

Submissions on amending Section 25 of the Constitution

A response to the Constitution Eighteenth Amendment Bill published by the ad hoc committee on the amendment of Section 25 of the Constitution of the Republic of South Africa, 1996.





INTRODUCTION

This submission is written in response to the Constitution Eighteenth Amendment Bill (hereafter “the Bill”), as published by the ad hoc committee on the amendment of Section 25 of the Constitution of the Republic of South Africa, 1996. The submission will be delivered per hand to the committee upon publication thereof. A formal request will also be submitted to deliver a verbal presentation to Parliament to elaborate further on the points made in this submission.

The submission is presented with the support of the more than 130 000 individual AfriForum members, as well as tens of thousands of members of the public who declared their support to AfriForum’s campaign for the protection of property rights in South Africa.

AfriForum has also already filed for a court order that the constitutional review committee’s report – which recommends that the South African Constitution be amended to make expropriation without compensation possible – be set aside as a result of various irregularities in the drafting of the report.

While the Bill declares that “there is a need for urgent and accelerated land reform in order to address the injustices of the past,” and that “the hunger for land amongst the dispossessed is palpable and the dispossessed are of the view that very little is being done to redress the skewed land ownership pattern,” all the available evidence points to the contrary. Opinion surveys and even government reports (some of which are quoted in this submission) repeatedly point to the same conclusions:

1. The vast majority of people in South Africa regard the need for land reform as a very low priority.
2. The so-called “hunger for land” is largely a myth – particularly with regard to rural or agricultural land. The hunger for title deeds for land that people are already living on does, however, exist with regard to millions of poor people (of whom the majority are black) who live on state-owned land, particularly in urban areas, and who do not have any property rights for the land that they live on.
3. People are in desperate need of responsible political leadership and economic stability – a state of affairs that is seriously threatened by the prospect of expropriation without compensation.
4. Government attempts at redistribution of land failed dismally, resulting in a loss of productivity and economic decline.
5. It is a well-documented fact – as is pointed out in more detail in the submission that follows – that South Africa

already had more than a quarter of a century of land restitution initiatives, as a result of which 1,8 million individuals have already been compensated for historic dispossessions of land. It is also a well-documented fact that more than 90% of land claimants declared that they would rather opt for financial compensation than for land to be restored to their ownership.

Furthermore, it is of crucial importance to point out that, while the Bill declares that the amendment of Section 25 of the Constitution (the property rights clause) is necessary to “address the historic wrongs caused by the arbitrary dispossession of land,” the methods proposed to achieve this (and the underlying political objectives that have repeatedly been made clear) have nothing to do with correction of historic wrongs and everything to do with empowering government to take the property which belongs to certain people and to hand that property over to people who comply with the criteria that government determines. It appears that the drafters of the Bill conflate restitution (the restoration of property to the actual owner) with redistribution (the distribution of property based on criteria determined by government that do not serve to correct particular historic injustices). This is because those who stand to benefit from expropriation without compensation are people who are identified merely because of the colour of their skin, regardless of whether the beneficiaries or their ancestors were deprived of the property in question. In a similar vein, those who are regarded as the illegitimate owners of land are also identified primarily and merely based on the colour of their skin, regardless of the history of the property in question.¹

There is no evidence that the amendment of Section 25 of the Constitution would ensure equitable access to land as declared in the Bill, nor that it would empower the majority of South Africans.

The Bill is the result of a set of economic ideas that has repeatedly been tried and tested in global history. If history taught us anything in this regard, it is that tampering with property rights, central planning and excessive government control does not lead to economic growth, nor to increased levels of equality. Rather, it almost always leads to the contrary: economic decline and greater inequality – exactly that which the Bill declares to want to prevent. The submission below was drafted by Adv. Mark Oppenheimer, Counsel for AfriForum.

Ernst Roets
Head of Policy and Action
AfriForum

¹ See for example:

- » Janse van Vuuren, A. 2018. *Land expropriation plans to exclude black-owned land*. Fin24, 6 July. Available at: <https://www.fin24.com/Economy/South-Africa/land-expropriation-plans-to-exclude-black-owned-land-mkhize-20180706>. [Accessed 13 January 2020].
- » Zvomuya, F. 2007. Picking the fruits of land restitution. *NAFU Farmer News* (December issue 2007). Available at: https://journals.co.za/doc-server/fulltext/ac_nafu/2007/10/103.pdf?expires=1578907008&id=id&accname=guest&checksum=2743B8A1F7C26E9EFCDF2BCF0AC82891. [Accessed 13 January 2020].

AFRIFORUM'S SUBMISSION ON AMENDING SECTION 25 OF THE CONSTITUTION

This submission will address 11 issues:

1. The state's current powers in terms of Section 25 of the Constitution to expropriate land without compensation.
2. The scope of the enquiry before the Joint Constitutional Review Committee ("the committee") to amend Section 25 of the Constitution.
3. The scope of the recommendation made by the committee.
4. The nature of the proposed amendment.
5. Why the proposed amendment exceeds the recommendations.
6. Why it breaches the state's international law obligations to pay appropriate compensation in cases of expropriation.
7. Why it may lead to South Africa being expelled from AGOA.
8. Why it is unlawful for breaching Section 2 of the Constitution.
9. Why it is unlawful for breaching Section 36 of the Constitution.
10. Why the preamble to the amendment is misleading.
11. Why the amendment may be used to disenfranchise the poor and vulnerable by future regimes.

THE STATE'S CURRENT POWERS IN TERMS OF SECTION 25 OF THE CONSTITUTION TO EXPROPRIATE LAND WITHOUT COMPENSATION

The relevant sections of the constitutional property clause state:

25. (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
- (2) Property may be expropriated only in terms of law of general application-
- (a) for a public purpose or in the public interest; and
 - (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
- (3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including -
- (a) the current use of the property;
 - (b) the history of the acquisition and use of the property;
 - (c) the market value of the property;
 - (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
 - (e) the purpose of the expropriation.

The equitable balance required by the Constitution for the determination of just and equitable compensation will in most cases best be achieved by first determining the market value of the property and thereafter by subtracting from or adding to the amount of the market value, as other relevant circumstances may require.

In the case of *Khumalo and others v Potgieter and others*³ the court set out a two-stage process to determine the amount of compensation that was fair and equitable in terms of Section 25 of the Constitution.

In the first stage, it was determined what the market value of the property was by examining comparable sales. In this process the court endorsed the *Pointe Gourde* principle. According to this principle, in the assessment of the market value of land that is acquired in an expropriation, there will be no regard for any increase or decrease in value of the land, which is attributable to the scheme underlying the acquisition.

In the second stage, the other four factors set out in Section 25(3) of the Constitution are utilised to adjust the market value price up or down.

There will be situations where no compensation is due after expropriation. For example, if the land in question has no market value, or where the amount that was paid by the state to subsidise the initial acquisition of the land is equal to or greater than the market value. However, as a rule the Constitution does require the payment of some compensation that is just and equitable and it will only be in a narrow set of situations that no compensation will be due.

In the case of *Ex parte Former Highland Residents: In re Ash and Others v Department of Land Affairs*, the Court held that:²

² [2000] 2 All SA 26 (LCC) in para [35] at 40e – f.
³ [2000] 2 All SA 456 (LCC).

THE SCOPE OF THE ENQUIRY BEFORE THE COMMITTEE TO AMEND SECTION 25 OF THE CONSTITUTION

The committee invited the public to make “submissions on the 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.”⁴

Section 25 of the Constitution sets out the parameters for state expropriation of property. Land and property are not synonymous. Land is a type of **property**, but it has been confirmed by our Constitutional Court that the term property refers to a range of other assets which include (amongst others): immovables (flats and houses); movables (cars and

laptops); intellectual property (authors and artists’ rights); shares held on the stock exchange; rights conferred by law (liquor licences); and contractual rights (construction or management contracts).

Given the narrow scope of the enquiry before the committee, it would have been impermissible for it to recommend any changes to Section 25 of the Constitution that would alter the state’s current powers and obligations regarding the broad category of **property**. It only had the power to make recommendations about **land**.

THE SCOPE OF THE RECOMMENDATION MADE BY THE COMMITTEE

The committee made the following recommendation (own emphasis):⁵

... that ... Section 25 of the Constitution [must be amended] to **make explicit that which is implicit** in the Constitution, with regards to Expropriation of **Land** without Compensation,

as a legitimate option for Land Reform, to address the historic wrongs caused by the arbitrary dispossession of land, and in so doing ensure equitable access to land and further empower the majority of South Africans to be productive participants in ownership, food security and agricultural reform programs.

THE NATURE OF THE PROPOSED AMENDMENT

Amendment of Section 25 of the Constitution

1. Section 25 of the Constitution of the Republic of South Africa, 1996, is hereby amended—

(a) by the substitution in subsection (2) for paragraph (b) of the following paragraph:

“(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court: Provided that in accordance with subsection (3A) a court may, where land and any improvements thereon are expropriated for the purposes of land reform, determine that the amount of compensation is nil.”

(b) by the substitution in subsection (3) for the words

preceding paragraph (a) of the following words:

“(3) The amount of the compensation as contemplated in subsection (2)(b), and the time and manner of any payment, must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—”; and

(c) by the insertion after subsection (3) of the following subsection:

“(3A) National legislation must, subject to subsections (2) and (3), set out specific circumstances where a court may determine that the amount of compensation is nil.”

WHY THE PROPOSED AMENDMENT EXCEEDS THE RECOMMENDATIONS

The recommendations limit the scope of the constitutional amendment in two important ways.

First, only a change that makes explicit that which is already implicit is provided for. This means that the amendment can clarify the existing powers that the state already has to expropriate land without compensation. It

cannot provide the state with any new powers that it does not currently have.

The amendment goes beyond mere clarification. Its effect is to bypass the relevant circumstances that currently determine compensation (set out in Section 25(3) of the Constitution) and replace these with circumstances that

⁴ Parliament of South Africa. 2018. *Constitutional review committee calls for written submissions*. Press release on 13 April. Available at: <https://www.parliament.gov.za/press-releases/constitutional-review-committee-calls-written-submissions>. [Accessed 13 January 2020].

⁵ Parliament of South Africa. 2019. *National Assembly establishes committee to amend Section 25 of the Constitution*. Press release on 25 July. Available at: <https://www.parliament.gov.za/press-releases/national-assembly-establishes-committee-amend-section-25-constitution>. [Accessed 13 January 2020].

have yet to be determined by national legislation. This grants Parliament a blank cheque to pass a law (at the lower voting threshold of 50% plus 1), setting out when nil compensation is payable.

Second, the recommendations only use the term “land”. The amendment goes beyond this by referring not only to

land, but also any improvements on the land. This would include structures built on the land like houses, factories and dams. It also includes the products of cultivating the land, like crops and vineyards.

Therefore, the amendment is unlawful because it exceeds the scope of the recommendations made by the committee.

WHY IT BREACHES THE STATE’S INTERNATIONAL LAW OBLIGATIONS TO PAY APPROPRIATE COMPENSATION IN CASES OF EXPROPRIATION

Constitutional obligation to consider international law

Section 39(1)(b) of the Constitution requires that “when interpreting the Bill of Rights, a court, tribunal or forum must consider international law.”

International laws

The Resolution on Permanent Sovereignty over Natural Resources 1803 (XVII) of 1962 (of the United Nations, of which South Africa is a founding member and has been since 1945) states that (own emphasis):⁶

4. Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication.

There is longstanding international authority that Resolution 1803 reflects customary international law. In *Texaco Overseas Petroleum v Libya*,⁷ an international arbitrator (Professor René-Jean Dupuy, a French national) was selected by the International Court of Justice to rule on Libya’s liability under various concession agreements signed between the parties. The arbitrator held that Resolution 1803 was adopted by “a great many States representing not only all geographical areas but all economic systems”.⁸ This, he found, established both the practice and *opinio juris*

elements of customary international law, and reflected the acquiescence of states to certain customary rules regarding the nationalisation of foreign property specifically. The customary law status of Resolution 1803 was later confirmed in the arbitral award in *State of Kuwait v The American Independent Oil Company*.⁹

Article 2(2)(c) of The Charter of Economic Rights and Duties of States Resolution 3281 (XXIX) of 1974 states that (own emphasis):¹⁰

2. Each State has the right:

...

- (c) To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.

Current standards of international human rights law extend the duty of the state to pay market-related compensation to a state’s own nationals whose property is expropriated, not just to foreign nationals.

The European Court of Human Rights (ECHR) held unequivocally that expropriation without market-related compensation would fall foul of international human rights standards. For instance, in *Pincová and Pinc v Czech Republic*,¹¹ the applicants, who were Czech nationals, had their private residence, barn and cowshed expropriated under laws that provided for the restitution of property seized by the former communist regime in the Czech Republic.

⁶ National Assembly of the United Nations. 1962. *General Assembly resolution 1803 (XVII) of 14 December 1962, “Permanent sovereignty over natural resources”*. Available at <https://www.ohchr.org/Documents/ProfessionalInterest/resources.pdf>. [Accessed 13 January 2020].

⁷ 1979 53 ILR 487 (“**Texaco**”).

⁸ *Ibid.*, 489.

⁹ 1982 21 ILM 976 (“**Aminoil**”).

¹⁰ National Assembly of the United Nations. 1974. *Charter of economic rights and duties of states*. Available at: https://www.aas.org/sites/default/files/SRHRL/PDF/IHRDArticle15/Charter_of_Economic_Rights_and_Duties_of_States_Eng.pdf. [Accessed 13 January 2020].

¹¹ Application No 36548/97, 2002 (3) ECHR 712.

The applicants were reimbursed the purchase price they had paid to the state in 1967, which represented about one-fiftieth of the current market value of their home. Finding that the state had violated the right to property under the European Convention on Human Rights, the ECHR held that any measure which interferes with the right to peaceful enjoyment of possessions must strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The ECHR held as follows:¹²

In particular, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure depriving a person of his possessions ... Thus the balance to be maintained between the demands of the general interest of the community and the requirements of fundamental rights is upset if the person concerned has had to bear a "disproportionate burden ..."

Consequently, the Court has held that the person deprived of his property must in principle obtain compensation "reasonably related to its value", even though "legitimate objectives of 'public interest' may call for less than reimbursement of the full market value ..."

The Court also found that the appropriate balance of rights and interests was generally achieved where the compensation paid to the person whose property had been taken was reasonably related to its "market" value, as determined at the time of the expropriation.

A 2012 study¹³ of state practice by the United Nations Conference on Trade and Development, in the context of a foreign investors facing expropriation, stated the following about the requirements of international law: "Failure by a State to pay any compensation for a direct expropriation can be seen as rendering such an expropriation unlawful ..." (own emphasis).

In terms of international law, a state has the power to expropriate, but this power is accompanied by a duty to pay appropriate compensation. There may be circumstances where it is appropriate to pay no compensation, but each case will have to be determined on its own merits. Therefore, the proposed amendment would be a breach of international law.

WHY IT MAY LEAD TO SOUTH AFRICA BEING EXPELLED FROM AGOA

A likely consequence of amending the Constitution to allow for expropriation without compensation would be the exclusion of South Africa from the African Growth and Opportunity Act (AGOA). AGOA is a United States Trade Act that significantly enhances market access to the US for qualifying sub-Saharan African countries. South Africa is a beneficiary of AGOA and in 2018 we exported over R100 billion worth of goods to the United States.¹⁴

In terms of Section 104 of AGOA South Africa would remain eligible to benefit from the Act provided that it:¹⁵

has established, or is making continual progress to establishing --

(A) a market-based economy that protects private property rights, incorporates an open rules-based trading system, and minimises government interference in the economy through measures such as price controls, subsidies, and government ownership of economic assets; ...

WHY IT IS UNLAWFUL FOR BREACHING SECTION 2 OF THE CONSTITUTION

Section 2 of the Constitution states that:

This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

The current text of Section 25 of the Constitution sets out the circumstances to be considered when determining how much compensation will be paid when land is expropriated.

The amendment bypasses these factors and refers to national legislation to determine when no compensation will be payable. Instead of the Constitution reigning supreme, it is made subservient to national legislation.

This approach is unconstitutional and vastly different to other references to the promulgation of national legislation in the Constitution.

¹² Ibid.

¹³ United Nations Conference on Trade and Development. 2012. *Expropriation – UNCTAD Series on Issues in International Investment Agreements II*. New York & Geneva: United Nations, p 44. Available at: https://unctad.org/en/Docs/unctadaddiaeia2011d7_en.pdf. [Accessed 13 January 2020].

¹⁴ African Growth and Opportunity Act. S.d. *Country info: South Africa*. Available at: <https://agoa.info/profiles/south-africa.html>. [Accessed on 31 January 2020].

¹⁵ African Growth and Opportunity Act. S.d. *AGOA country eligibility*. Available at: <https://agoa.info/about-agoa/country-eligibility.html>. [Accessed 13 January 2020].

For example, the right to access to information is formulated as follows:

32. (1) Everyone has the right of access to -
 - (a) any information held by the state; and
 - (b) any information that is held by another person and that is required for the exercise or protection of any rights.
- (2) National legislation must be enacted to give effect

to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

In this case, the Constitution sets out the parameters of the right and the legislation merely gives effect to the right.

In the circumstances, the amendment is a breach of Section 2 of the Constitution.

WHY IT IS UNLAWFUL FOR BREACHING SECTION 36 OF THE CONSTITUTION

Section 36 of the Constitution reads as follows:

36. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -
 - (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

The amendment is a limitation of the existing right to receive compensation for land that has been expropriated. The authors of The Bill of Rights Handbook state that:¹⁶

Section 25 requires compensation for an expropriation to be fair and equitable in amount, timing and manner of payment. Compensation not meeting this requirement will be unfair and inequitable and can hardly be considered reasonable and justifiable.

Therefore, the amendment is a breach of Section 36 of the Constitution.

WHY THE PREAMBLE TO THE AMENDMENT IS MISLEADING

The preamble to the amendment reads:

WHEREAS there is a need for urgent and accelerated land reform in order to address the injustices of the past that were inflicted on the majority of South Africans and especially as the hunger for land amongst the dispossessed is palpable and the dispossessed are of the view that very little is being done to redress the skewed land ownership pattern.

AND WHEREAS such an amendment will further ensure equitable access to land and will further empower the majority of South Africans to be productive participants in ownership, food security and agricultural reform programs.

Land restitution claims

South Africa has a dark history of land dispossession. Justice requires that the wrongs of the past are addressed by awarding compensation to the victims of land dispossession. Between 1995 and 2014 over 1,8 million individuals have received compensation, either in the form of land or money. This was achieved without the need to expropriate land without compensation and the strong inference is that the remainder of land claims can also be resolved without interfering with the Constitution.

¹⁶ Currie, I. & De Waal, J. 2007. *The Bill of Rights handbook*. Fifth edition. Landsdowne: Juta, p. 562.

Table 1: Land restitution and settlements per province (1995–2014)

Province	Amount of land restored (hectares)	Total number of households involved	Total number of beneficiaries	Outstanding claims	Total settlements as at March 2014	Total valid claims
Eastern Cape	136 752	67 579	257 049	462	16 465	16 716
Free State	54 058	7 619	49 022	10	2 685	2 682
Gauteng	17 189	14 157	64 432	-3	13 327	13 158
KwaZulu-Natal	771 022	85 477	499 722	1 323	15 171	16 398
Limpopo	639 287	50 731	256 489	163	3 655	3 489
Mpumalanga	473 673	53 832	257 597	621	2 847	3 400
North West	407 057	40 476	202 932	184	3 740	3 902
Northern Cape	575 732	22 656	120 270	145	3 719	3 852
Western Cape	4 178	28 613	131 439	562	16 001	16 099
South Africa	3 078 948	371 140	1 838 952	3 467	77 610	79 696

Source: Department of Rural Development and Land Reform (2014)¹⁷

When land claim cases are resolved, claimants are given the choice of receiving land or financial compensation. In 92% of cases, people choose money over land.¹⁸ This shouldn't come as much of a surprise, because money translates into freedom. Beneficiaries can use that money to start businesses, pay off debts or invest in the market.

Lack of demand for land distribution

The Institute of Race Relations polled South Africans to determine what they perceive to be the country's most serious unresolved problems. Almost 40% identify unemployment, 33% raise a lack of service delivery, while less than 1% are concerned about land distribution.¹⁹

Table 2: IRR field survey 2016

Most serious unresolved problems	Total	Black	Coloured	Indian	White
Unemployment	39,7%	42,0%	36,8%	30,7%	25,8%
Service delivery/water/electricity/roads	33,6%	37,4%	15,5%	22,5%	23,1%
Lack of housing	18,2%	19,8%	17,3%	8,3%	9,6%
Crime	14,9%	10,8%	24,5%	40,3%	31,3%
Education (cost, quality, access)	14,7%	15,8%	14,5%	8,7%	9,1%
Corruption/nepotism	8,5%	6,7%	6,9%	27,5%	19,0%
Poverty	6,9%	5,7%	12,7%	11,1%	10,4%
Racism (including inequality, xenophobia)	6,4%	6,0%	4,5%	11,8%	10,4%
Racism (alone)	3,2%	2,4%	3,0%	7,2%	9,0%
Land distribution	0,6%	0,5%	0,9%	0,0%	1,3%

Source: Institute of Race Relations, 2017²⁰

Farming is a technical job

Government spent over R1,4 billion buying farms in the Eastern Cape to redistribute to aspirant farmers. Of the 265 farms purchased, only 26 remain viable.²¹ In 90% of

those cases, once thriving farms that produced food and employment are now in ruin. This fact was acknowledged by the Minister of Land Reform and Rural Development.²² Being a farmer is not easy. It's a technical job that requires an enormous amount of time, expertise, and money as well

¹⁷ Department of Rural Development and Land Reform. 2014. *End of term report: 2009–2014*. Pretoria: DRDLR, p. 22.

¹⁸ Jeffery, A. 2018. 'Pressing' hunger for land? The stats show something different. *News24*, 1 March. Available at: <https://www.news24.com/Columnists/GuestColumn/pressing-hunger-for-land-the-stats-show-something-different-20180301>. [Accessed on 13 January 2020].

¹⁹ South African Institute for Race Relations. 2017. *Reasons for Hope 2017 – Sound, but fraying at the edges*. Available at: <https://irr.org.za/reports/occasional-reports/files/race-relations-in-south-africa-2013-reasons-for-hope-2017>. [Accessed 13 January 2020]. P. 3.

²⁰ Ibid.

²¹ Fuzile, B. 2018. In case you missed it: 90% government farms failed. *Daily Dispatch*, 21 April. Available at: <https://www.dispatchlive.co.za/news/2018-04-21-in-case-you-missed-it-90-government-farms-failed/>. [Accessed 13 January 2020].

²² *Mail & Guardian*. 2010. Land reform: Use it or lose it, says minister. Article by staff reporter, 2 March. Available at: <https://mg.co.za/article/2010-03-02-land-reform-use-it-or-lose-it-says-minister/>. [Accessed 13 January 2020]. See also: Johnson, R. W. 2015. *How long will South Africa survive?* Johannesburg: Jonathan Ball Publishers.

as a lot of support and training if you have no background in farming. Providing someone with the land to farm on is no guarantee that the farm will be successful.

Damage to the economy

Life involves trade-offs; you can't remove property rights and have a flourishing economy. Foreign investors won't risk having their land confiscated in South Africa when they can pick any number of other nations that will protect their investments.

When Zimbabwe implemented a policy of expropriation without compensation, it led to the world's worst case of hyperinflation. It wasn't just the original landowners

who were hurt – the average man on the street was left destitute after the economy had been destroyed.

A floundering economy would have a negative impact on the amount of tax revenue that can be collected to assist the poor. If the state wants to acquire more land for the benefit of the poor and dispossessed, it can do so by utilising funds from the annual budget. The fact that R5,7 billion was budgeted for land reform and restitution in the last financial year – which is only 0,3% of the total budgeted expenditure of R1,67 trillion²³ – is further evidence that government's land reform initiative is largely a political ploy. Meanwhile, the negative economic impact of the mere threat of expropriation without compensation is already visible.²⁴

WHY THE AMENDMENT MAY BE USED TO DISENFRANCHISE THE POOR AND VULNERABLE BY FUTURE REGIMES

South Africa has a history of state-sanctioned land dispossession. The law was used as a weapon to the detriment of citizens in order to take their land. It has been used as a weapon to the detriment of poor, vulnerable black citizens for a long time. As South Africans, we need to say: Never again, never again shall the poor and vulnerable be subject to the whims of the state and for the law to be used against them to perpetrate further injustice. It's important that the law is used in a just manner.

When drafting the law, we must bear in mind that positions of power change over time. Legislators should always bear

in mind that the laws they craft are like weapons, which can be used against them by their opponents across the aisle. If the Bill of Rights is changed – for the first time ever – to allow for expropriation without compensation, there is no guarantee that, in future, this power won't be abused by those who inherit the law from those who made the law.

South Africa is governed by a range of different political parties who may use it in all sorts of ways. It will not always be the noble who expropriate. They may use it as a weapon to punish people and those who don't share their political views or their ethnic backgrounds.

CONCLUSION

The proposed amendment exceeds the scope of the recommendation made by the committee, circumventing the current factors used to determine compensation and by targeting improvements on land.

If enacted, it would breach Sections 2 and 36 of the Constitution, flout international law and cause South Africa's expulsion from AGOA.

In its current form, the Constitution allows for expropriation without compensation in particular circumstances. However, as a general rule, the Constitution and

international law create an obligation to pay compensation when land is expropriated.

We have an internationally-lauded Constitution premised on freedom, dignity and equality. We have never altered our Bill of Rights and the evidence shows that there is no reason to do so now.

Counsel for AfriForum
Mark Oppenheimer
10 January 2020

²³ National Treasury. 2018. *Estimates of national expenditure 2018*. Pretoria: National Treasury. Available at: <http://www.treasury.gov.za/documents/national%20budget/2018/ene/FullENE.pdf>. [Accessed 13 January 2020].

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