



THE BANKING
ASSOCIATION
SOUTH AFRICA

**THE CENTRALITY OF PROPERTY RIGHTS FOR ALL IN SUCCESSFUL
ECONOMIES AND DEMOCRACIES**

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THE BANKING ASSOCIATION SOUTH AFRICA

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Industry body representing all banks registered in terms of The Banks Act, No. 94 OF 1990 and operating in South Africa:

- **35 member banks, which include both South African and International Banks.**
- **All licenced banks are members of The Banking Association.**

We forge partnerships with relevant stakeholders to influence an environment in which banks can do profitable business in a way that promotes international best practice, transformation and sustainable socio-economic growth and development.





POSITION STATEMENT

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Fully supportive of State's initiatives to rectify past injustices and to correct land ownership patterns (essential for SA Inc's. sustainability) but EWC should benefit the poor, not increase their plight (job losses, food insecurity) ;

Remain committed to playing a leading role in working with key stakeholders, including government in finding all-inclusive solutions to economic challenges so as to create a better life for all South Africans;

Essential that land reform needs to occur in a manner that does not undermine property rights and/or property values;

We are supportive of expropriation to give effect to land reform, provided this is done within the confines of the Constitution;

Given the magnitude of the challenge, we do not believe that either the state or the private sector can do it alone. A meaningful partnership is required and by necessity this will need to include key agricultural stakeholders, communities, the state and financiers alike:

- We therefore propose that a "land indaba" be held, once the state has a clear perspective of what it needs to do in respect of land reform.





PROPERTY RIGHTS AND THE CONSTITUTION

- Prosperity and property rights are inextricably linked. In many countries, insecure property rights hinder economic development and limit economic opportunities.
 - Property rights are the basis of exchange and the extension of ownership to capital goods provides the basis for the development of financial markets, which is essential for economic growth and development.
 - A society's ability to define, within a broad system of rule of law and establish institutions which can enforce property rights is a critical precondition for social and economic development.
 - Classical economists such as Adam Smith & Karl Marx recognized the importance of property rights in the process of social and economic development.
 - Well enforced property rights provide incentives for individual to participate in economic activities, such as investment, innovation and trade, which in turn leads to a more efficient market.
 - Property rights also lower transaction costs by providing an efficient conflict resolution mechanism for scarce resources.
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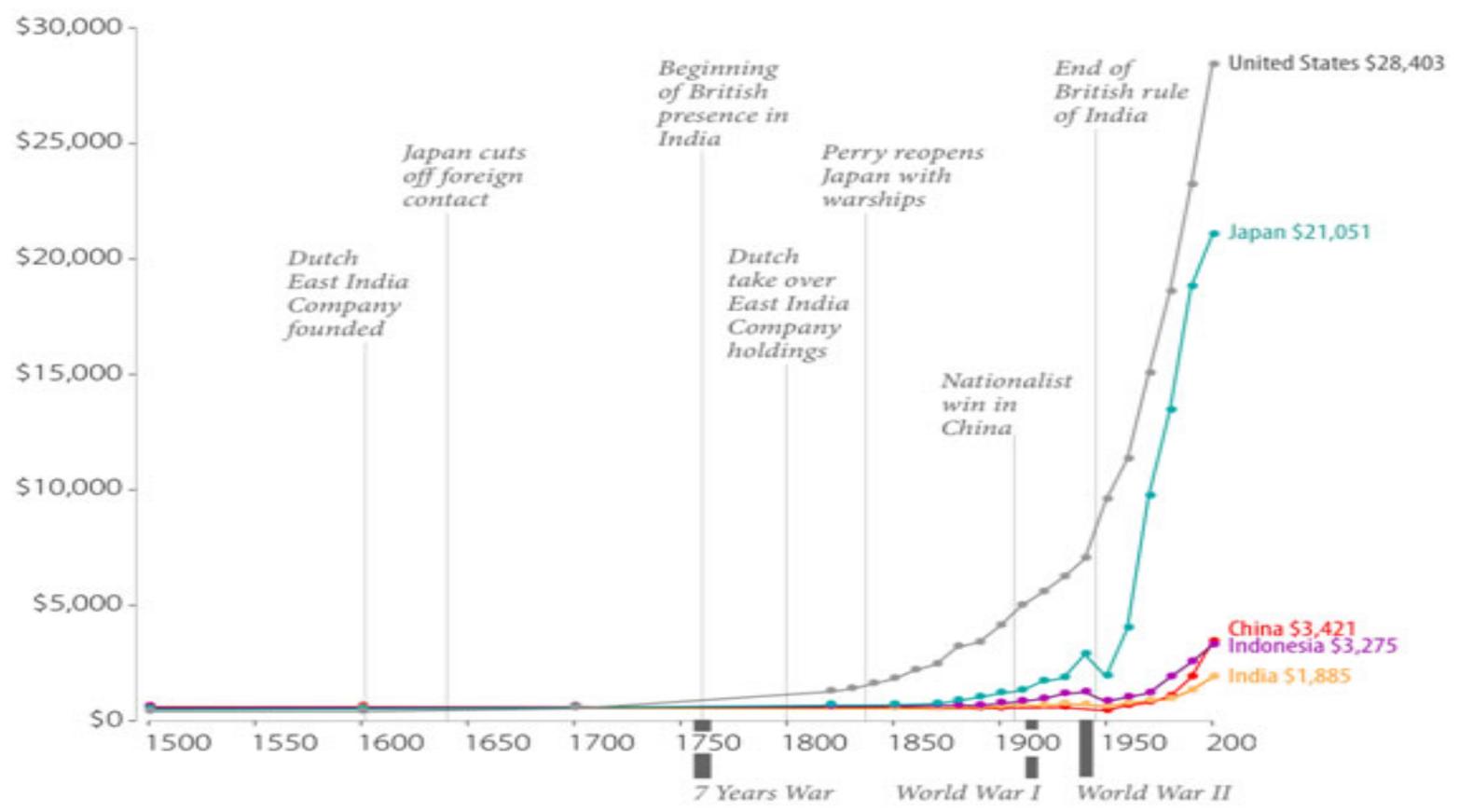


- **De Soto:**
 - **5/6th of humanity have things, but they lack the process to represent their property and create capital.**
 - **Without formal property rights, no matter how many assets the excluded accumulate or how hard they work, most people will not be able to prosper in a capitalist and global village society. They will continue to be beyond the range of policy makers, official records and thus are economically invisible.**
 - **The Bell Jar:**



GDP per Capita: East Asia Compared to United States

China, India, Japan, Indonesia, and United States

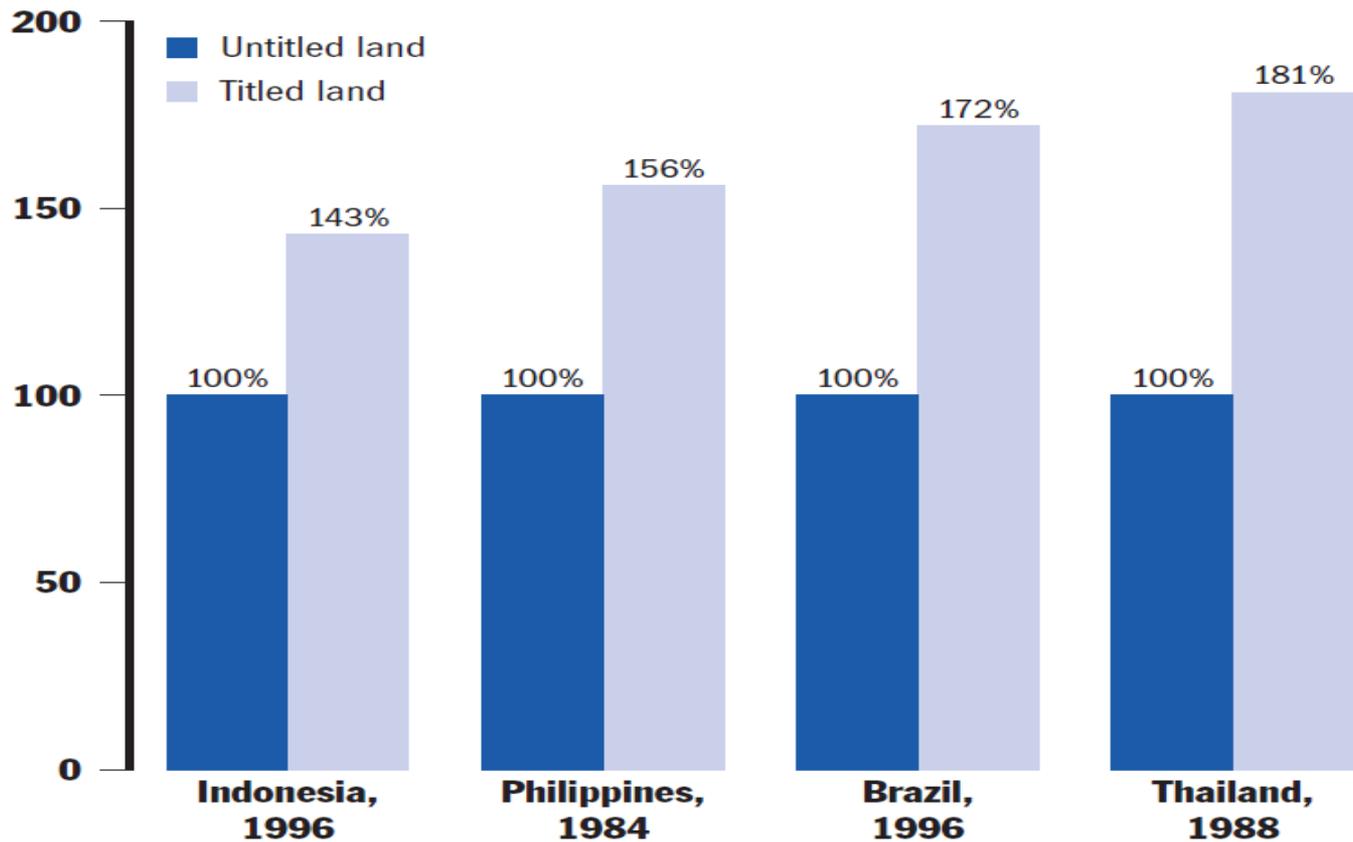


Source: Angus Maddison, University of Groningen





Land values (percent)

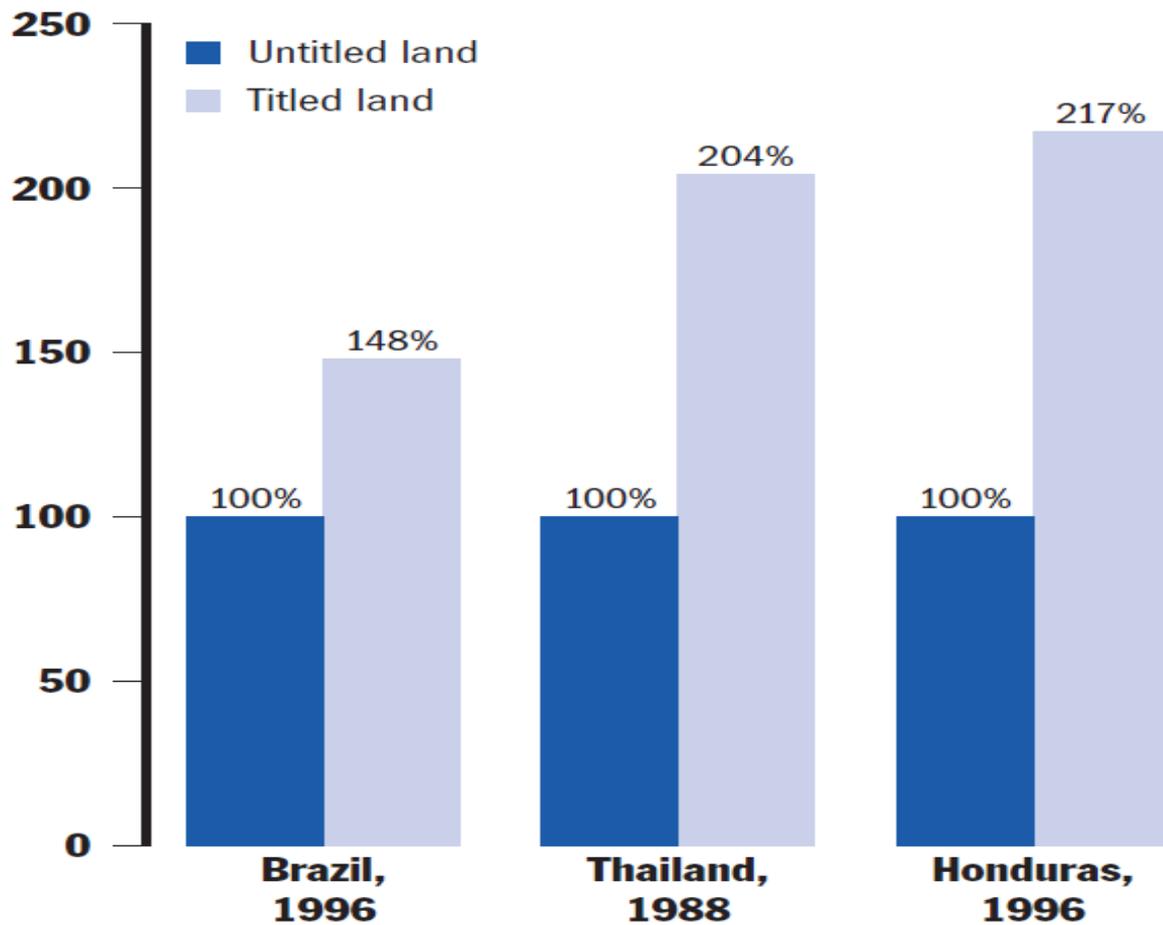


Source: Feder (2002).





Investment (percent)

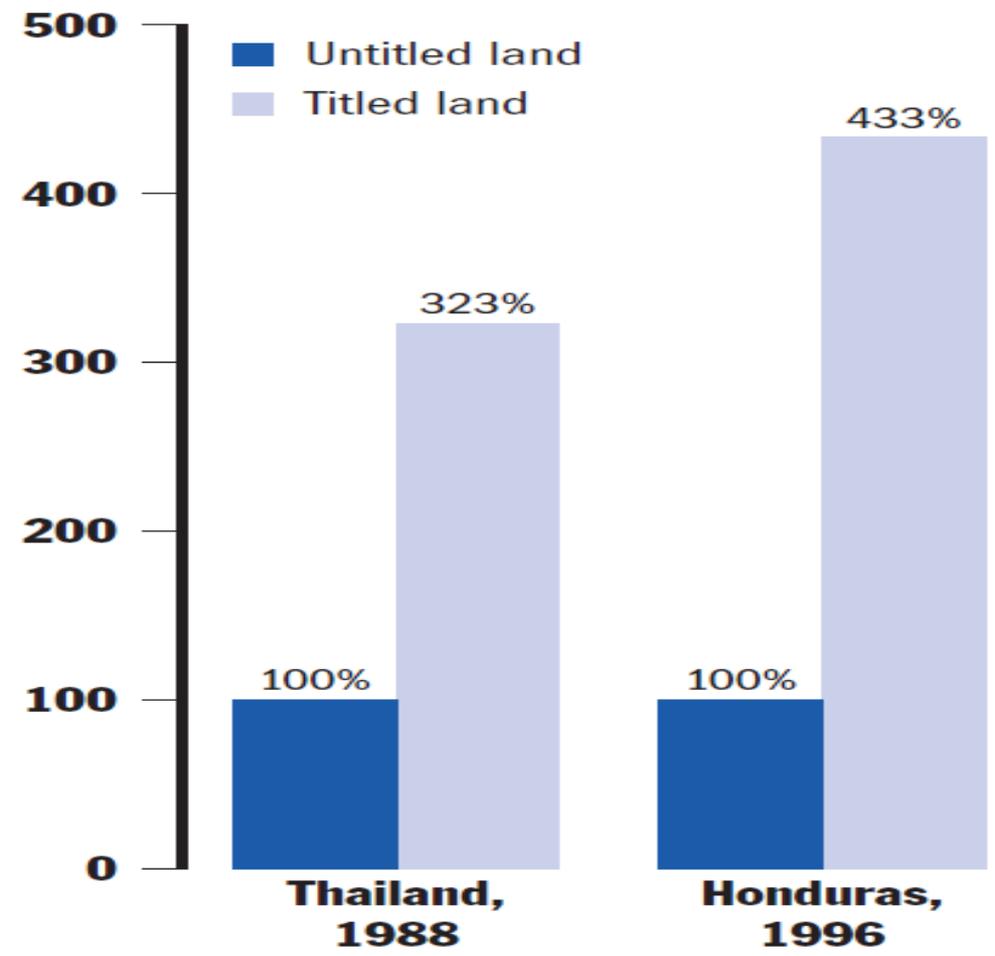


Source: Feder (2002).





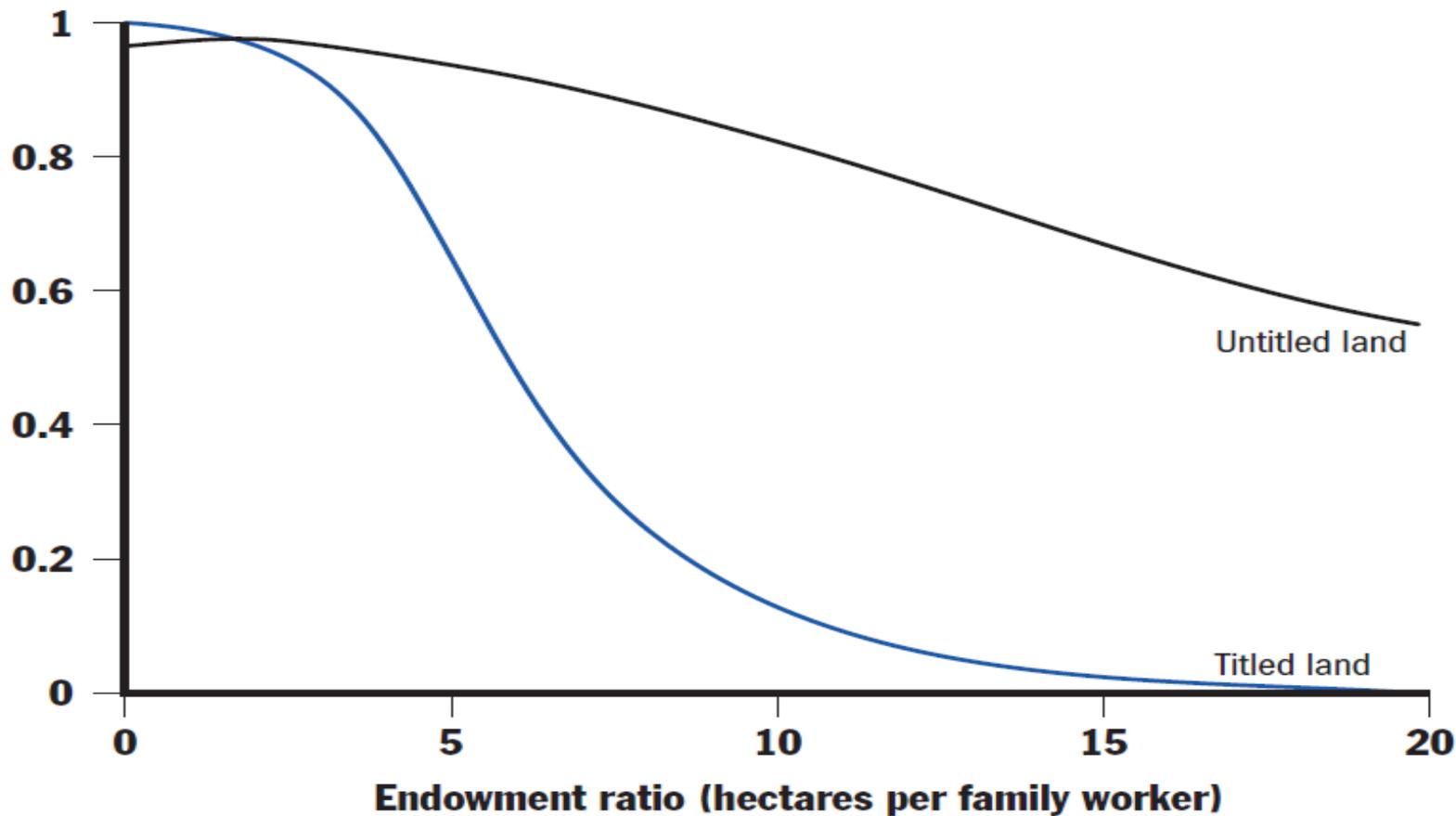
Access to credit (percent)



Source: Feder (2002).



Probability of credit rationing



Source: Carter and Salgado (2001).





- **SA Inc. currently rated 29th/138 in terms of Global Competitiveness Index (1st in Africa).**
- **To promote economic development that benefits the poor, formal property rights are required. Such rights can take a number of forms, but security of tenure and the tradability of such property is pivotal.**
- **Within the SA Inc context, immovable property alone constitutes R4.5 trillion of household nett assets. The generational wealth creation attributes of property rights is therefore absolute.**
- **Property is a social good, and as most Black South Africans were legally denied the right to acquire land and as many Black South Africans were dispossessed of their land during the colonial and apartheid eras, Section 25 of the Constitution makes it clear that the expropriation of property is permissible to either effect land redistribution or to achieve some other public purpose or for the public interest.**





BILL OF RIGHTS (CHAPTER 2 OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA)

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The Bill of Rights sets out the fundamental rights of all South Africans, including the right to dignity and the right to equality. The Bill of Rights also states when rights may be limited.

The mechanism envisaged by the resolution to achieve EWC is to amend the Constitution, specifically, Section 25 thereof, which requires “just and equitable” compensation to be paid whenever property is expropriated.

We are of the view that there is no legal reason why Section 25 of the Constitution needs to be amended to remove the requirement for compensation to be paid, to achieve the goal as set out in the resolution, especially if one considers the provisions of Section 25(2), (3) and (4).





- **As many property owners use their land productively, paid market value for the property, owe money on mortgage bonds taken out to pay for such property or need access to property for housing purposes, Section 25 prohibits the arbitrary deprivation of property as well as the expropriation of property without the payment of “just and equitable” compensation, which has either been agreed upon or which has been decided by a court of law.**
- **However, notwithstanding the said prohibition, it must be noted that section 25(8) specifically states that no provisions of section 25 may impede the state from taking legislative and other measures to achieve land, water and related reform, to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).**
- **The expropriation of land required for the purposes of redressing the dispossession of land from Black property holders, and that this purpose would constitute “for a public purpose or in the public interest “, as set out in Section 25 (4)(a).**
- **Furthermore, Section 25(3) states that the amount of the compensation that must be paid should be “just and equitable”, for the reasons set out in that subsection.**
- **The provisions of Section 25(8), read with section 36(1) [limitation of rights] are also applicable.**





Section 36 (1) of the Constitution dealing with the limitation of rights provides as follows:

36 “Limitation of Rights

- (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 achieving the purpose.”**





THE IMPACT OF EWC ON PROPERTY RIGHTS

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EWC, in its current form, does not on face value seem to take into consideration the security rights (real rights) mortgagees have over immovable property.

A mortgage bond over immovable property is real security that is registered with a deeds office in the jurisdiction in which the immovable property is located and in accordance with the Deed Registries Act 47 of 1937 (as amended).

A mortgage bond registered in favour of a mortgagee affords the mortgagee certain rights which includes the following:

- **The mortgagee has a right of preference where a sale of the immovable property has been levied (even where it has been levied by other creditors). Similarly, if a Borrower is declared insolvent, the mortgagee is to be regarded as a preferent creditor over all other creditors in relation to the immovable property;**
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- **The mortgagee has the right to foreclose:**
 - **Firstly, the mortgagee obtains judgment specifically declaring the immovable property executable;**
 - **Then, the mortgagee, as judgment creditor, issues a writ of execution against the mortgaged property, instructing the Sheriff to levy the execution immediately.**





At this stage it is not understood if any of these rights will be affected and if property law legislation in South Africa would need to be amended to cater for the changes. This will need to be fully investigated.

Apart from security, we understand that in the event a property which a bank has taken security over is to be expropriated, relative to residential/commercial/agricultural property finance loans, such an event will be considered as default under the loan and will have the following consequences:

- the repayment of the loan at the election of the Bank could be accelerated and this would place the borrower in a situation whereby he/she would need to repay the loan far quicker than what was anticipated;**
- the immovable property could, at the election of the bank be foreclosed upon as set out above; and/or**
- cause default in other loans (not only to the property finance loans) which has the potential impact of financially crippling the borrower as those loans could be accelerated at the election of the bank and security executed against same.**





RESIDENTIAL/COMMERCIAL AND INDUSTRIAL PROPERTY SPECIFIC

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We submit that all residential/communal property in urban/peri-urban areas must be excluded from consideration for EWC due to the risk of a significant negative impact on the market (this excludes abandoned and unproductive property);

In respect of unproductive property, one needs to safeguard peri-urban 'land banked' vacant/unproductive property earmarked for future residential/commercial and industrial development by developers;

We are of the view that transformation can be accelerated through the review of the current human settlements policy/legislative framework, including, amongst others:

- Accelerate housing delivery by providing households living within informal settlements increased security of tenure;**
- The state to provide basic services to households, allowing them to construct their own homes under the guidance of professional state institutions so that the National Building Regulations and Standards Act, 1973 and Amendments thereto are adhered to. This will also ensure the health and safety of such households;**





- Review the qualifying criteria for subsidy houses, including expediting the delivery of title deeds to owners. Removing restrictive conditions on the trade of such stock will increase the availability of property stock;
- Promote alternative forms of tenure;
- Promote “inclusionary housing” as a compulsory component in new residential developments;
- The mooted Human Settlements Development Bank should incentivise first time home buyers to enter the residential market. This framework should consider means tested qualifying criteria, a review of current legislation and financial assistance in respect of differentiation and subsidisation, and incentivising the private sector to increase the production of affordable housing property stock;
- The various pieces of regulation and legislation that are identified as being impediments in respect of accelerating transformation of the residential property market should be reviewed.





CONCLUSION

Meaningful land reform, together with the reversal of skewed land ownership patterns is an imperative for the country. We are however of the opinion that amending the Constitution to give effect to this is unnecessary.

Rather, a firm commitment by all key stakeholders to take steps to give effect to the NDP goals is preferred.

If the state is intent on giving effect to EWC:

- only the Minister Public Works or the President should have a mandate/power to authorise this;
- Land reform needs to occur in a manner that does not undermine property rights and/or property values;
- We stress the need for the State to create policy certainty as early as September once it has considered inputs, failing which, we believe it will negatively impact on the vibrancy of this sector, including property values.





Land expropriation, with or without compensation, looms large for landowners. EWC, if not done according to the confines of the Constitution and a law of general application, could create systemic risk for specific classes of property, lenders and the state alike.

We emphasise the need for the state to create market certainty through crisp and definitive policy/legislative frameworks which are well communicated and that measures are put in place to prevent ‘EWC property class ‘creep’.

We must ensure that going forward, EWC does not increase the plight of the poor, either because of job losses or more importantly increased levels of food insecurity, caused by the collapse of food production.

The implementation of EWC must also not inhibit the attraction of local and global investment and inclusive growth. If this were to happen, we would all suffer, and mostly the poor, whom we are hoping will benefit from land reform.





QUESTIONS

