Chapter 5 The Dangers of South Africa's Proposed Policy of Confiscating Property

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Introduction

In December 2017, South Africa's ruling party, the African National Congress (ANC), adopted into its policy program the idea of expropriation without compensation as a means to achieving land reform. In February 2018, the Economic Freedom Fighters (EFF), South Africa's third largest political party, proposed a resolution in Parliament that the Constitution should be amended to allow government to expropriate property without being required to pay compensation. The ANC moderated this resolution somewhat, but in principle supported it. The result was that Parliament resolved in favor of amending the Constitution, setting in motion a process that at the time of writing was still ongoing.

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

The index published in the Fraser Institute's *Economic Freedom of the World* (EFW) measures five Areas of policy to determine a country's economic freedom ranking. Area 2: Legal System and Property Rights, is what this article is concerned with, and is described as follows: "Protection of persons and their rightfully acquired property is a central element of both economic freedom and civil society. Indeed, it is the most important function of government". It is further written of Area 2:"The key ingredients of a legal system consistent with economic freedom are rule of law, security of property rights, an independent and unbiased judiciary, and impartial and effective enforcement of the law" (Gwartney, Lawson, Hall, and Murphy, 2020: ix, 3).

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

This chapter discusses the dangers of the government's proposed confiscation regime. Secondly, it explains why secure, entrenched rights to private property serve, rather than undermine or hamstring, the public interest. Thirdly, some alternatives to expropriation without compensation are briefly considered. Fourthly, a viable, pro-property rights alternative to the government's proposed legislation is outlined.

The dangers of confiscation

South Africa is presently considering two statutes that concern government's power to confiscate property, mainly from private persons. The first is the Constitution Eighteenth Amendment Bill. In its present form, it provides that section 25 of the Constitution, which presently guarantees the right to property for all South Africans and requires that government pay "just and equitable" compensation whenever it expropriates such property, is to be amended to allow for cases of expropriation where "the amount of compensation is nil". It will also empower Parliament to determine, by legislation, under which circumstances compensation might be nil. At the time of writing, it had become clear that the Amendment Bill will additionally include a provision that will allow government to effectively nationalize "land" (effectively any fixed property) under the guise of so-called "custodianship", with or without compensation.

The second statute under consideration is the Expropriation Bill, which is the legislation that the Constitution Eighteenth Amendment Bill refers to. The bill, in its present form, in addition to ordinary provisions related to expropriation *with* compensation, furthermore provides government with a general power to confiscate property without compensation under open-ended circumstances. While the Constitution Eighteenth Amendment Bill might on its face seem benign, the operationalization of it in the Expropriation Bill is where the trouble lies.

The bill replaces South Africa's existing Expropriation Act, from 1975, in the name of aligning it to South Africa's post-apartheid constitutional democratic dispensation. While it cannot be denied that bringing the country's expropriation regime in line with constitutional values and principles is necessary, the bill assuredly does not achieve that aim. Among other things, the bill makes it significantly easier for government to engage in expropriation. Here one might point to the provisions that allow government to take possession of the property it wishes to expropriate before the legal proceedings arising out of the expropriation have been settled or decided in court.

Clause 12(2)(a) of the bill, significantly, removes the payment of *solatium* upon expropriation. *Solatium* is that additional amount of money an owner of expropriated property receives over and above the market value of their property to

compensate for the emotional trauma, inconvenience, or financial hardship that the expropriation process itself may have caused. *Solatium* is one of the few institutions that are meant to characterize expropriation not as a tool of punishment, but as a vehicle for social improvement. In the absence of *solatium*, it becomes less clear whether government is simply confiscating property to punish owners, or whether it is truly interested in serving a public purpose.

However, the most concerning provisions are those related to so-called expropriation for "nil compensation"—colloquially known as "expropriation without compensation"—but most accurately described as "confiscation".[1] The Expropriation Bill, taking its cue from the Constitution Eighteenth Amendment Bill to define those circumstances under which property may be confiscated without any payment from government, contains a list of six circumstances empowering the government to do just that. However, most notably, this list is not a closed list (*numerus clausus*), but an open list. This means that in addition to the listed six circumstances, government may in any other circumstance omit paying compensation upon confiscation if it deems that to be "just and equitable".

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

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

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

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

1 It is inappropriate to refer to what government is contemplating as "expropriation", as expropriation as a legal institution is inherently associated with compensation. "Confiscation" is the more apt term. However, given the ubiquity of the expression "expropriation without compensation" in the discourse, it will also be used throughout this chapter.

2 All the other items, but for the second, nonetheless also entail significant dangers for property rights in South Africa.

Clause 12(3)(c)

Clause 12(3)(c) provides that government may confiscate property without payment "where the owner has abandoned the land by failing to exercise control over it". This provision, however, does not refer to abandonment in law. Property is only abandoned according to South African property law if the owner no longer manifestly intends to own the property, and no longer exercises control over the property (*Reck v Mills & Another* [1990] 1 All SA 560 (A) at para. 16). Abandonment, in other words, is usually intentional. Instead, this provision takes away the requirement of intention and redefines the requirement of control, changing it from "not exercising control" to "failing to exercise control", thus strongly implying owners may still intend to own the property. The result is that if an owner is forcefully removed from their property by criminal trespassers—a relatively common occurrence in South Africa—the government may itself confiscate that property and leave the owner penniless. It is noteworthy that the previous version of the same Expropriation Bill defined abandonment according to its conceptualization in common law. One wonders why government removed that appropriate definition and replaced it with the present one.

Clause 12(3)(e)

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

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

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

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

Intellectual property

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

The Land Court

Finally, it is worth noting that government has proposed the creation of a special court, the Land Court, to deal with matters arising out of land reform in general and confiscation under the Expropriation Bill. This bill, which has not yet been made publicly available, will apparently not be focused on the protection of property rights but instead on the government's often perverted conceptualization of social justice. For instance, the court will allow hearsay evidence in land claims processes to allow claimants to simply assert that at some past point they or their ancestors were dispossessed of the property they claim to be theirs. Such an intervention might have been necessary had real evidence not existed; however, the colonial and apartheid governments, after 1910, were required by law to publish notices of the property they expropriated in terms of their racist legislation in *Government Gazettes*. All gazettes since 1910 are publicly available. Tangible evidence of dispossession therefore exists for restitution claims.

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

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

The Constitution Eighteenth Amendment Bill and Expropriation Bill represent a departure from both international best practice and from practice in South Africa, where market-related compensation, including *solatium*, is the standard. While advocacy for these statutes has been clad in the rhetoric of redress for the wrongs of apartheid, neither statute limits the general power of confiscation

bestowed on government to such redress. While the Eighteenth Amendment Bill does provide that no-compensation expropriations must be for purposes related to land reform, the term "land reform" is not defined in the Constitution and will likely be construed generously by a court, thus making this provision quite ineffective as a limiting device. Indeed, it must be emphasized that this is effectively a new, *general power* of government. It may, therefore, if the statutes are adopted, confiscate property for any reason, without paying compensation, if it can somehow argue that it is "just and equitable" to do so.

Serving the public interest through rights to private property

In South African legal discourse, it is often uncritically assumed that rights to private property serve private interests, and State initiatives that might sometimes have to sacrifice these rights serve the public interest (Van der Merwe, 2016; Roux, 2013: 46.2). In other words, there is a division between private interests and the public interest, and private-property rights fit neatly into the former whereas State initiatives that undermine it fit neatly into the latter. This is an erroneous assumption.

The recognition and protection of private-property rights is in the public interest. Where private interests and the public interest need to be balanced, it is crucial that private-property rights be considered not as private interests but as part of the public interest. As the authors of the 2019 edition of the *International Property Rights Index* write:

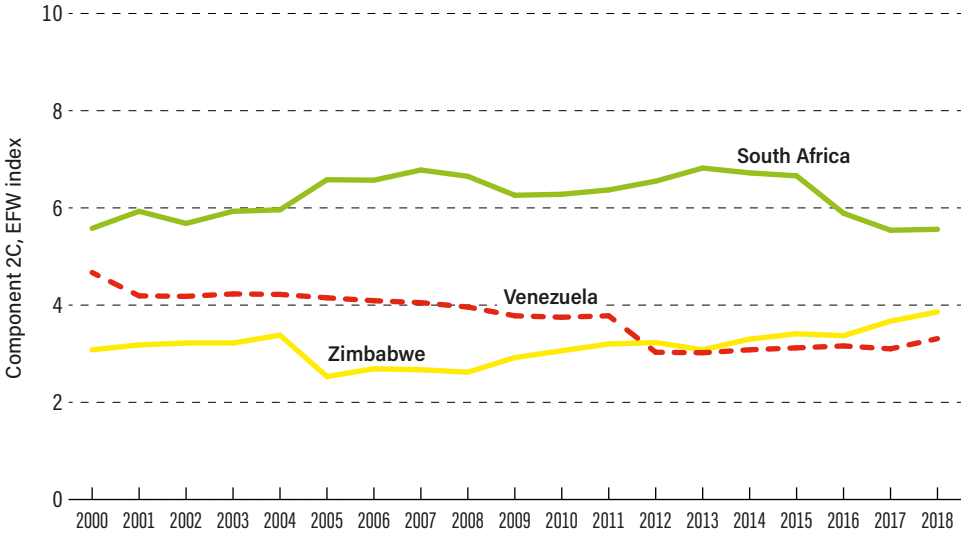
> Property rights are a decisive institution of the rule of law that maintains an unavoidable link with freedom. They are a complex legal institution that allows owners to use parts of nature and limit their use by others. They are a condition for the exercise of other rights and freedoms. Property rights are a natural counterbalance to the exercise of power because they limit the power of the State and are fundamental for productive transformation in the knowledge society. (Levy-Carciente *et al.*, 2019: 3, citations omitted)

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

Life expectancy is the highest and malnutrition lowest where liberty is prioritized. On the other hand, where the State and its ideological goals are placed front and center as the organizing principles of society, there is destitution. Most importantly, *Economic Freedom of the World* shows that the poorest 10% of the people in countries in the top quarter of economic freedom have incomes nearly eight times higher ($12,293) than their counterparts ($1,558, PPP constant 2017, international$) in the lowest quarter of economically free nations over the period from 2000 to 2018 (Gwartney, Lawson, Hall, and Murphy, 2020: xi).

Property rights are the *conditio sine qua non* for investment, development, and economic growth (Botero *et al.*, 2020: 9, 14). The collapse of the Venezuelan and Zimbabwean economies is well known today. Figure 5.1, which measures the protection of property rights, clearly shows that the drops in such protection in those countries—1995–2000 and 2011–2012 in Venezuela, and 2003–2004 in

Figure 5.1: Component 2C. Protection of Property Rights (EFW index)—South Africa, Venezuela, and Zimbabwe, 2000–2018



Source: Gwartney, Lawson, Hall, and Murphy, 2020; research and construction by Prof. Richard Grant.

Zimbabwe—correlates quite closely with the massive growth and development problems facing those states. While their respective scores for protection of property might be increasing, the damage initially done to their economies—causing, for example, hyperinflation—still lingers.

Indeed, aside from its political disenfranchisement of black, colored, and South Africans of Indian descent, apartheid's greatest crime was its denial of the common-law property rights protection enjoyed by whites. The poverty rampant throughout South Africa today is at least partly due to this denial.[4] According to the Liberal Party parliamentarian, Brookes, co-writing with MacAulay in 1958, "[the economic life of] the African is almost entirely in the hands of officials [...] possessed of very wide discretion" (Brookes, and MacAulay, 1958: 95).

Property rights also give substance to citizenship. When citizens are not allowed to accumulate property and be secure in the knowledge that that property will be safe from arbitrary taking, and when it is taken, such a taking will be reasonable and subject to full market-related compensation including *solatium*, citizenship itself is robbed of its essence. For, without such security of property rights, citizens are subject to the mercy and generosity of the State, and cannot provide meaningfully for their own sustenance. Where people are dependent on the State for leases, permissions to occupy, or have full ownership but which is subject to being taken at any time, there is a chilling effect summed up neatly by the saying: *One does not bite the hand that feeds you*. In other words, protests, petitions, criticisms, or challenges to government power will not happen, or will not happen easily, if government can rip the material foundation upon which citizens stand from under their feet (Malan, 2018).

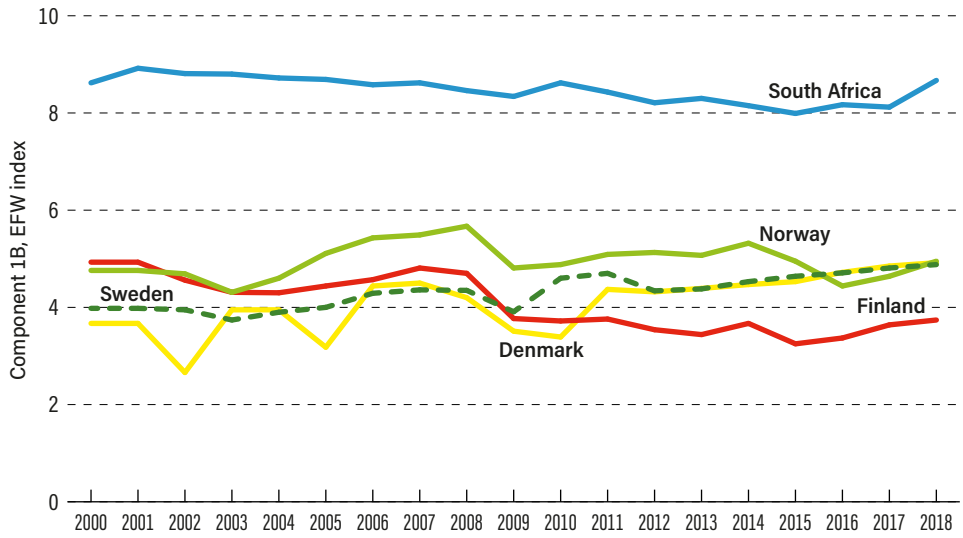
The uncritical assumption that property rights are simply about self-interested individuals protecting their profits and advantages from social programs is far off

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

the mark (Reese, 1976: 87). Government has an interest in marketing their social programs as beneficial, but when they come at the expense of something as crucial as property rights, one must ask whether this is the case. Indeed, social programs that complement a regime of strong property rights must in all cases be preferred over those that do not.

Consider, for example, the generous and well-noted welfare states of the Scandinavian countries. Government transfers and subsidies, which includes social payments (figure 5.2), is higher in all these states than in South Africa.[5] In other words, they offer their citizens more generous welfare benefits, including free education.

Figure 5.2: Component 1B. Transfers and Subsidies (EFW index)—South Africa, Sweden, Denmark, Norway, and Finland, 2000–2018



Source: Gwartney, Lawson, Hall, and Murphy, 2020; research and construction by Fred McMahon.

Yet, at the same time, these states are all able to have a high degree of protection of private-property rights (figure 5.3) whilst maintaining their social programs. This leads to a higher economic freedom score, placing countries with an even more active welfare-oriented governments in a higher quartile than South Africa. In other words, generous social programs need not come at the expense of property rights. And the far more likely case is that well-protected property rights, which lead to economic growth, investment, and development, in fact contribute in large part to the ability of the State to maintain a welfare program.

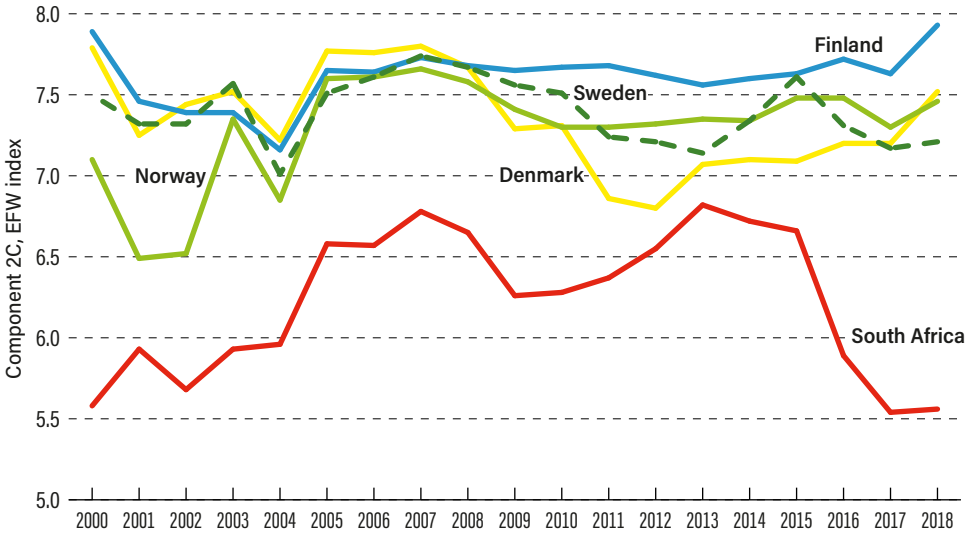
Alternatives to confiscation

While the rhetoric for property confiscation and nationalization without the payment of compensation is disguised in various appeals to the public interest and justice, there exist real alternatives to such a policy.

South Africans wish to live in the cities, as do people across the world. They do not want to farm in rural areas, where government appears intent on driving

5 Figure 5.2 shows Component 1B of the EFW index, where a higher score indicates a lower level of spending on transfers and subsidies.

Figure 5.3: Component 2C. Protection of Property Rights (EFW index)—South Africa, Sweden, Denmark, Norway, and Finland, 2000–2018



Source: Gwartney, Lawson, Hall, and Murphy, 2020; research and construction by Prof Richard Grant.

them. But they are not being accommodated, because many "township"[6] inhabitants continue to live on municipally owned land, a leftover of apartheid leasehold tenure that this government refuses to abolish. Where government does try empowerment in the cities, it fails. House title deeds under the Reconstruction and Development Programme (RDP) come with pre-emptive clauses that, for the first eight years, prohibit owners from selling their property to others, but stipulate that they must sell to government at cost.[7] These owners are not given a title deed when they move in but often only after several years' delay. Government would be fulfilling its constitutional obligation to bring about security of tenure by, instead, immediately providing beneficiaries of the RDP with unencumbered title deeds to their properties upon taking possession.

Restitution of property, additionally, is an imperative recognized by South Africa's common law, and is a principle deeply entwined with property rights. It has a simple meaning: anyone taking property without the consent of the owner is obliged to give that property back, and if that is physically impossible, pay compensation. In South Africa, wherever someone can prove a claim to a piece of land that was taken from them or their ancestors by the apartheid regime, they are entitled to that property. But the current "owner", who will almost universally be an innocent party who bought the property in good faith, should be compensated and, at the very least, get back what they paid for the property. They are blameless and in no system dedicated to constitutionalism will innocent parties be punished in the way envisioned by those who favor expropriation without compensation.[8]

6 In South Africa, "township" refers to largely poor housing projects on the peripheries of cities where, during apartheid, black South Africans were required to live as tenants without any ownership rights.

7 The post-apartheid Reconstruction and Development Programme involved a rollout of State housing schemes across the country.

8 The Restitution of Land Rights Act, 1994, has seen the successful processing of restitution claims over the last three decades.

Finally, all spheres of government and organs of State own great amounts of underused or unused land throughout South Africa. This land can quickly and easily be transferred—again, in unencumbered ownership—to deserving poor families and communities.

These alternatives invariably improve society, safeguard the Constitution as the centerpiece of the legal system, and entrench property rights for the poor and marginalized. They, unlike expropriation without compensation or nationalization, do not have any "side-effects" that could collapse an economy or flare up into civil strife, starvation, or a humanitarian disaster. They are also not pulled out of a hat—again, like expropriation without compensation or nationalization—but instead based on international and historical best practice.

Where expropriation without compensation is reasonable

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

This will, however, require important changes to both the Constitution Eighteenth Amendment Bill and the Expropriation Bill. President Cyril Ramaphosa, after all, has repeatedly stated that government will ensure that any amendment of this nature to the Constitution will not be harmful to investment potential, economic growth, or food security. To this end, the parliamentary discretion in the Amendment Bill to determine in ordinary legislation under which circumstances government may confiscate property must be removed and replaced by a closed list (*numerus clausus*) of circumstances under which government may confiscate property.

It is proposed that this closed list provide that property may only be confiscated for the purpose of restitution, and restitution must be defined as it presently is in section 25(7) of the Constitution as redress for "[a] person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices". Moreover, such property may only be confiscated without compensation in three circumstances: [1] if it is State-owned land; [2] if it is abandoned land;9 or [3] if the confiscation strictly complies with all the requirements of section 36(1) of the Constitution, which contains a formula for how government may lawfully limit rights.

Section 36(1) of the Constitution provides that a right in the Bill of Rights, for instance the right to property or its concomitant right to compensation upon expropriation, may be limited only if that limitation is reasonable and justifiable (in front of a court of law) in an open and democratic society that is founded on freedom, dignity, and equality. To determine whether this is the case, a court must inquire, *inter alia*, into the nature and importance of the right being limited, the purpose for which government seeks to limit that right, the nature and extent of

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

the invasiveness of the limitation, the relationship between the limitation and that purpose government seeks to achieve, and whether there are any less restrictive means available to government to achieve that purpose without limiting the right. In other words, in the present context, this provision will allow a court to ask substantive questions about the nature of the confiscation and, specifically, why government does not wish to pay compensation. If government cannot provide a good reason—and it is quite unlikely that it can, because government in fact can always afford to pay compensation (Van Staden, 2021c)—then the court would have to force the payment of compensation. Whereas ordinarily a court would defer to the executive without inquiring into so-called policy matters, section 36(1) enjoins the courts to ask these rightly intrusive questions that require substantive answers (Van Staden, 2020c: 491–492). Under all other circumstances—that is, other than the three mentioned above—compensation must be paid.

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

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

Conclusion

All the progress made since apartheid ended stands to be undone unless people recognize that a most fundamental human right is for people to be able to own and control property. This implies a market economy, where all people are at liberty to deal with their property and conduct their affairs according to their own needs and motivations. Apartheid was a denial of this fundamental human right to the majority of South Africa's citizens. To be in favor of property rights today, therefore, is not to maintain so-called white privilege, but to ensure that the benefits of property ownership that whites had enjoyed be extended to everyone. If people of all races could have the security the white population had, we would see more suburbs and fewer townships, tar rather than dust, and prosperity rather than destitution.

When the current Constitution came into operation in 1996 with a relatively strong provision for property rights, everyone finally had the right to property, and almost immediately black incomes that had plateaued during apartheid began rising steadily.[10] Property rights are meaningless if the State is not under an obligation to provide compensation for expropriation. If one is not entitled to

10 Black incomes, of course, plateaued again around the time the government started introducing draconian labor legislation (Van Staden, 2019: 288).

compensation, it means one's prior legitimate ownership is denied. Such a state of affairs will make the granting of credit in respect of mostly agricultural property a thing of the past. This is what destroyed the Zimbabwean economy in the 2000s.

White South Africans, for the most part, will survive expropriation without compensation. There are no majority-white shanty towns in Zimbabwe. Farmers either left Zimbabwe to farm in neighboring states, returned to England, or moved into the cities where they are still, by far, more prosperous than the black Zimbabwean majority. Expropriation without compensation would be a significant inconvenience for white South Africans, but completely disastrous for most black South Africans and, in particular, the poor. This not because black people cannot farm,[11] but because, as tenants on State-owned land, they will have no security of tenure or guaranteed entitlement to the land's produce.

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

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

11 This is a well-loved "straw man argument" employed by those who favor expropriation without compensation—that opponents apparently believe blacks cannot farm—when this is certainly not the argument being made by such opponents, which includes a great many black South Africans.

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