials was R20m.)³⁸

The land reform process has also often been abused to benefit a relative elite with good political connections – as illustrated by the case of the Bekendvlei Farm in Limpopo. Two ANC ‘insiders’, one of whom had worked at ANC headquarters for ten years, wanted to buy the farm, but lacked the money to do so. After they had spoken to land reform minister Gugile Nkwinti, the farm was bought by the land department in 2011 for R97m. It was then leased to the two men, even though they had no farming experience and were not listed on the department’s data base of possible land reform beneficiaries.³⁹

As the *Sunday Times* reports, Mr Nkwinti allegedly received a R2m fee to ‘facilitate’ the deal. When auditing firm Deloitte was hired to investigate, its initial draft report said Mr Nkwinti was ‘guilty of abusing his position as minister to influence the acquisition of Bekendvlei’ and should ‘be charged with possible corruption’. However, the firm’s final

report, released in November 2016, made no mention of any possible culpability on Mr Nkwinti's part.⁴⁰

Said the *Sunday Times* article: 'Soon after the [two] men took over, there was no money to pay 31 workers on the farm. No wages were paid for five months and the farm became run down. Despite the Department also bankrolling an additional R30m for machinery, salaries, and construction, the once-thriving farm quickly fell into disrepair. About 3 000 cattle, worth R18m, were sold off, machinery disappeared and crops died... After four years of lavish spending and regularly failing to pay farm workers or make lease-agreement payments, Mr Nkwinti was forced to take legal action to evict the men in March 2016.'⁴¹

The High Level Panel has also flagged corruption and elite capture as significant factors in the failures of land reform. In its 2017 report, the Panel found that the focus of land reform had initially been on 'pro-poor redistribution', but that policy had 'drifted' away from this and now showed 'signs of elite capture'. This careful wording understates the extent of the problem. According to Professor Ruth Hall of the Institute for Poverty, Land and Agrarian Studies (Plaas) at the University of the Western Cape, 'elite capture' is a growing problem – and 'urban-based businessmen are increasingly gaining access to farms', while emerging farmers are bypassed.⁴²

5.6 Analysis by the High Level Panel

Summarising the overall failures of land reform, the High Level Panel spoke of 'the poor outcomes and slow pace of restitution' and of 'the divisions and disappointments' the land reform process had generated. Having identified the 'key constraints' on land reform as 'a lack of capacity, inadequate resources, and failures of accountability', the Panel went on:

'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.'⁴³

6 Propaganda in support of the EWC proposal

A propaganda campaign has been mounted in support of the EWC proposal. This involves the constant repetition of various false assertions, so as to conceal the truth and skew public perceptions.

The five most prominent of these false assertions are set out below. Racially-charged rhetoric is also being used to buttress the EWC demand, as illustrated thereafter.

6.1 *There is huge popular demand for farming land*

The government has long claimed that a public ‘clamour’ for access to land is forcing it to step up the pace and extent of land reform. It has also claimed (as set out in the *Green Paper on Land Reform* of 2011) that black South Africans have a strong desire to return to peasant farming; that their whole way of life (in the words of the *Green Paper*) is ‘integrally linked to land’; and that ‘the very foundation of their existence’ depends on their having access to farming land.⁴⁴

More recently, President Cyril Ramaphosa has repeatedly asserted that the ruling party must move ahead with EWC because of a ‘pressing’ and ‘urgent’ hunger for farming land among South Africans.⁴⁵

However, comprehensive opinion polls commissioned by the IRR from 2015 to 2017 have repeatedly shown that the great majority of black South Africans have little interest in land reform. This is not surprising, as the country is already 65% urbanised and most people want jobs and houses in the towns and cities.

The IRR’s first survey, conducted in September 2015, began by asking respondents to identify ‘the two most serious problems unresolved since 1994’. No prompting was provided, leaving people free to identify whatever issues they thought the most important. Yet only 0.4% of respondents identified skewed land ownership as a problem of this kind. In September 2016, when the same question was posed, the proportion flagging this issue as a serious unresolved problem was much the same, at 0.6%. In addition, when people were asked to list ‘the two main causes of inequality’, only 1% of the respondents canvassed in 2015 identified land as such a cause. In 2016, that proportion was lower still, at 0.3%.

In the IRR’s 2016 field survey, moreover, only 1% of black respondents (down from 2% the previous year) said that ‘more land reform’ was the ‘best way to improve lives’. By contrast, 73% of black people saw ‘more jobs and better education’ as the ‘best way’ for them to get ahead.⁴⁶

In similar vein, in the IRR’s 2017 field survey, only 1% of black respondents identified ‘speeding up land reform’ as a top priority for the government.⁴⁷

Even among people who were dispossessed of land under apartheid laws – and were most likely to have a strong wish to see their land restored to them – there has been little interest in land as opposed to cash compensation.

When the land restitution process began in 1994, some 79 700 land claims were submitted by December 1998, as earlier described. In 2013 Mr Nkwinti said that roughly 76 000 of these claims had been disposed of, but only about 5 800 of these successful claimants (roughly 8%) had chosen to have their land restored to them. The remaining 92% had preferred to receive cash compensation instead.⁴⁸

Said Mr Nkwinti: ‘We thought everybody when they got a chance to get land, they would jump for it. Now only 5 856 have opted for land restoration.’ People wanted money because

of poverty and unemployment, but they had also become urbanised and ‘de-culturised’ in terms of tilling land. ‘We no longer have a peasantry; we have wage earners now,’ he said.⁴⁹

The roughly 74 000 successful claimants who could have chosen land rather than money could be seen as respondents in a particularly large opinion poll. That most of them – faced with a real-life choice – opted for cash, rather than land, is telling.

6.2 Blacks own a mere 2% of all land and 4% of agricultural land

The government has long promised a comprehensive audit of the ownership of land by race. An audit of this kind was thus ostensibly finalised in November 2017 and released in February 2018. This audit put the quantity of land in state ownership at 20 million hectares or 16.6% of the country’s total land area, which amounts to some 122 million hectares. However, this conclusion differs sharply from a 1996 state land audit which had put the proportion of land in state ownership at 32 million hectares or 26% of the total.⁵⁰

The main focus of the 2017 audit was on allocating a racial identity to privately owned land. It found, however, that 61% of the country’s total land area was owned by companies, trusts, churches, and other organisations, the racial identity of which could not easily be established.⁵¹ It therefore left this land out of its further analysis.

Turning to the land owned by individuals, rather than by juristic entities, the report stated that blacks owned a mere 1.2% of rural land and only 7% of formally registered erven (plots) in towns and cities. As regards agricultural land, the report said that this constituted some 94 million hectares, of which some 37 million hectares were privately owned by individuals. A racial breakdown of these 37 million hectares showed that whites owned 26.7 million hectares (72%), coloured people owned 5.4 million hectares (15%), Indians owned 2 million hectares (5%), and blacks owned 1.3 million hectares (4%). (Co-owners and others owned a further 1.7 million hectares, or 4%, it said.)⁵²

The report’s conclusion – that blacks own less than 2% of all land and only 4% of agricultural land – leaves out the 61% of land which is privately owned by companies and other juristic entities. It also excludes:

- all land in state ownership,
- all land held in traditional customary tenure,
- the formal houses that are owned by 8 million blacks, but often without their having title deeds, and
- most restitution and redistribution land (the 8.2 million hectares the state claims to have bought, but which cannot be privately owned by blacks because of the government’s insistence on collective or state ownership, as earlier outlined).

To claim that EWC is vital because blacks own these miniscule proportions of South Africa’s total land area is fundamentally misleading. The figures in the audit report are also often so contradictory that it is difficult to understand them at all.

A far more accurate audit of land ownership has been conducted by Agri SA. This audit report (published in November 2017) put the total quantity of farming land owned by the state and ‘previously disadvantaged individuals’ or ‘PDIs’ (defined as people of black, coloured, and Indian descent) as 25 million hectares or 26.7% of the total. Taking land potential into account, it put the proportion of agricultural land owned by the government and PDIs at 46.5%. (This is largely because the land which has long been held in customary tenure is clustered in the fertile, well-watered eastern areas of South Africa.)

The report added that PDIs had privately purchased some 4.4 million hectares of rural land since 1994. This was far more than the 2.2 million hectares of rural land which the Deeds Registry showed the government as having purchased in the same period. Said Agri SA: ‘This is a key indicator that private sector agrarian transformation takes place much faster than government programmes.’⁵³ (For further information on Agri SA’s land audit and its methodology and findings, see *Appendix 1*.)

6.3 *EWC will return the land to ‘the people’*

The ANC has repeatedly claimed that EWC will ‘return’ the land to ‘the people’. The EFF’s Mr Malema makes the same promise, saying: ‘We want to give land to our people. It is going to happen, it will happen in our lifetime, whether they like it or not. The land will be returned.’⁵⁴

However, this is fundamentally misleading. Land expropriated without compensation will be owned by the state, not by individual black South Africans. Nor will it transferred to them thereafter, for the ANC’s policy is to keep land in state ownership.

Since 2013, as earlier noted, the *State Land Lease and Disposal Policy (SLLDP)* has expressly required that the beneficiaries of redistribution land be confined to leasehold tenure for decades, if not for ever. The *SLLDP* shows the fraud at the heart of current land redistribution policies. That same fraud is intrinsic to the EWC idea. EWC offers no redress for past wrongs. It empowers the state, not the individual, and will be used by the state as a patronage tool and to deepen dependency on the ruling party.

6.4 *Skewed land ownership is the primary cause of poverty and inequality*

The ANC often also claims that skewed land ownership is the predominant cause of poverty and inequality. This diagnosis makes little sense. The agricultural sector contributes a mere 2.3% to GDP and provides only about 4% of all employment. Hence, it cannot possibly provide all the jobs and incomes required to lift some 30 million people out of poverty. In addition, the key causes of poverty and inequality are rather:⁵⁵

- a meagre economic growth rate averaging some 1.6% of GDP over the past five years, rather than the 6% or more required;
- one of the worst public schooling systems in the world, despite the massive tax revenues allocated to it;

- a stubbornly high unemployment rate (27%), made worse by labour laws that encourage strikes, deter job creation, and price the unskilled out of work;
- pervasive family breakdown, as a result of which some 70% of black children (as opposed to 30% of whites) grow up without the support and guidance of both parents;
- great inefficiency in the management and maintenance of vital infrastructure and the provision of water, electricity, and other essential services;
- a limited and struggling small business sector, unable to thrive in an environment of low growth, poor skills, and suffocating red tape; and
- a mistaken reliance on affirmative action measures, which (like similar policies all around the world) generally benefit a relative elite while bypassing the poor.

6.5 *EWC will be carefully carried out, so as to promote investment, maintain food security, and avoid land grabs*

Mr Ramaphosa has repeatedly stated that EWC will simply be one of the ‘options’ available to the government to speed up land reform. This suggests that its use will be occasional and selective. He has also stressed that EWC will be carefully implemented so as to avoid any adverse impacts on investment, growth, agricultural production, and food security.⁵⁶

Such assurances mean little in practice. Already, the possibility of an EWC amendment to the Constitution has made potential direct investors more wary. It has also prompted South Africa’s commercial banks – which have extended some R125bn in working capital to farmers – to warn of major risks to the financial sector if EWC is implemented (see *Section 7*, below).

Mr Ramaphosa has further promised that there will be no ‘smash-and-grab’ once EWC is authorised. On the ground, however, the smash-and-grab has already begun. In metropolitan areas, where in-migration from depressed rural areas (and many other countries on the African continent) has been particularly rapid, informal settlements and back-yard shacks have mushroomed. This is already fuelling the unlawful occupation of vacant land in Tshwane, Johannesburg, and other major cities. In Tshwane alone, in the first ten months of 2017, there were more than 4 000 illegal occupations driven by this hunger for housing land.⁵⁷

Urban land occupations have also intensified since Parliament endorsed the EWC motion. Some of these occupations have turned violent, marked by arson attacks and the looting of foreign-owned township shops (spazas). In Hermanus (Western Cape), for instance, demonstrators demanding land burnt down the municipal library and a satellite police station. Confrontations between illegal occupiers and blacks with bonded houses – who fear that their properties will be devalued by informal settlements nearby – are growing too.⁵⁸

Farm invasions have been less common, but have sometimes also occurred. In KwaZulu-Natal, for instance, a crowd 100-strong, armed with pangas and machetes, recently invaded a farm in the Dannhauser area. Police from the nearest station declined to come to the farmer’s help, saying they had no vehicles available. Police from further afield did arrive, but not before the crowd had made off with 100 goats and sheep, tools, and equipment.⁵⁹

These invasions point to a key risk, says Prince Mashele, a political analyst. If the Constitution is changed and the ANC then drags its heels on EWC – saying that it must go slowly to safeguard investment or to maintain food security – the EFF will condemn its tardiness and encourage people to intensify land occupations.

Supporters of the more radical ‘Jacob Zuma’ wing of the ANC may do the same thing. In March this year, for instance, the president of the National Funeral Practitioners’ Association of South Africa (Nafupa SA), Muzi Hlengwa, praised Mr Zuma for having been ‘the first president to ever talk about expropriation without compensation.’ Thanks to Mr Zuma, he went on, ‘whites would see Nafupa SA “radically and forcefully” leading land grabs, “whether it is at the expense of food or at the expense of the economy. It does not matter, we are taking our land back”’.⁶⁰

6.6 Racial rhetoric in support of EWC

Former President Jacob Zuma kicked off this racial rhetoric more than two years ago. In January 2016 he stated that the government should no longer pay for the ‘stolen’ land. This had been ‘taken, not bought’ and was now ‘the key source of poverty, inequality and unemployment’, he said.⁶¹

In November that year, Mr Malema stepped up the accusations, saying: ‘We, the rightful owners, our peace was disturbed by the white man’s arrival here. They committed a black genocide. They killed our people during land dispossession... They found peaceful Africans here. They killed them! They slaughtered them like animals! We are not calling for the slaughtering of white people, at least for now... But 1994 means NOTHING without the land! Victory will be only be victory if the land is restored in the hands of the rightful owners. And the rightful owners are unashamedly black people. This is our continent, it belongs to us.’⁶²

Since November 2017, racial rhetoric by key figures in the ANC and EFF has increased. Examples include:

- ‘Our land was stolen from our forebears, leading to the destruction of the asset base of the African people and resulting in the impoverishment of the black nation’ (Cyril Ramaphosa, then national and ANC deputy president, in November 2017);
- ‘White people are the ones who have looted and even stolen the land from black people’, and yet they complain about the ANC’s plans for ‘radical economic transformation’ (Dr Nkosazana Dlamini-Zuma, then the favoured candidate for the ANC and national presidency, shortly before the Nasrec conference in December 2017);
- ‘Almost 400 years ago, a criminal by the name of Jan van Riebeeck landed in our native land and declared an already occupied land by the native population a no-man’s land. Van Riebeeck... would later lead a full-blown colonial genocide, anti-black land dispossession criminal project, arguing that simply because our people could not produce title deeds, this land, that they had been living in for more than a thousand years, was not their own. Essentially, he was disregarding their humanity,

treating them as part of the animal world’ (Mr Malema, introducing the EWC motion in Parliament in February 2018);

- ‘We need legislation as forceful as war...to ensure that the goal of reclaiming stolen land is attained’ (Ronald Lamola, former deputy president of the ANC Youth League and now a member of the ANC’s inner core, its national working committee, later in February 2018);
- ‘Let us not forget that the land was taken from the masses of our people through the brutal wars of dispossession during the colonial and apartheid eras. These historical injustices resulted in the skewed land ownership patterns along racial lines. This harmed the dignity of the victims of land dispossession’ (Ms Maite Nkoane-Mashabane, minister of rural development and land reform, speaking at a national land summit in March 2018);
- ‘If driven by revenge, we would send dogs, trucks, Nyalas,...and security forces armed with fatal ammunition to forcefully remove white people from the land, as colonialism and apartheid did to black people’ (EFF MP Mbuyiseni Ndlozi during a parliamentary debate on Human Rights Day in March 2018).

Some black journalists have added to the racial rhetoric, with one of the most damning narratives coming from the deputy editor of the *Financial Mail*, Sikonathi Mantshantsha, who wrote: ‘The 1994 settlement was to end a series of wars that had raged in what is now South Africa for more than 300 years. During that time, black people had lost everything to white, European conquerors who had invaded and violently taken over the country. The conquerors’ descendants, in various guises, went on not only to inherit their ill-gotten gains, but also to visit upon the vanquished one of the worst forms of dehumanisation and humiliation ever seen. Colonialism and apartheid, built on black dispossession through armed robberies, were to formalise this white privilege.’⁶³

These statements grossly distort the historical record and the extent to which blacks also acquired land by conquest and treaty in the colonial period (see *Section 4*). They also ignore the preamble to the Constitution, which pays tribute to those who ‘worked to build and develop our country’. In addition, they are premised on a doctrine of collective guilt which has no place in a democracy founded on respect for individual human rights.

7 The likely impact of EWC, if confined to land

In constantly stressing the ‘original sin’ of land dispossession, the ANC and EFF are carefully building up perceptions that EWC will be confined to land, especially farming land. However, as earlier noted, the property clause in the Constitution expressly states that ‘property is not confined to land’. Unless this definition is changed for EWC purposes, property of virtually any kind could become open to expropriation without compensation (see *Section 9*, below).

Assuming, however, that EWC is indeed confined to farming land, its economic ramifications will nevertheless be severe. Mr Ramaphosa may be hoping to confine EWC to ‘unused’ or ‘under-utilised’ agricultural land (see *Section 10*, below) but this will be resisted by many in

the ANC and the EFF. Moreover, if any of this supposedly ‘under-utilised’ land forms part of a farm subject to a bond from a commercial bank, the resulting uncertainty about land title will still have major ramifications for the banking industry.

Cas Coovadia, managing director of the Banking Association of South Africa (Basa), has been forthright about the risks. Commercial banks have extended some R125bn in working capital to commercial farmers, while EWC (even if implemented on a limited scale) would erode property rights significantly. Says Mr Coovadia: ‘Once that happens, land can no longer serve as collateral in support of loans to farmers and agro-processors.’ Existing loans to expropriated farmers might remain unpaid, as farmers would battle to raise the money and banks would no longer be able to foreclose. The increased risk, warns Mr Coovadia, might ‘compel banks to exit the agricultural sector altogether’. Without these loans, farmers would be unable to purchase seed, fertiliser, feed, or implements and would be unable to produce.⁶⁴

‘The resultant decline in food production would not only make food more expensive, but South Africa would need to import food to feed its population, driving up food costs even further.’ Expropriation would also discourage investment in farm technology and innovation, which drives agricultural productivity. ‘The sector would regress, productivity would be compromised, and further job losses would follow’, says Mr Coovadia.⁶⁵

The country might also lose its current benefits under the Africa Growth and Opportunity Act (Agoa), which gives South Africa duty-free access to the lucrative US market. Agoa benefits are restricted to African countries which uphold private property rights, so EWC would put this preferential access at risk. Diminished food production could also put an end to South Africa’s agricultural exports to the European Union and other countries, which totalled more than \$10bn (R130bn at current exchange rates) in 2017.⁶⁶

In addition, South Africa could face further disinvestment, rather than the increased direct investment it so badly needs. Already, foreign direct investment (FDI) into South Africa has decreased from R76bn in 2008 to R17.6bn in 2017. Mr Ramaphosa has thus recently appointed four ‘special envoys’ to help generate \$100bn (R1.2 trillion) in direct investment, both local and foreign, over the next five years. However, direct investment is likely to dry up as soon as uncompensated farm expropriations begin.⁶⁷

Says IFP leader Mangosuthu Buthelezi: ‘I would not invest my money in a country which does not compensate landowners. Only an insane businessman would invest here.’ This in turn, he cautions, would restrict growth, increase unemployment, and ‘exacerbate poverty’. Mosiuoa Lekota, leader of the Congress of the People (Cope), warns of this too, saying EWC will ‘destabilise’ the country and drive investors away.⁶⁸

Depending on the scale of its implementation, adds Mr Coovadia, EWC could also pose ‘systemic risks’ to the financial sector. The overall exposure of banks to the agricultural sector is significant (R180bn, including the Land Bank), so ‘question marks over how the debt will be handled’ could erode confidence in the banking system. The consequences would be even more severe if EWC was not confined to farming land but extended to urban land and other forms of property.⁶⁹

Says Mmusi Maimane, leader of the official opposition, the Democratic Alliance (DA): ‘You can have a growing, thriving economy, or you can have expropriation. But you absolutely cannot have both... We are the party for the protection of all individual rights, cardinal among those the right to security of one’s own property and the right to enjoy the fruits of one’s own labour. We regard the attempt to change the Constitution as nothing but a populist effort to scapegoat the Constitution for the failure of the ANC...to reform land ownership.’⁷⁰

Already, moreover, the economy is performing far below its potential. For some five years now, South Africa’s growth rate – which used closely to track the global growth performance – has dipped well below the growth rates being achieved in both emergent and developed economies. In per capita terms, the real growth rate in South Africa has been negative for the past four years. The labour absorption rate has declined to around 40%, while the official unemployment rate (at 27%) is one of the highest in the world.⁷¹

In the past ten years, public debt has soared from R630bn (26% of GDP) in 2008 to R2.5 trillion (54% percentage of GDP) in 2017. (Overall public debt is also higher still if government guarantees, now standing at some R450bn, for the ballooning debts of various mismanaged parastatals are factored in.) Two ratings agencies, Fitch Ratings and S&P Global Ratings, have already downgraded the country’s sovereign debt to sub-investment or junk status. If Moody’s Investors Service were to follow suit, South Africa would be excluded from the Citi World Government Bond Index, triggering a major outflow from the bond market and further hobbling the economy.⁷²

The optimism triggered by the new Ramaphosa administration persuaded Moody’s not to downgrade South Africa in March 2018, as it would probably otherwise have done. However, Moody’s has warned that downgrades might yet follow if the country fails to stimulate the economy through structural reforms and by inspiring investor confidence. At this critical juncture, EWC thus poses a particularly serious risk to an already fragile economy.⁷³

The ANC is trying to create the impression that the economic fall-out will be limited because EWC will be used only relatively rarely. However, an EWC amendment to the Constitution could in fact encourage the government to take land as ‘custodian’ and to embark on a host of ‘regulatory’ expropriations, as described below.

8 The ‘custodianship’ issue

South Africa’s valuable mineral resources – two-thirds of which used to be privately owned – have already been vested in the ‘custodianship’ of the state under the Mineral and Petroleum Resources Development Act (MPRDA) of 2002. In similar vein, the National Water Act of 1998 makes the government the ‘public trustee’ of the nation’s water resources, so effectively extinguishing the private ownership of water the common law had long allowed.

The government has already sought to extend the custodianship concept to land. In 2014 it published a bill – the Preservation and Development of Agricultural Land Framework Bill (the Agri Land Bill) – under which all agricultural land was to be vested in the ‘custodianship’ of the Department of Agriculture, Forestry, and Fisheries. On this basis, the

private ownership of farms would effectively be extinguished, as had already happened with mineral resources and water. Farmers would be accorded ‘a right to farm’, but would have to do so on the terms set by the minister. Farmers, like miners, would soon find themselves labouring under increasingly intrusive and costly BEE requirements, which in time might make farming as ‘uninvestable’ as mining has become.

The custodianship proposal was dropped from a 2016 version of the Agri Land Bill. But the EFF has continued to push for the government to take custodianship of all rural and urban land. Says Mr Malema: ‘Every title deed will be meaningless and the state will be the custodian of the land. The government will then outline what use the land will be for.’⁷⁴

An EFF policy document elaborates on what the party has in mind, saying:⁷⁵

- ‘all land should be transferred to the custodianship of the state in a similar way’ to what has happened to mineral resources under the MPRDA;
- ‘this transfer should happen without compensation and should apply to all South Africans, black and white’;
- ‘those who are currently using the land or intend using land in the immediate future will apply for land-use licences’, which should be granted only if the state approves the ‘purpose’ for which the land is to be used;
- These licences will last ‘for a maximum of 25 years’ and will be renewable with state approval, but the state will also have ‘the right to withdraw the licence and reallocate the land for public purposes’; while
- the 25-year maximum will apply to ‘all land leases’, whether these are sought by individuals or ‘by private corporations’.

According to EFF secretary general Goodrich Gardee, once all land has been vested in the custodianship of the state, ‘preference can then be given to black people who have been excluded from having rights over land for generations’. This will also save the state from having to deal with tens of thousands of land claims, all of which will be slow and costly to resolve under the current ‘excessively litigation-based land reform programme’.⁷⁶

If the Constitution is amended to allow EWC, the state may seek to embark on the uncompensated ‘custodial’ taking of the 8 million houses owned by blacks, the 1 million homes owned by whites, the millions of customary plots held by some 21 million blacks living in the former homelands, and all privately-owned mining, industrial, and commercial land. The resulting damage to all South Africans would, however, be enormous.

The ANC currently finds it politically expedient to distance itself from this custodianship demand and let the EFF make the running on it. However, both the ANC and the EFF share the same ideological convictions and the same ultimate goals (see *Section 13*, below). In addition, the ANC has already endorsed the custodianship idea via the Agri Land Bill of 2014, while its November 2017 land audit effectively does so too by proposing that all land be vested in the state ‘as the common property of the people of South Africa’.⁷⁷

Behind the scenes, moreover, the ANC has long identified the custodianship concept as a useful way of achieving EWC. Its thinking here is based on a majority ruling of the Constitutional Court, which was handed down in 2013 in the *Agri SA* case. This majority judgment, penned by Chief Justice Mogoeng Mogoeng, found that ‘the assumption of custodianship’ by the state under the MPRDA is different from the state’s ‘acquisition of ownership’, which is the hallmark of expropriation. Hence, the taking of custodianship did not count as an expropriation – and no compensation was payable under the property clause. (This clause may be seen as distinguishing between a ‘deprivation’ of property at the hands of the state and an ‘expropriation’, and as requiring compensation only for the latter.)⁷⁸

This judgment may not, however, suffice to establish a general principle of law allowing the state to take custodianship of land without compensation. Chief Justice Mogoeng was dealing only with the particular facts before him, as he took pains to stress. In addition, three of the court’s judges distanced themselves from his ruling, so weakening its authority. (One judge cautioned that the acquisition of ownership by the state is not ‘necessarily’ the hallmark of expropriation. The two others warned that the chief justice’s approach could result in the ‘abolition’ of all private property rights without compensation having to be paid, provided this was done by the state ‘as custodian of the country’s resources’.)⁷⁹ An EWC amendment to the Constitution would thus be useful in negating these caveats and turning the majority judgment into an unassailable rule beyond the reach of any legal challenge.

In the interim, the ANC has crafted the Expropriation Bill in a manner calculated to allow the taking of custodianship without compensation. The Bill defines expropriation as ‘the compulsory acquisition of property’ by the state, whereas the ‘assumption of custodianship’ is something different, according to Chief Justice Mogoeng. Some senior figures in the ANC and the South African Communist Party (SACP) thus believe that EWC can be achieved under the Expropriation Bill and without having to amend the Constitution (see *Section 10*, below). But the ANC may decide that an EWC amendment is still required, as it would preclude any constitutional challenges to the validity of uncompensated custodial takings.

9 Regulatory (or indirect) expropriations

The Bill’s definition of ‘expropriation’ is also calculated to allow ‘regulatory’ (or ‘indirect’) expropriations to proceed without compensation having to be paid. A regulatory expropriation arises where the state does not itself acquire ownership, but its regulations nevertheless deprive the owner of many of the usual benefits and powers of ownership.

The ANC is already planning to implement a number of regulatory expropriations, as set out in various bills and policy proposals. An EWC amendment to the Constitution – particularly one which preserves the current definition of property as ‘not being limited to land’ – would allow all these regulatory takings to proceed without any risk to the government of compensation having to be paid.

The uncompensated regulatory expropriations the ANC intends to bring about, and which an EWC amendment would facilitate, include the following:

- 9.1 ***a 51% ‘indigenisation’ requirement for foreign private security companies*** operating in South Africa, under the Private Security Industry Regulation Amendment Bill of 2012, which has already been adopted by Parliament and needs only the president’s assent to be enacted into law. Under this measure, these companies – which are defined broadly enough to include firms such as Fedex, which transport security equipment – must transfer 51% of their equity or assets to South Africans within a specified and short period. No compensation would be paid for this loss of majority control, or for the depressed prices likely to arise from these forced sales;
- 9.2 ***price and export controls on mineral products*** ‘designated’ for local beneficiation or otherwise regarded as ‘strategic’, under the MPRDA Amendment Bill of 2013, which is currently before Parliament. These controls will prevent mining companies from selling their mineral products at market prices, either locally or abroad, but no compensation would be paid for the losses which would result;
- 9.3 ***a 51% BEE ownership requirement for new prospecting rights*** under the revised mining charter gazetted in June 2017 (and currently on hold pending negotiations between the Minerals Council South Africa, previously the Chamber of Mines, and mining minister, Gwede Mantashe). Mines already in operation, which often need new prospecting rights to reap the full benefit of their investments, would not be compensated for any resulting losses. Moreover, if the ANC were to introduce a 51% BEE ownership requirement on the holders of all mining rights, as it has long been intending to do, no compensation would be paid for the loss of majority control or the depressed prices at which many of the resulting BEE (or disinvestment) deals would have to be done;
- 9.4 ***a 51% BEE ownership requirement for coal mining companies*** wanting to sell coal to Eskom, a parastatal which owns and operates virtually all coal-fired power stations in the country. Eskom has imposed this requirement even though the current BEE ownership target in the mining sector is 26%. No compensation would be payable for the loss of majority control, or for depressed prices on forced sales;
- 9.5 ***increasing pressures for 51% BEE ownership in many other sectors*** of the economy under the revised generic codes of good practice that took effect in May 2015 – and again without compensation being paid for any resulting losses;
- 9.6 ***comprehensive price controls under the proposed National Health Insurance (NHI) scheme***, which will give state officials the power to set fees for all specialists and other health practitioners and to determine the prices of all medicines, medical devices, consumables, and other goods and services. An NHI bill is soon to be put before Parliament, along with a medical schemes bill under which the state will dictate what benefits these companies may provide and bar them requiring any co-payments from members. No compensation would be paid for the losses resulting from these new controls. Moreover, once the NHI is fully operative and all private hospitals, pharmaceutical companies, health practitioners, and other suppliers become

subject to the government's price controls, no compensation would be paid for these resulting losses either;

- 9.7 ***compulsory licences over patented medicines***, under the Intellectual Property (IP) Policy of 2017, Phase 1 (recently approved by the Cabinet). Under this policy, the state pharmaceutical company, Ketlaphela, will be able to produce generic copies of patented medicines for sale both domestically and across the African continent. In return, it would pay royalties set as low as 3% of the price of the copied products, but again no compensation would be payable;
- 9.8 ***prescribed assets for pension and other asset management funds***, so as to compel them to invest in the bonds of Eskom and other parastatals now hovering on the brink of bankruptcy after years of mismanagement and corruption. This proposal was endorsed by the ANC at its Nasrec conference,⁸⁰ while again no compensation would be paid for any losses which were to result; and
- 9.9 ***compulsory divestments to smaller BEE players by companies in concentrated markets***, as proposed by the Competition Amendment Bill of 2017. This is ostensibly needed to counter the dominance of a small number of firms with 'an adverse effect on competition'.⁸¹ Again, no compensation would be payable for losses resulting from forced sales.

To help pave the way for these regulatory expropriations, the government has already cancelled its bilateral investment treaties (BITs) with the United Kingdom and 12 European countries. Compensation for such expropriations will still have to be paid to existing investors from these countries during the 10- to 20-year 'sunset' periods recognised in the cancelled BITs. However, new investors have already been stripped of the protection against regulatory takings which these BITs used to provide. The government has also persuaded the Southern African Development Community to remove equivalent protections against regulatory expropriations from the SADC Protocol on Finance and Investment.⁸²

10 EWC within the Constitution

With criticisms of the proposed EWC constitutional amendment mounting, some senior figures in the ANC and the SACP have argued that the property clause does not need to be changed. In their view, the 'just and equitable' compensation which Section 25 requires can often be set at zero, which means that EWC can be achieved without changing the Constitution.

Jeremy Cronin, deputy minister of public works and a former first deputy general secretary of the SACP, is a strong proponent of this perspective. According to Mr Cronin, rather than amending the Constitution, the Expropriation Bill should instead be changed to specify the circumstances in which the state may 'withhold compensation'. This could be done for 'abandoned buildings, unutilised land, property held unproductively and purely for speculative purposes, and under-utilised property owned by public entities', Mr Cronin says.⁸³

ANC MP Mathole Motshekga has also supported this idea, arguing that the Expropriation Bill could indeed achieve the EWC goal. However, he says, the ANC still needs to decide whether an EWC amendment would not have the advantage of making the expropriation process ‘easier and less onerous’.⁸⁴

In March 2018 land reform minister Ms Nokoana-Mashabane made it plain that she planned to push ahead with a test case on EWC under the current property clause. Speaking at a two-day meeting on land reform (which was convened in March 2018 at the request of the Constitutional Review Committee), the minister said that ‘there are elements in the Constitution which already allow for expropriation of land without compensation’. The ANC had not used these in the past, but the Ramaphosa administration now ‘had the will to go ahead’ – and her department had already identified the land it planned to expropriate.⁸⁵

Said the minister: ‘So we are coming. If we need to expropriate your land, we are going to do that because it’s in the Constitution... We can’t wait for the constitutional review process.’ Mr Cronin has encouraged her to proceed, saying she should not be afraid of a court challenge. Ronald Lamola, a former deputy president of the ANC Youth League who now serves on the ANC’s national working committee, has also urged the ruling party to embark on EWC without delay as ‘the Constitution allows it to happen’.⁸⁶

Former Constitutional Court judges Dikgang Moseneke and Albie Sachs have also suggested that the state would not have to pay compensation on expropriation, provided this was ‘just and equitable’ under the existing terms of Section 25. Geoff Budlender SC, a former director general of land affairs, agrees, saying ‘it is not difficult to think of situations where a strong case can be made for no compensation to be paid’.⁸⁷

According to these views, along with Chief Justice Mogoeng’s majority ruling in the *Agri SA* case, EWC is already permitted where the government:

- takes ownership of land or other property in circumstances where zero compensation would be ‘just and equitable’;
- ‘assumes custodianship’ of land and other natural resources; and
- embarks on regulatory expropriations via price controls, indigenisation requirements, and 51% BEE ownership rules, as outlined in *Section 9*.

The ANC’s national executive committee (NEC) – which is the organisation’s highest decision-making body between its national conferences – has since decided (at a meeting held in late May 2018) that the ruling party must press ahead with a test case on EWC under the current property clause. This will be done to ‘test the argument that the Constitution [already] permits expropriation of land without compensation’. If it becomes apparent that Section 25 ‘impedes implementation’ of EWC, then ‘the Constitution will be amended’.⁸⁸

It seems unlikely, however, that the ANC will wait for a test case to wend its way through the courts. The same NEC decision also ‘adopted’ the ‘recommendations’ of an earlier ANC land summit, which had said that the ruling party must ‘proceed to affirm the amendment of Section 25(2)(b) [of the Constitution] to immediately effect the principle of expropriation

without compensation'.⁸⁹ Section 25(2)(b) is the sub-clause that requires the payment of compensation on expropriation. The implications are two-fold. First, the ANC is still intent on a constitutional amendment, despite its disclaimers to the contrary. Second, it has no intention of changing Section 25(4), which is the sub-clause defining property as 'not being limited to land'.

According to the NEC statement, the ANC will now 'immediately pass' the Expropriation Bill, as earlier described. It will also swiftly enact a 'Land Redistribution Bill' (still to be drafted), which will allow land transfers to proceed without proof of prior dispossession. Moreover, the 30% target for redistribution is to be reassessed, says land reform minister Ms Nkoana-Mashabane, as this was simply 'a floor target' and not the final goal.⁹⁰

11 The mandate given to the Joint Constitutional Review Committee

On 27th February 2018 the National Assembly adopted a motion (originally put forward by the EFF and then amended in some ways by the ANC) which 'instructed' the Joint Constitutional Review Committee to 'review Section 25 of the Constitution and other clauses where necessary to make it possible for the state to expropriate land in the public interest without compensation'.⁹¹

During this process, the committee must 'conduct public hearings' so as to 'get the views of ordinary South Africans' and others 'about the necessity of...expropriating land without compensation'. The committee must also 'propose the necessary constitutional amendments where applicable with regards to the kind of future land tenure regime needed'. The EFF had wanted to include a clause on 'the necessity of the state being a custodian of all South African land', and this wording might open the door to wording along these lines.⁹²

The motion 'notes' that 'South Africa has a unique history of brutal dispossession of land from black people by the settler colonial white minority', and says this has 'helped design a society based on exploitation of black people and sustenance of white domination'. Ignoring the many weaknesses in the state's 2017 land audit (see *Section 6.2*, above), it also 'acknowledges' that 'black people own less than 2% of rural land and less than 7% of urban land'. It thus 'recognises' that 'current policy instruments', including Section 25 of the Constitution, 'may be hindering effective land reform'. (This is different from the original EFF motion, which stated that Section 25 was 'at the centre of the present crisis'.)⁹³

The motion goes on to quote from Mr Ramaphosa's 'State of the Nation Address' at the opening of Parliament in February 2018. In this address, as the document says, the president 'recognised the original sin of land dispossession'. He also 'made a commitment that the government would continue the land reform programme that entails expropriation of land without compensation'. This programme would be 'implemented in a manner that increases agricultural production and improves food security'. However, it would also 'ensure that the land is returned to those from whom it was taken under colonialism and apartheid'.⁹⁴

As earlier noted, the motion was adopted by 241 votes to 83. Only the DA, Cope, the African Christian Democratic Party, and the Freedom Front Plus opposed it.⁹⁵

In normal circumstances, the Joint Constitutional Review Committee – which comprises members of both the National Assembly and the National Council of Provinces (NCOP) – meets once a year in May to deal with submissions sent in by the public and propose any constitutional changes it thinks appropriate. On the EWC motion, however, the committee has called for written submissions (to be sent in by an extended deadline of 15th June 2018) and plans hold at least three consultative public meetings in each of the nine provinces. It is expected to make its recommendations in September 2018. It was only in response to widespread criticism that the original deadline for written submissions (31st May 2018) was extended by a fortnight to give the public the 60-day period usually allowed for submissions on ordinary legislation. However, given the enormous importance of the constitutional amendments now under consideration, a much longer period should have been allowed (as set out in *Section 2* of this submission, below).⁹⁶

12 Requirements for amending the Constitution

The ANC and EFF seem to assume that an EWC amendment can be adopted in the same way as other amendments to the Bill of Rights. In general, such an amendment may be adopted only with the support of ‘at least two thirds’ of the members of the National Assembly. It must also be endorsed by six of the nine provinces represented in the National Council of Provinces (NCOP).⁹⁷

However, the ANC and EFF are incorrect in their implicit assumption that a two-thirds majority will suffice in this particular instance. In the words of Paul Hoffman SC, director of Accountability Now: ‘Section 74(1) of the Constitution provides that the foundational values of the new order cannot be amended unless the proposed amendment enjoys the support of 75% of the National Assembly’ as well as six of the nine provinces in the NCOP.⁹⁸

An EWC amendment to the Constitution will undermine the foundational values of the Constitution. Those foundational values, as set out in Section 1 of the Constitution, include not only the ‘supremacy of the Constitution’, but also ‘the supremacy of the rule of law’. As Advocate Hoffman adds: ‘The rule of law is regarded as sacrosanct in our constitutional dispensation’. Upholding the rule of law is also needed to secure other foundational values, including respect for the inherent ‘human dignity’ of all, the ‘achievement of equality’ and ‘the advancement of human rights and freedoms’.⁹⁹

In addition, the World Justice Project has devised an ‘internationally accepted definition of the rule of law’, which it uses as the basis for its respected annual *Rule of Law Index*. According to this definition, the rule of law requires ‘clear, publicised, stable, and just laws’, which are ‘applied evenly’ and which ‘protect fundamental rights, including the security of persons and property’.¹⁰⁰

‘Security of property rights is a basic tenet of the rule of law’, concludes Adv Hoffman. A constitutional amendment which derogates from the security of property rights thus undermines the rule of law, the supremacy of which is guaranteed by Section 1 of the Constitution. It follows that an EWC amendment can be adopted only with a 75% majority in the National Assembly.¹⁰¹

13 The real reasons for the EWC proposal

The supposed need to speed up land reform is not the real reason for the EWC proposal. Rather, the ANC is using the historical land injustice as the thin edge of the wedge to push ahead with its long-standing plans to weaken property rights in a host of spheres.

From as far back as 1969, the ANC's real aim has been to gain state power (as it did in 1994) and then use this to implement a 'national democratic revolution' (NDR). Though it first endorsed the NDR some 50 years ago, the ANC regularly recommits itself to this revolution. It has done so at each of the five-yearly national conferences it has held since 1994 – and it did so once again at its Nasrec conference in December 2017.

The NDR is a Soviet-inspired strategy, which the ANC's allies in the SACP and the Congress of Trade Unions (Cosatu) openly identify as offering the 'most direct' route to a socialist and then communist future. The ANC itself is more circumspect about publicly embracing this goal as this would erode its popular appeal. However, the ANC has also been dominated by the SACP since the 1940s, and remains so to this day. Both organisations play down the extent of the SACP's control, as open acknowledgement of this would also jeopardise support for the ANC 'horse' the SACP has successfully ridden into power without ever having to stand for elections in its own right.

In addition, the ANC remains deeply committed to the Freedom Charter of 1955, which it continues to describe as its 'lodestar'. The Freedom Charter (which was drawn up with significant input from the SACP) declares that 'all the land shall be re-divided among those who work it'. It also states that 'the mineral wealth beneath the soil, the banks, and monopoly industry shall be transferred to the ownership of the people as a whole'. According to the SACP, implementation of the Freedom Charter will provide 'an indispensable basis for the advance of our country along non-capitalist lines to a communist and socialist future'.¹⁰²

The ANC's national conferences invariably adopt a '*Strategy & Tactics*' document setting out the key goals of the NDR and the mechanisms to be used in attaining them over the next five years. One of the goals set out in these *Strategy & Tactics* documents is the 'elimination' of existing 'property relations', which the ANC identifies as being 'at the core of all social systems'. The free market system depends on private property rights, whereas a socialist one requires comprehensive state ownership and control of all the means of production (at least until such time as the communism is attained and the state supposedly withers away). Property relations are thus vital, which means that any attempt at major redistribution is sure to spark a strong counter-reaction. These 'tensions', says the ANC, 'require dexterity in tact and firmness in principle' so that the proposed redistribution is not halted and the NDR is not derailed.¹⁰³

In recent years, the steady undermining of property rights has been cloaked in the language of 'radical economic transformation' or RET. This concept is essentially the most recent iteration of the NDR. The ANC defines RET as 'a fundamental change in the structure, systems, institutions, and patterns of ownership, management and control of the economy in favour of all South Africans'. Most people assume that what the ruling party has in mind is an

acceleration of BEE, so that the current, supposedly ‘white’, ownership and management of businesses is increasingly transferred to black entrepreneurs and industrialists. However, the real goal now – as it has been for at least five decades – is to transfer the ownership of all important assets from the private sector to the state.

The EWC proposal is integral to these NDR goals. It is not at all about providing redress to black South Africans for past land injustices. Its real aim is to give the ANC the power to embark on a host of custodial and regulatory takings, as earlier outlined. This will incrementally extend the state’s power over the economy and lay the foundation for the ultimate transition to socialism and then communism.

The call for EWC is thus simply the latest development in an incremental NDR strategy which the ANC and the SACP have been steadily pursuing ever since they gained power in 1994. It is being strongly pushed at this juncture because the revolutionary alliance believes that the global and domestic ‘balance of forces’ favours its success. In the global arena, China and Russia are becoming stronger and the West is weakening. In South Africa itself, rising expectations of a better life can no longer be fulfilled with the growth rate so low, the unemployment rate so high, and corruption and inefficiency so widespread. In addition, enough time has passed since the political transition and Nelson Mandela’s death for the NDR assertion that Mr Mandela ‘sold out’ during the constitutional negotiations to gain ground among jobless and disaffected youth.

EWC also offers some immediate political gains. It is already proving highly successful in distracting attention from ANC corruption and gross inefficiency in the run-up to the 2019 general election. In addition, it offers a useful way of bringing the EFF ‘home’ and so avoiding any further splitting of the ANC vote.

Also politically useful is the fact that land expropriated without compensation will not be handed to ‘landless blacks’. Instead, it will be held by the state and used by the ANC as a patronage tool. This will give ANC cadres increased opportunities for personal enrichment and strengthen their loyalty to the ruling party. State control will also cement the population’s dependency on the ruling party and help it maintain its grip on power.

14 President Cyril Ramaphosa’s views on the EWC proposal

Though the ANC publicly proclaims its commitment to the NDR at regular intervals, many journalists and other commentators discount the significance of its expressed intentions. Given the ‘Ramaphoria’ that has arisen since the Nasrec conference, many further assume that Mr Ramaphosa is a pragmatic businessman who is ‘playing a long game’ in order to isolate the radical faction within the ANC and so neutralise the EWC proposal.

According to this perspective, Mr Ramaphosa was pushed into endorsing EWC because his margin of victory at Nasrec was so narrow (179 votes) and the need to unite a deeply divided ANC was so strong. Many commentators thus assume that any ‘scaremongering’ around EWC is unwarranted, as Mr Ramaphosa will successfully limit its scope and potential damage. In particular, he will ensure that EWC is used only for ‘unused’ and ‘unproductive’

land, which can be taken without depriving people of their livelihoods and without restricting food production or undermining investor confidence.¹⁰⁴

However, even if these qualifications are initially written into the relevant rules, this will not compensate for the damage to business and investor confidence that is sure to arise from authorising the government to embark on EWC. In practical terms, disputes as to whether particular farms are at least partially ‘unused’ or ‘under-utilised’ are also sure to abound. So too are disputes as to how much land individual farmers in fact need to maintain their livelihoods and how much is excess to their requirements (anything above the ANC’s proposed land ceilings, for example?). Inevitably, the qualifications will prove unworkable in practice and will be removed or eroded in due course.¹⁰⁵ Moreover, once the principle of EWC has been conceded and written into the Constitution (or the Expropriation Bill), the terms on which this may be done can easily be changed.

This may also be the cynical intention behind Mr Ramaphosa’s emphasis on these supposed safeguards. As the ANC is well aware, the EWC threat to property rights is sure to provoke a strong counter-reaction, which needs to be handled with ‘dexterity in tact’ (an apparent willingness to compromise) and ‘firmness in principle’ (a determination to secure EWC at the end of the day).

Mr Ramaphosa, as a long-standing and senior ANC leader and a former general secretary of the National Union of Mineworkers, must be well aware of this tactic. During the constitutional negotiations, moreover, he reportedly endorsed this approach, telling the late Mario Orsini-Ambrosini that the ANC was pursuing a 25-year programme against white (private) property rights. This would be implemented in the same way as one might boil a frog, he said. The temperature would be raised very slowly so that the frog would not be prompted to jump out of the water before it had boiled. In this way, ‘the black majority would pass laws transferring wealth, land, and economic power from white to black slowly and incrementally, until whites lost all they had gained in South Africa, but without taking too much from them at any time to cause them to rebel or fight’.¹⁰⁶

In addition, if Mr Ramaphosa is indeed playing ‘a long game’ aimed at neutralising the EWC proposal, he is going about it in a strange way. Since he gained the presidency, he has repeatedly spoken of the ‘original sin’ of ‘the violent land dispossession of our people’s land and its wealth’. He has also stressed that there can be ‘no backing down on land’, that the time for ‘decisive’ action has come, that EWC will help usher in a ‘garden of Eden’, and that the state’s 2017 land audit accurately puts black ownership of agricultural land at a meagre 4%.¹⁰⁷

If the president were really trying to pursue the supposed long game, there would be many different points that he could reiterate so as to strengthen the more moderate element within the ANC and weaken the radicals. He could stress, among other things:¹⁰⁸

- that expropriation is not needed when millions of hectares of state-owned land are available for redistribution and 20 000 farms are up for sale;

- that EWC will not address the reasons for land reform failures, as identified by the High Level Panel, and that these problems must be overcome before any attempt is made to speed up land reform;
- that organised agriculture has repeatedly made practical proposals to help develop a prosperous black agricultural sector, and that these offers should be pursued before EWC is tried;
- that the state's 2017 land audit is incorrect and that 47% of all high potential farm land is already in black hands; and
- that putting millions of new farmers onto tiny farms that they do not own is no solution to poverty or inequality.

However, Mr Ramaphosa is saying none of these things. Like other senior figures within the ANC, he seems to accept that 'the principle' of EWC has already been decided, and that 'the modalities' of its implementation are all that remain to be considered.¹⁰⁹

15 Lessons from Venezuela

In assessing the likely ramifications of the EWC proposal, it is vital to learn from the lessons from Venezuela. Venezuela, with its significant oil and mineral wealth, had the highest per-capita income in Latin America in the 1980s. For many years after 1999, when Hugo Chavez came to power, the country benefited from a sharp rise in the oil price. This increased from \$20 per barrel in the late 1990s to a peak of \$145 in 2008. Though it declined thereafter, it remained above \$80 until October 2014, when it suddenly dropped. Elevated oil prices over a prolonged period provided the country with an extraordinary revenue bonanza of more than US\$1 trillion between 2002 and 2012.¹¹⁰

For roughly a decade, oil revenue kept the Venezuelan economy afloat even as its productive capacity was destroyed through land and other expropriations. However, as political analyst John Endres writes, 'When the oil price started dropping from its August 2014 level of \$100 a barrel, the fatal flaws of "21st century socialism", as Chavez called it, became glaringly obvious.'¹¹¹

South Africa has no equivalent of Venezuela's oil revenues to shield it even for a short time from the adverse consequences of uncompensated expropriations. The lessons from Venezuela are nevertheless particularly important here. This is partly because senior figures in the ANC and the EFF seem to regard Venezuela as an appropriate model for South Africa to follow. In addition, there are strong parallels between the stated rationale for land expropriations in Venezuela and what is now being said in South Africa. Moreover, when ANC and SACP leaders here emphasise that EWC will apply solely to 'unused' or 'unproductive' land, this echoes both the language and the laws that were used in Venezuela to justify land expropriations that soon became very much more extensive. The ANC's emphasis on the need for an 'agrarian revolution' to accompany land redistribution also echoes developments in Venezuela.

In 1999 Chavez amended the Constitution to allow the state, 'for reasons of national convenience', to acquire complete control of all oil and hydrocarbon activity and other

private assets of public interest. In 2001 he introduced a Land Law which permitted the expropriation of large tracts of land or *latifundia*. The stated rationale for this law was that the poor owned only 6% of the land, while the top 5% owned 75% of it. The Bolivarian government thus emphasised the need to ‘break up large, idle land estates and allow peasants to gain ownership of the land they cultivate’.¹¹² This is strongly reminiscent of the ANC’s (inaccurate) claim that black South Africans own only 4% of agricultural land, and that this land must now (as the Freedom Charter states) be ‘shared among those who work it’.

The government at first promised to compensate private owners for improvements at market rates in the local currency. But former owners wanted payment in US dollars and had little interest in receiving devalued bolivars or government bonds, whose value would decline as inflation rose. In time, however, the government decided that it was not obliged to pay at all for the investments made in expropriated land by former landowners.¹¹³

Targeted *latifundia* were initially defined as ‘high quality idle agricultural land over 100 hectares’, or ‘lower quality idle agricultural land over 5 000 hectares’. In 2011, however, the government changed the meaning of *latifundia* to ‘a piece of land larger than the average in its region, or land not producing at 80% of its productive capacity’. This redefinition of *latifundia* had ‘sweeping consequences in...regulating production on private farms and limiting the size of individual landholdings [so as] to redistribute unused lands to peasant families’.¹¹⁴

The government also encouraged land invasions, which often had the effect of reducing productivity to the point where the affected farms would qualify for expropriation. It also introduced a ‘one cow per hectare’ rule (which has echoes of South Africa’s ‘two cow per hectare’ policy). Farms with less than one cow per hectare were deemed unproductive and were expropriated for that reason. But farmers who increased the number of their cattle, so as not to fall foul of the rule, were then deemed to be overburdening the land. Since this would in future erode its productivity, these farmers were expropriated too. The result was a debilitating uncertainty which made virtually every farmer potentially vulnerable.¹¹⁵

New farmers were not given title to land, despite the government’s promises that this would be done. Instead, they were granted land on a provisional basis, which meant their land grants could be revoked if they failed to meet the state’s production targets. Land was also allocated according to political criteria, with those who supported the government (*chavistas*) far more likely to receive it than those who were apolitical or supported the opposition. Writes Michael Albertus in *Foreign Policy*: ‘This helped generate a set of politically reliable clients, who are favoured through land grants, and who then helped the regime perpetuate itself in power by voting for it in elections.’¹¹⁶

The redistribution programme was accompanied by a focus on ‘food sovereignty’: the idea that Venezuela should gain control over its own food production so as to reduce dependency on foreign capital, imports, and technology. This was presented as ‘a complete policy solution’ that would stimulate local production and marketing and thereby ‘reduce rural poverty...and better integrate food production chains and markets’.¹¹⁷

Land and grants were provided to small farmers, particularly agrarian cooperatives with a focus on social production. In the interests of ‘food sovereignty’, Chavez could also demand, for example, that a private cattle ranch should stop producing meat and instead install a sponsored cooperative to produce sorghum. This is what happened to the British Vestey Group, a meat producer in the region for five decades, which was ordered to shift its production from beef to cultivating sorghum. (The Vestey Group took the case to court to demand \$100m in compensation against the Venezuelan government.)¹¹⁸

The government also demanded that large corn producers should sell their products at below production costs, so as to meet the insatiable public demand for corn-based foods, such as *arepas*. ‘Those that did so went broke; those that did not were expropriated.’¹¹⁹

By 2010 the government put the quantity of farmland it had seized at between 5.5m and 7.5m hectares out of the 27 million hectares used for cultivation. At the lower of these figures, these 5.5m hectares amounted to 20% of Venezuela’s total productive farmland. However, the redistribution of land to small farmers did not result in an increase in food production. On the contrary, according to the National Confederacy of Agriculture and Livestock Associations, agricultural production dropped sharply between 2007 and 2011: maize by 40%, rice by 39%, sorghum by 83%, sugar cane by 37%, coffee by 47%, potatoes by 64%, tomatoes by 34%, and onions by 25%.¹²⁰

Large quantities of fertile land fell out of production, while food imports rose. After 2014, however, when the oil price dropped dramatically, imports of all essentials, including food, became increasingly difficult for the government to afford. Shortages were blamed on ‘hoarding’, while food rationing was introduced. The government also began forcing farmers and food producers to sell at prices below the cost of production, which reduced supply still further. By 2015, thousands of people were queuing for five to six hours a day in the hope of being able to buy much-needed items. In 2016 Nicolas Maduro, who had become president in 2013 after Chavez’s death, began urging people to grow food and raise chickens in their homes, even though 80% of the population live in cities. People were expected to achieve this on balconies and roof tops, and in small gardens.¹²¹

In 2016 food riots began, along with the hijacking of food trucks and the violent looting of stores. Maduro put the delivery of basic foods under the control of defence minister General Vladimir Padrino Lopez, while the labour ministry announced that all private and public employers were obliged to let their workers be reassigned to grow crops.¹²²

Though uncompensated expropriations first targeted land – and were justified on the basis of skewed land ownership and the need to make ‘idle’ land more productive – they soon spread to other sectors. In 2007, for example, the Chavez government demanded majority control of projects managed by international oil companies. It then expropriated the assets of the two companies (Exxon Mobil and ConocoPhillips) that refused to acquiesce in this. Chavez justified these oil expropriations on the basis that he was ‘returning’ the wealth of Venezuela to the ownership of ‘the people as a whole’.¹²³

In 2008 the government nationalised the cement sector, targeting Switzerland's Holcim Ltd, France's LaFarge, and Mexico's Cemex SAB de CV. In 2009 he closed down a number of small banks for what he said were operational irregularities, but re-opened some as state-run firms. He also vowed to nationalise any bank that failed to meet the government's lending guidelines or was in financial trouble. In 2009 the mining ministry seized Gold Reserve Inc's Brisas project, while in 2011 Chavez announced that he was nationalising the gold industry. (By then, Toronto-listed Rusorp Mining Ltd, owned by Russia's Agapov family, was the only large gold miner operating in Venezuela; and it soon filed an arbitration claim for compensation.)¹²⁴

The economic consequences have become ever more catastrophic. In the words of Greg Mills and Lyal White of The Brenthurst Foundation: 'Between 2013 and 2017, Venezuela's economy contracted by 39%. It is expected to plummet yet further, with a 50% contraction by 2019 at current rates of collapse. Although government stopped providing official figures in 2016, monthly inflation reached 100 per cent in February 2018. This will translate into annual rates of inflation of more than 1 000 000 per cent. While government studiously maintains an official exchange rate of 14 Bolivars to the US dollar, the black-market rate, which shopkeepers openly use, is 240 000:1... University professors now earn US\$6 a month, as does a police superintendent with 17 years of experience. It requires an estimated 98 times the official minimum monthly wage of 700 000 Bolivars merely to survive.'¹²⁵

Add Mills and Lyal: 'By 2018, total government debt was estimated at US\$150bn, more than 100% of GDP. In 2017 the government's bond default was US\$2.5bn. For 2018 it is projected to be US\$10bn... Basic water and electricity infrastructure is near collapse, and unemployment is rampant.' In addition, they write, 'local industry has been destroyed and virtually everything has to be imported, including food, but the government no longer has the funds to do so... The percentage of the population living in poverty is well over 80%. Extreme poverty has leapt from 24% of the population in 2014 to more than 61% three years later.'¹²⁶

The government has attempted to blame the country's economic collapse on an 'economic war' being waged on it by opposition parties, or the targeted sanctions which have been imposed solely on Maduro and other senior figures in the ruling party. But the real reason lies rather in the government's uncompensated expropriations, extensive price controls, and other damaging and *dirigiste* interventions.¹²⁷ If South Africa wishes to avoid a similar economic meltdown – with all its attendant suffering for the great majority of its people – it should abandon any thought of following Venezuela's example and of introducing EWC.

16 A better way forward

The Constitution should not be amended to allow EWC. As Dave Steward of the F W de Klerk Foundation writes: 'If EWC were to be adopted, even in diluted form, it would be a body blow to the already battered national accord on which the new South Africa was founded. The property clause was one of the most tightly negotiated compromises in the final Constitution. Non-ANC parties conceded the principle of expropriation in the national

interest, which included land reform. In return, the ANC accepted that equitable compensation would be paid for expropriated property. The property clause was at the heart of the constitutional agreement – because, as the ANC correctly observes, “property relations are at the core of all social systems”.

An EWC amendment would not only unravel one of the most important elements in the Constitution but also set a precedent for further damaging changes. The doctrine of judicial review, for example, is already being eroded – especially on issues vital to the NDR – through the ANC’s significant control over judicial appointments. But the doctrine might then be jettisoned altogether, so that the legislation adopted by Parliament can no longer be ‘undermined’ by unelected judges. This would take South Africa back to the doctrine of parliamentary sovereignty and fundamentally weaken all constitutional safeguards against the abuse of power.

The notion that EWC is possible within the parameters of the present property clause is only marginally less dangerous. This too would deal a ‘body blow’ to the negotiated settlement reached in the 1990s. This too would be an invitation to the government to embark on the extensive custodial takings and wide-ranging regulatory expropriations it already has in mind. This too would fatally erode investor confidence and the prospects of boosting growth and reducing unemployment.

IF EWC is not the answer, what, then, should be done to make a success of land reform, the ostensible rationale for the EWC idea? Here, the focus must shift from land to farming. The critical issue is not the number of hectares transferred – especially when most of that land is then likely to fall out of production – but rather how best to increase the number of successful black commercial farmers. Emerging farmers wanting to expand into large-scale production must thus be helped to do so. However, no one should be encouraged to believe that farming is an easy option, when agriculture is in fact an exceptionally high-risk sector – and especially so in a water-stressed country such as South Africa.

People with the necessary entrepreneurial drive are likely to be found among the black South Africans who have already bought 4.4 million hectares of rural land on the open market since 1994. Others could be identified through the African Farmers’ Association of South Africa (Afasa), or via the commodity organisations, such as Grain SA, which are already doing much to develop new farmers. Effective steps should then be taken to help fulfil their needs – but quick fixes are unlikely to succeed and should rather be avoided.

Emerging farmers in need of land should buy it at market prices from among the 20 000 farms that are already on the market (along with the additional farms that are likely to be put up for sale by ageing farmers in the future). Preferential interest rates could be made available by the Land Bank to facilitate these purchases. However, it is questionable whether the state should provide ‘free’ land to farmers when it does not do the same for entrepreneurs in retail or manufacturing. Rather, the government should sell them some of the land it already owns. If necessary, it could start by leasing some of its land to emerging farmers, who must, however, be granted firm options to buy as soon as they can afford to put down deposits.

The role of the state should largely be confined to the critically important task of providing better rural infrastructure in the form of roads, railways, and dams. Electricity, abattoirs, produce markets, milling and storage facilities could be provided either by the state or by the private sector.

The government should also help with the financing of effective extension services. The government should stop trying to provide these services itself, as it clearly lacks the capacity to do so. Instead, essential training and mentorship should come from existing commercial farmers, with their unparalleled know-how and experience. These farmers, who last year alone put R332m into development initiatives through their commodity organisations, should be applauded for their efforts. Their existing mentorship programmes, should, however, be expanded with the help of tax-funded vouchers. Emerging farmers could then use these vouchers to purchase the particular extension services they need from the providers of their choice.

What of working capital? Emerging farmers will often need to borrow from commercial banks and will battle to do so unless the government guarantees their loans. This will have to be done if small black farmers are to grow into big ones. Guaranteeing loans for a carefully selected pool of such farmers would, however, be a much better investment than spending R2bn on grandiose projects, such as agri-parks, as the government is currently intent on doing. It would also be a far better use of tax revenues than repeatedly providing billions in bail-outs to South African Airways and other poorly managed parastatals. Privatising some of these companies would also be a good way of raising funds to help emerging farmers expand.

South Africa's current crop of some 30 000 commercial farmers should be encouraged to stay on the land and keep producing, so as to feed the nation, contribute to export earnings, and provide the necessary mentoring to new entrants. The population is expanding (from 40 million in 1994 to a projected 67 million in 2030) and will soon be more than 70% urbanised. Its need for secure and affordable food supplies cannot be met in any other way.

In addition, much of the country's well-watered and high-potential farming land is still held in customary communal tenure in former homeland areas. As a result, large swathes of this land are not being used for agriculture at all. This land cannot be brought into full production without much better infrastructure and sound extension services. Secure title must also be transferred at reasonable prices to present occupants, who are currently tenants of the state as represented by traditional leaders. Those who rely on social grants rather than on farming could be bought out by people wanting to become commercial farmers. Consolidation into much larger units will also be needed to achieve economies of scale.

What of the people now living on customary plots who sell their land to new commercial farmers? There will be increased job opportunities for them in the revitalised rural economy, but many will want to move to urban areas. Such urbanisation is already well in train and echoes developments all around the world, where people move off the land and into jobs in the towns and cities. South Africa's problem is that the necessary urban jobs are not being generated on anything like the scale required.

EWC is, of course, no solution to this challenge. Rather, people in the cities need secure title to their homes and other properties, so they can secure mortgage finance or use their assets as collateral for loans in setting up small businesses. However, these small businesses will battle to succeed in the current context of poor skills, anaemic growth, and rising unemployment. These fundamental challenges must be overcome if the country and its people are to prosper.

The IRR's *National Growth Strategy* outlines the steps needing to be taken. First, property rights must be strengthened by jettisoning the EWC idea and reversing all the current laws and proposed policies that undermine and threaten them. Without this essential step, direct investment at the scale required will continue to pass the country by.

Second, a business-friendly environment must be put in place. Many parastatals on the brink of bankruptcy should be sold off on terms that guard against corruption and the emergence of new private monopolies. Effective public/private partnerships should then be used to expand essential infrastructure and maintain what already exists. Red tape must be slashed, especially for small businesses. The inefficient public service must be trimmed and professionalised, and the tax load lightened for both companies and individuals. The fraud and wasteful spending which currently taints up to 40% of state procurement must be stamped out.

Third, labour laws must be substantially reformed. The government itself acknowledges that entry-level wages are generally already so high they lock the unskilled and inexperienced out of jobs. Rules which push up labour costs – including the extension of bargaining council agreements to non-parties and the proposed national minimum wage – should be scrapped. Instead, private employers must be allowed to take a leaf out of the government's book and pay the unskilled, as the state does, a stipend of some R90 a day. This is far below the entry-level wages generally paid in other spheres, but the government provides work opportunities at these low wages because it hopes they will pave the way to better jobs. Often, however, they do not. By contrast, if people were allowed to work for the same low wages in the private sector, they would generally receive better training, notch up more relevant experience, and have greater prospects of moving into higher paying jobs over time.

Increased flexibility in the hiring and firing process is also essential, as business needs to be able to adjust to peaks and valleys in demand. Employers will thus hire freely only if they can dismiss freely. The presumption that dismissals are unfair unless the employer can prove otherwise should be removed. Instead, employers should be free to dismiss employees under the notice periods agreed in their employment contracts.

Fourth, South Africa's ineffective and damaging 'transformation' policies require fundamental reform. BEE is by far the most ambitious and far-reaching affirmative action programme in the world. Partly for this reason, misperceptions have grown up around its effects. Some people criticise it for harming the economic prospects of whites, but there is little evidence of this. At the same time, most people assume that BEE is effective in helping the poor and enjoys broad support. These assumptions are equally flawed. BEE helps only some 15% of black people – and its benefits go primarily to a small and often politically

connected elite. This is also not surprising, for the great mass of the unskilled and unemployed have little prospect of ever benefiting from BEE ownership deals, management posts, or preferential tenders.

Behind the scenes, most business people are well aware of these limitations, and criticise BEE for its ineffectiveness and high costs. Many also support the IRR's alternative policy of 'EED' or 'Economic Empowerment for the Disadvantaged'.

EED selects its beneficiaries on a socio-economic basis, as does the social grants system. It also puts its emphasis on the inputs needed to empower the poor. It thus rewards business for expanding opportunities by making direct investments, creating jobs, contributing to tax revenues, adding to export earnings, topping up venture capital funds, appointing staff on a 'wide' definition of merit (which takes account of disadvantage), and entering into effective public-private partnerships to improve education, housing, and health care.

What EED proposes is a paradigm shift to a system which no longer bypasses the poor but rather takes effective steps to empower the disadvantaged. It also uses carrots rather than sticks to encourage and reward the key contributions made by business to investment, employment, and development.

South Africa's economic problems are becoming increasingly serious, but they are not yet intractable. The country still has enormous strengths. With these essential structural changes in place, it could soon start living up to its great potential. The IRR's proposed reforms would have a measurable impact on investment, growth, employment, and income levels within 12 months. They would also provide the foundation for sustainable growth rates of 6% to 7% of GDP within a decade. This would be far more effective than EWC – or any of the government's other intrusive and damaging interventions – in overcoming unemployment, poverty, and inequality. These reforms would also allow the country to unshackle itself from current ideological and other constraints and emerge as a prosperous middle-income economy by the 2030s.

Appendix 1: Agri SA's 2017 Land Audit: Methodology and Findings

Agri SA's 2017 land audit report (as earlier outlined in *Section 6.2* of this submission) is based primarily on a detailed analysis of the land purchases registered in South Africa's various deeds offices from 1994 to 2016. Surnames and geographical locations were used to allocate a racial identity to individuals. 'In terms of ownership by companies or trusts, ownership was allocated to PDIs ['previously disadvantaged individuals', defined as people of 'African, coloured, and Indian descent'] only where such ownership could be clearly identified.' In other instances, such ownership was allocated to white people.¹²⁸

The Agri SA analysis puts the total amount of land (both urban and agricultural) owned by the government and PDIs in 2016 at 43 million hectares or 35% of the country's land area. Having noted that the amount of agricultural land has fallen from 79 million hectares in 1994 to 76 million hectares in 2016 (largely because of urbanisation and increased mining), Agri SA puts the total quantity of farming land owned by the government and PDIs at 25 million hectares or 26.7% of the total.¹²⁹

In some provinces, the proportion of farming land owned by the government and PDIs is higher than the national average, for it stood at 73.5% in KwaZulu-Natal, 52% in Limpopo, 48.3% in the Eastern Cape, 45.3% in North West, 39.7% in Mpumalanga, and 39.1% in Gauteng. Only in three provinces is the proportion of farming land in government and PDI ownership far below the national average, coming in at 4.9% in the Western Cape, 6.4% in the Northern Cape, and 7.9% in the Free State.¹³⁰

If land value and land potential are taken into account, the proportion of agricultural land owned by the government and PDIs is higher than 26.7%. Says Agri SA: 'In terms of Rand value, the share is 29.1% and in terms of land potential, the share is 46.5%.' This last figure reflects the fact that land ownership by PDIs is largely concentrated, for historical and other reasons, in areas with greater fertility and higher rainfall.¹³¹

Agri SA's research also shows that the amount of land bought privately by PDIs far exceeds the quantity of land bought by the government for land reform and other purposes. Between 1994 and 2016 (according to the data reflected in the different deeds offices), the government bought a total of 2.8 million hectares of land, in both urban and rural areas, at a cost of R20.5bn. In the same period, PDIs purchased 6.1 million hectares of both rural and urban land at a cost of some R69.8bn. The rural land privately purchased by PDIs amounts to some 4.4 million hectares. This far exceeds the quantity of rural land bought by the government (2.2 million hectares). Says Agri SA: 'This is a key indicator that private sector agrarian transformation takes place much faster than government programmes'.¹³²

Appendix 2: How the government could help establish successful black commercial farmers

If the government really wanted to establish black commercial farmers, this model outlines what it could do. The IRR has done some sums around livestock farming, and this is what the figures show.

We estimate that good quality grazing land is in the market for R10 000 per hectare. To purchase a 1 000 hectare farm for a young upcoming farmer would cost R10 000 000. To stock that farm with 200 (pregnant) cows would cost another R4 000 000. In addition, around R2 500 000 could be spent providing the emerging farmer with a new Land Cruiser bakkie, a tractor, trailer, and implements. He could then be given R3 500 000 in cash as working capital.

The whole investment would come to R20 000 000 and would create a debt-free commercial farmer generating a positive cash flow of around R1 000 000 a year and with more than sufficient collateral to buy more land and expand his farming enterprise. Surely this is the ideal that the champions of land reform in South Africa should be aspiring to?

But government policy is not to do this. The policy of the government is to confiscate land from successful producers and to lease it to emerging producers who have no collateral and no capital. The reason for this approach, the government says, is that ‘the willing buyer, willing seller model has failed’ as there is not enough money to make it work.

But this, as the IRR can show, is simply not so. Take the example of South African Airways (SAA), which received a bailout of R10 billion from the government last year and has just asked for another R5 billion. Based on our sums, if R15 billion had instead been spent on land reform, it could have established 750 successful new black commercial farmers over the past two years alone. Considering that there are only 30 000 commercial farmers in the country, this is a considerable number. A ten percent cut in the government’s wage bill would finance the establishment of an estimated 3 000 new black commercial farmers every year.

Instead of pursuing this option, the government seems to be starving emerging black farmers of support. Writes the IRR’s Terence Corrigan: ‘This year the budget of the Department of Rural Development and Land Reform is some R10.4 billion. This amounts to less than 1% of government’s total budgeted spending. The budget for land reform – the acquisition of land for redistribution – comes in at R2.7 billion. Restitution – settling land claims – is budgeted at R3.7 billion. (In each case, this includes administration costs, and not just the amounts dedicated to actual land transfers.) By contrast, VIP protection and associated services are expected to cost a total of R2.6 billion. In other words, protecting the country’s political elite is seen as pretty much on a par with providing land to emerging farmers, and not much less important than addressing cases of land dispossession. That tells us a great deal about the government’s priorities.’

The contrast between the amounts allocated to land reform and those being spent on SAA bailouts and VIP protection are stark. Clearly, land reform is not seen as meriting anything

like the same amounts of revenue. ‘Willing buyer, willing seller’ cannot be said to have failed when there has generally been no buyer wanting to proceed.

Each of the new farmers established under our model would be very well positioned to grow their businesses through their own collateral and cash flow – particularly if the Land Bank were to grant them generous loan conditions, something it does not at present do. These emerging black farmers would arguably be in a much stronger financial position than most white farmers. Their rise, eminence, and success and expansion would be the most powerful response South Africa could provide to the historical denial of property rights to black people.

Our model is simple, straight forward, cost effective and could be put into action within weeks. But it will only work if property rights are respected and the agricultural sector continues to be run on the market principles that underpin its present success.

Why is this model not already the policy of the government? The answer seems to lie in an ideological preference for state control of property – and a fear of the political power that could be exercised by a new class of successful and independent black rural property owners. However, if these political obstacles could be overcome, South Africa could use this model to clock up enormous successes in land reform.

(This Appendix is based on an article by Frans Cronje, CEO of the IRR, which was first published in Rapport.)

South African Institute of Race Relations NPC (IRR)

14 June 2018

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