THE FW DE KLERK FOUNDATION

Upholding South Africa's National Accord

Portfolio Committee to Initiate and Introduce Legislation
Amending Section 25 of the Constitution
Parliament
Cape Town
Attention: Mr V Ramaano
Per email: **section25@parliament.gov.za**

30 January 2020

Submission on the *Draft Constitution Eighteenth Amendment Bill, 2019* (the Bill)

1. The FW de Klerk Foundation (the Foundation) was established in 1999 to protect and promote the Constitution of the Republic of South Africa, as the most important legacy of its founder, former President FW de Klerk.
2. Accordingly, the Foundation endeavours to contribute positively to the promotion and protection of our constitutional democracy. As such, the Foundation welcomes the opportunity to make a concise submission - per the invitation by the Ad Hoc Committee to initiate and introduce legislation amending section 25 of the Constitution (the Committee) on the Bill published in *Government Gazette Notice* 42902 of 13 December 2019.
3. The Foundation regards the question of amending section 25 of the Constitution (section 25) to provide for the expropriation of land without compensation (or "*nil compensation*" as provided for in the Bill), of central importance to the future of South Africa. This is not only in relation to the essential requirement for the successful process of land reform, but also for the future of property rights and hence the prospects for the economy, as well as for the future of race relations in South Africa.
4. In this regard, please find attached our submission for the Committee's attention and consideration.
5. We trust that our submission will be of assistance in guiding the Committee in its deliberations regarding the Bill. We are also available to make an oral submission to the Committee.

Yours sincerely,

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1. INTRODUCTION AND SUMMARY OF THE FOUNDATION'S APPROACH TO THE BILL

1.1. From the outset, the Foundation wishes to unequivocally state that it believes that there is an urgent need to address the systemic obstacles to land reform in South Africa, and that promoting the property rights of all South Africans is of the utmost importance. That said, we firmly believe that it is not necessary to amend section 25 in order to advance land reform and to extend property rights in the country. The proposed amendment to section 25 is not the solution.

1.2. Our approach to the Bill is as follows: In Part A of the submission, we provide a legal analysis of the provisions in the Bill, which also includes concerns related to the process followed with the publication of the Bill and the manner in which the Committee approached its mandate in this regard. In Part B, we raise concerns regarding the economic implications of the proposed amendment, and, in Part C, we examine the broader political context, considering the genesis of section 25. We emphasise that the proposed amendment would strike a critical blow to the historic accord upon which our new society has been constructed.

1.3. For ease of reference, a short summary of points under each section:

1.3.1. In **Part A**, the **legal analysis** of the Bill, we emphasise that the current formulation of section 25 provides no impediment to the acceleration of land reform. Instead, it is institutional incapacity, corruption, and a failure to ensure a proper legislative framework to give effect to section 25 that has jeopardised the constitutional imperative to extend property rights.

1.3.2. We hold that one cannot propose an amendment to a mechanism without fully grasping the foundation of such a mechanism. As a starting point, one must understand the current structure of section 25 to appreciate both its "*protective*" and "*reformative*" purposes and, importantly, the nature of expropriation under our constitutional dispensation.

1.3.3. It is critical to understand the rationale behind why the State is obligated to compensate once it exercises its legislative power to expropriate, as well as the nature of compensation that is provided for under the Constitution. We hold that compensation is critical to ensure that there is no "*disproportionate burden*" on a property owner who must give up their property to advance a public purpose or in the public interest to achieve a social goal.

1.3.4. We point out that the Constitution clearly diminished a reliance on market value as the supreme factor on the determination of the amount of compensation for expropriation. The legislature has failed miserably to provide interpretative guidance to the Courts on the application of the criteria in section 25(3)(a) to (e) to determine the amount that reflects an "*equitable balance*".

1.3.5. We furthermore note that it was unclear whether the Committee saw "*nil compensation*" in the Bill as interchangeable with "*without compensation*". We held that the Committee failed to show in its deliberations - in light of the fact that no consideration was given to circumstances that could

justify no compensation ("*nil compensation*") - that it dealt with the question of whether "*expropriation without compensation*" could constitute an arbitrary deprivation prohibited in terms of section 25(1) of the Constitution.

1.3.6. We also hold that the Committee in effect disregarded the "*equitable balance*" structure constructed in section 25(3) by singling out one criterion - the purpose of expropriation (for land reform, in this instance) - above all other criteria provided for in section 25(3)(a) to (e) which, according to the constitutional imperative, should be given equal recognition.

1.3.7. Regarding the legal procedural concerns, we submit that the short time given to the public to comment on this Bill has jeopardised public engagement and that critical "*necessary information*" has not been provided to the public to allow them to engage meaningfully with the Bill. Furthermore, the failure of the Committee to obtain a legal opinion on the impact of South Africa's international obligations in terms of Bilateral Investment Agreements is a critical failure.

1.3.8. We also submit that the Committee did not show that it rationally applied its mind to its mandate. There was no indication of what the Committee considered in order to conclude that the proposed insertions of the words "*nil compensation*" in section 25 will advance land reform and, more specifically, that the exact criteria of their mandate, as we analysed it, has been fulfilled.

1.3.9. In **Part B**, regarding the **economic implications of the proposed amendmen**t, we point out - without fear of rational contradiction - that the proposal of "*expropriation without compensation*" and its planned implementation have already caused harm to the South African economy, investment, food security and agricultural production. This, we submit, is clearly reflected in a report of the World Bank (detail of which is provided in the relevant section), the number of agricultural farms for sale and the 2019 *Index of Economic Freedom* of the Heritage Foundation.

1.3.10. We point out that, if the proposed amendment is successful, the economic consequences would be even more devasting. We further raised concerns about the potential impact on South Africa's eligibility to trade with the Unites States of America in terms of the *African Growth and Opportunity Act* (AGOA). We submitted that the proposed amendment can in no way be construed as being in the best interests of South Africa and all its people. On the contrary, it is bound to cause harm to all South Africans, including the poorest of the poor.

1.3.11. In **Part C, the broader political considerations,** we hold that there is not only a clear correlation between the recognition of property rights and investment inflows but that there is also an absolute correlation between property rights and political and civil freedoms. Respect for property rights also has a clear impact on social and development outcomes of a country.

1.3.12. We furthermore held that it is critical to study the intentions of the authors of the Constitution and the political and ideological factors that have given rise to the Bill.

1.3.13. We point out that the success of South Africa's constitutional negotiations depended on a continuous search for balance between the often diametrically opposed demands of the main parties. We submit that the search for finding a balance was at the heart of the negotiations on the key question of property - which is reflected in the final constitutional text adopted.

1.3.14. However, we submit, that the ruling party's long-term ideological goals only became clear in the subsequent *Strategy and Tactics* documents of the organisation, and that the ruling party has little intention of maintaining a reasonable balance on property rights. Subsequent documents, such as the Department of Rural Development and Land Reform's *2011 Green Paper on Land Reform,* spelled out the ruling party's intentions regarding property rights, emphasising that "*all anti-colonial struggles are, at the core, about two things: repossession of land through force or deceit; and, restoring the centrality of indigenous culture*."[1]

1.3.15. We submit that the Bill strikes a fatal blow to the historic accord upon which our new society has been constructed. We also submit that, in finding solutions, one needs to challenge the perception of ownership patterns in South Africa. According to a 2017 report by the organisation, Agri SA, titled "*Land Audit: A transactional approach*"[2] (Agri SA's report), ownership shares of "*Previously Disadvantaged Individuals*" on a national level - in terms of the land's value and the land's potential - have increased significantly since 1994.[3] Agri SA's report held that on a "*national level: in terms of value, the share is 29.1% and in terms of land potential, the share is 46.5%*".[4]

1.3.16. We submit that, if handled correctly, land reform could be the most positive development since 1994. However, if handled unjustly and with an expectation that the proposed amendment will be the solution to land reform challenges, it will be a catastrophe for all South Africans.

1.4. In conclusion, we submit that the future of property rights is one of the core questions that will determine the future success or failure of our young democracy. It requires renewed and frank communication between the State, agricultural stakeholders, NGOs, the public and the private sector. On the one hand, there is a clear need - and a constitutional imperative - for balanced, effective and sustainable transformation. On the other hand, we must avoid the implementation of failed ideologies that will destroy our constitutional democracy, our economy and any vestige of national unity.

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[1] At page 1 of the Green Paper.

[2] Agri SA. Land Centre of Excellence. *Land Audit: A transactional approach*. 2017.

[3] The Executive Summary of the Agri SA report highlighted that the ownership cannot be merely measured in terms of land size (hectares) but rather that a combination of factors such as "*land size, value, land potential and other factors*" should be taken into account. For more detail see chapter 2 on the method and data used in the report.

[4] Note 2. In the Executive Summary of the report.

PART A: LEGAL ANALYSIS OF THE BILL

1. ***The proposed amendment against the current framework of section 25 and other Constitutional provisions***

1.1. On 15 June 2018, the Foundation made a written submission to the Joint Constitutional Review Committee (JCRC) mandated 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, and propose the necessary constitutional amendments where necessary*"[5] (Foundation's s25 review submission).

1.2. The Foundation's s25 review submission relied strongly on the recommendations in the "*Report of the High Level Panel on the assessment of key legislation and the acceleration of fundamental change"*[6] (High Level Panel report) to support its view that the current formulation of section 25 provides no legal impediment to accelerate the land reform process.[7] One of the three themes of the High Level Panel (chaired by former President Motlanthe) was "*land reform: restitution, redistribution and security of tenure*". The High Level Panel conducted its work over 21 months and extensive contributions were made by various stakeholders and experts on the topic.

1.3. The Foundation held in its s25 review submission that the land reform process could be sped up by ensuring there is a proper legislative framework to give effect to section 25, supported by adequate funding being made available for land reform. Any attempts to speed up land reform would be in vain without urgently addressing corruption and incapacity within State departments involved in land reform.[8] We unequivocally still maintain these points for the purpose of this submission.

1.4. The Foundation's strong belief that the current formulation of section 25 is not the obstacle to fast-track land reform, but that the incapacity of State Departments has jeopardised the constitutional imperative, was also shared by the Constitutional Court in a scathing judgment in 2019. The Constitutional Court in *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another*[9] (Mwelase) critically held that -

> "*The Department's failure to practically manage and expedite land reform measures in accordance with constitutional and statutory promises has profoundly exacerbated the intensity and bitterness of our national debate about land reform. It is not the*

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[5] The mandate of the JCRC is reiterated in the "*Report of the Joint Constitutional Review Committee on the possible review of section 25 of the Constitution, dated 15 November 2018*."

[6] *Report of the High Level Panel on the Acceleration of Key Legislation and the acceleration of fundamental change*, November 2017.

[7] See page 51 of the report above.

[8] The High Level Panel report emphasised at page 51 that "*Experts advise that the need to pay compensation has not been 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 more serious stumbling blocks to land reform*".

[9] [2019] ZACC 30.

Constitution, nor the courts, nor the laws of the country that are at fault in this. It is the institutional incapacity of the Department to do what the statute and the Constitution requires of it that lies at the heart of this colossal crisis."[10] (own emphasis)

1.5. The Foundation specifically noted that the *JCRC's report on the possible review of section 25 of the Constitution*, (JCRC's report), recommending essentially that section 25 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...*" paid no attention to recommendations of the High Level Panel report.[11] The JCRC's report only noted that the High Level Panel report was often referred to in submissions received and that it was a point of divergence whether the report's recommendations should be engaged with.

1.6. On reading the JCRC's report and recommendations, the Foundation is unconvinced that the JCRC "*evaluate*d" as they were mandated to do, the reasons for the failures of land reform (evidenced in the High Level Panel report) or provided evidence that an amendment to section 25 will rationally address these concerns. The High Court in *AfriForum v The Chairperson of the Joint Constitutional Review Committee of South Africa*[12] pointed out that this JCRC's mandate was "*...to procure and evaluate the substantive points of members of the public and interested organisations on the issue of the amendment*."[13] (own emphasis)

1.7. The Foundation therefore submits, in analysing the constitutionality of the Bill, the starting point should be the current structure of section 25 and critically the nature of expropriation under our constitutional dispensation.

1.8. We submit that one cannot propose an amendment to a mechanism without fully grasping what that mechanism is based on. For the purpose of this submission - and for the sake of brevity - the Foundation will not be expanding on the legislative failures to effect land reform, as this is elaborated on in the Foundation's s25 review submission (a copy of the Foundation's s25 review submission can be provided if so requested).

1.9. *The nature of section 25 and expropriation under our constitutional dispensation*

1.9.1. We note that the Bill proposes to amend section 25(2)(b) relating to the amount of compensation the State must pay a property owner once it exercises its legislative power to expropriate property for a public purpose or in the public interest.

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[10] At paragraph 41 of the judgment.

[11] The final recommendations of the JCRC dated 15 November 2018 stated 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, so as 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 programmes*".

[12] Case no 21367/2017 of the Western Cape High Court. The reasons for the judgment were delivered on 27 February 2019.

[13] At paragraph 50 of the judgment.

1.9.2. The proposed insertion in section 25(2)(b) provides that subject to a new proposed section 25(3A), a Court may determine that where "*land and any improvements*" thereon are expropriated for "*the purposes of land reform*", that the "*amount of compensation is nil*".

1.9.3. The new section 25(3A) proposes that national legislation should (subject to section (25)(2) and (25)(3)) set out "*specific circumstances where a Court may determine that the amount of compensation is nil*."

1.9.4. Currently section 25(3) provides a non-exhaustive list of criteria (section 25(3)(a) - (e)) that must be considered to determine whether the "*amount of the compensation and the time and manner of payment*" is "*just and equitable, reflecting an equitable balance between the public interest and the interests of those affected*". The Bill also proposes that section 25(3) be amended to provide reference to section 25(2)(b) and that the words "*any*" should be inserted.

1.9.5. We note that the Committee has elected not to use the term "*without compensation*" in the proposed amendment, which has been used throughout the JCRC review hearings and during the Committee's own deliberations. The Committee has opted to use the term "*nil compensation*". However, no definition is provided for "*nil compensation*" and we assume it means that the amount of compensation may be zero Rand.

1.9.6. We however submit that it should have been clarified in the memorandum of the objectives of the Bill (the Bill's memorandum) what the Committee understands under "*nil compensation*". It is unclear whether the Committee sees this term as interchangeable with the term "*without compensation*" used throughout its deliberations and whether the Committee understands that compensation is a core legal requirement of expropriation. Not only does the Committee, in this instance, fail to provide the public with the necessary information to engage with the content of the Bill, which will be expanded on under procedural failures, it is also unclear whether the Committee grasps the legal nature of expropriation, deprivation and confiscation.

1.9.7. We also note that no definition is provided for "*land reform*" in terms of the Bill. In the Foundation's s25 review submission we pointed out that there is a need for a clear definition of the constitutional imperative of "*land reform*" as used in section 25(4)(a).[14] The failure to provide a definition also indicates failure by the Committee to apply its mind to the question of who will indeed be advanced by this proposed amendment and how it will "*ensure equitable access to land*" as per the Committee's mandate.

1.9.8. It is critical to understand that one cannot view the subsections of section 25 in isolation. The structure of section 25 must be viewed overall to understand that it serves both a "*protective*" and "*reformative*"

[14] In our s25 review submission we pointed out that most South Africans agree on the need for an effective and equitable process of land reform. Land reform, in terms of section 25, is also a constitutional imperative. However, there is no definition of land reform: it could be used to enhance the vast property rights and freedom of millions of South Africa citizens - or it could be used to consign them to a condition of perpetual dependency in which the State would be custodian of all the land in the country, or where traditional leaders control the land on which they work and live.

purpose in our new constitutional dispensation and that a proportionate balance is struck between these two purposes.[15]

1.9.9. Sections 25(1) to (3), the provisions providing protection against arbitrary deprivation of property and stipulating the requirements for expropriation, can be described as "*protecting existing property interests against unconstitutional interference*".[16] Sections 25(4) to (9), the "*reformative provisions*" can be described as "*providing authority for state action to promote land and other reforms*.[17]

1.9.10. The protection of property against unconstitutional interference is also directly reflected in international conventions, which South Africa has to adhere to, such as article 17 of the *Universal Declaration of Human Rights*, which stipulates that "*Everyone has the right to own property alone as well in association with others*" and, critically, article 17(2) provides "*No one shall be arbitrarily deprived of his property*".[18]

1.9.11. In *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance*[19](FNB matter), Justice Ackerman confirmed that -

> "*The purpose of section 25 has to be seen <u>both as protecting existing private property rights as well as serving the public interest, mainly in the sphere of land reform</u> but not limited thereto, and also <u>as striking a proportionate balance between these two functions.</u>*"[20] (own emphasis)

1.9.12. In the FNB matter, the Constitutional Court also emphasised that section 25(4) to (9), the "*reformative*" provisions, in "*one way or another, underline the need for and aim at redressing one of the most enduring legacies of racial discrimination in the past, namely the grossly unequal distribution of land in South Africa."* [21]

1.9.13. Section 25(4) to (9), and especially section 25(8), unequivocally mandate the State to take active measures to drive land reform. The State, however, has been slow to utilise these "*reformative provisions*" to enable citizens to gain "*access to land on an equitable basis*" as is clearly evidenced in the High Level Panel report.[22]

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[15] AJ van der Walt*, Constitutional Property Law*, Third Edition. Juta & Co Ltd, Cape Town at 12-13.

[16] See note 15 at page 12.

[17] See note 15 at page 12.

[18] Article 5(d)(v) of *the International Convention of the Elimination of All Forms of Racial Discrimination* also obliges State parties to ensure the right to own property is enjoyed without any distinction on the basis of race, colour, national or ethnic origin.

[19] 2002(4) SA 768.

[20] At paragraph 50 of the judgment.

[21] At paragraph 49 of the judgment.

[22] See the High Level Panel report at pages 37-39.

1.9.14. As the proposed amendment specifically intends to amend section 25(2) and (3), apparently to advance land reform, one must examine the nature of expropriation and its relationship with section 25(1) - the "*protection against arbitrary deprivation*" provision.

1.9.15. Legal scholars and the Courts have struggled to distinguish expropriation from deprivation and it is still not always clear.[23] AJ van der Walt has held that - "*Expropriation is usually defined in contrast with deprivation, which is seen as a less intrusive limitation of property and is usually not accompanied by compensation. It is usually said that expropriation consists of compulsory State acquisition of private property, while deprivations occur when the State regulates the use and enjoyment of private property in the public interest.*"[24] (own emphasis)

1.9.16. The State's authority to expropriate must be in terms of the law of general application; be either for the public purpose or in the public interest ("*which includes the nation's commitment to land reform*") and the property owner must be compensated on an "*equitable balance*" for carrying this societal burden. These legal requirements ensure that the State's interference with a property owner's property rights is not unconstitutional.

1.9.17. The FNB matter has further clarified that expropriation is a "*subset of deprivation*".[25] Therefore, essentially, the inquiry must start with section 25(1), according to the FNB matter. If the deprivation (which includes expropriation) infringes section 25(1), i.e. it is found to be arbitrary and cannot be justified under section 36 (the limitation of rights inquiry), then it is unconstitutional. If, however, it passes section 25(1), then the question is whether the deprivation amounts to expropriation by looking at the valid requirements it must fulfil, i.e. law of general application, for public interest or public purpose, and, importantly, compensation.[26]

1.9.18. We submit that the Committee has not showed in its deliberations that it dealt with the question of whether "*expropriation without compensation*" could potentially constitute an "*arbitrary deprivation*"? The arbitrariness of the proposed amendment was never tested by the Committee, which is a glaring failure. As a subset of deprivation, expropriation also needs to satisfy section 25(1) and it could be challenged on section 25(1) alone as potentially unconstitutional.

1.9.19. It would be critical in order to test arbitrariness to know what circumstances are envisioned where the Court may determine that the amount of compensation is nil. The proposed legislation, which we assume would be an amendment to the *Expropriation Act 63 of 1975* (the Expropriation Act), would first need to pass section 25(1) according to the FNB matter.

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[23] See note 15 at page 335.
[24] See note 15 at 335.
[25] At paragraph 57 of the judgment.
[26] At paragraph 59 of the judgment.

1.9.20. The fact that the Committee has given no consideration to the proposed envisioned circumstances where it might be possible for a Court to determine that the amount of compensation is "*nil*" during its deliberations, not only robs the public of the opportunity to engage with the content of the Bill, it also reflects a glaring failure on the part of the Committee to understand that the proposed section 25(3A) is, above all, subject to section 25(1) of the Constitution.

1.9.21. We emphasise that the Rule of Law, a foundational value of the Constitution, is encapsulated in section 25(1). The Constitutional Court in *Van der Walt v Metcash Trading Limited* [27] (Van der Walt judgment) emphasised that the basic tenets of the Rule of Law include:

- the "*absence of arbitrary power*" i.e. ensuring "*no person in authority enjoys wide unlimited discretionary or arbitrary powers*";
- "*equality before the law*" meaning that "*every person, whatever his/her station in life is subject to the ordinary law and jurisdiction of the ordinary courts";* and
- lastly "*the legal protection of certain basic human rights*".[28]

1.9.22. We wish to unequivocally state that the jurisdiction of the Courts cannot be ousted in this instance. It would be in clear contravention of the Rule of Law and would trigger section 74(1)(a) of the Constitution, relating to the process of amending section 1 of the Constitution.

1.9.23. The Southern African Development Community Tribunal (SADC) in *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe*[29] (concerning the Zimbabwean constitutional amendment regarding the acquisition of agricultural land by the State, without recourse to a Court of Law), explicitly held that the constitutional amendment subverted the Rule of Law and the Zimbabwean Government was found in breach of its obligations under the SADC treaty.

1.9.24. We noted that the proposed insertion in section 25(2)(b) clearly states that the determination of "*nil compensation*" remains with the Court. We have however noted that there have been media reports claiming that the ruling party appears to be of the opinion that this power should be given to the Executive.[30] As the formulation of such proposal is not before us, we can only comment to the extent that the Courts' jurisdiction cannot be ousted. The final determination of the amount of compensation will always have to remain with the Courts.

1.9.25. Furthermore, the proposed circumstances to be stipulated in legislation would need to pass section 25(1) to be constitutionally-aligned and had to be considered by the Committee. There are fears that the Committee has simply left this determination for the Legislature and by doing this, is attempting to

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[27] 2002(4) SA 317.

[28] At paragraph 65 of the judgment.

[29] [2008] SADCT 2(28 November 2008).

[30] See https://businesstech.co.za/news/banking/368266/ancs-new-land-expropriation-twist-could-collapse-the-economy-da/.

circumvent the strict procedural requirements regarding public participation and voting on a constitutional amendment of a right in the Bill of Rights, in terms of section 74(2) of the Constitution.[31] We submit that this simply fuels further fear and creates further uncertainty for property owners about their investments.

1.9.26. We acknowledge that the Constitution is not a detailed document. It provides the overall framework and the specifics of these fundamental rights must be given effect in ordinary legislation. However, there is no indication that the Committee has rationally applied its mind to this question of what circumstances might justify "*nil compensation*". The rationality argument is expanded on under procedural concerns.

1.9.27. We submit that the Bill's memorandum, at a minimum, had to stipulate what circumstances are envisioned, so that the public can rationally test this and determine firstly whether it adheres to section 25(1). This is even before one would test it against section 25(3)(a) to (e) criteria.

1.9.28. For instance, to address fears that these circumstances might target a specific group of people, one would need to ensure that the circumstances ensure equality before the law, a core aspect of the Rule of Law and that it does not discriminate on any of the prohibited grounds provided for in section 9(3) of the Constitution. We emphasise that the Van der Walt judgment held that - "*there is an overlap between the rule of law and equality. Both strike at arbitrariness*".[32]

1.9.29. We note that the *Draft Expropriation Bill, 2019*[33] *(2019 Expropriation Bill)*, which preceded the publication of this Bill (which was problematic in itself) stipulated in clause 12(3) circumstances where it may be "*just and equitable*" for "*nil compensation*" to be paid, which for instance included where the "*land is held for speculative purposes*".[34]

1.9.30. However, these proposed circumstances in the 2019 Expropriation Bill raised extensive concerns as the list was firstly not limited. No definition was, for instance, provided for "*speculative reasons*", making it quite plausible that it could be abused and become punitive in nature. There was also no indication that these circumstances gave effect to the criteria in section 25(3)(a) to (e) in the Constitution and "*land*" in this instance, did not - as we understand it - include "*improvements thereon*". In terms of the Bill under consideration, "*nil compensation*" is considered for "*land and improvements thereon*". It is therefore highly concerning that the Committee did not deliberate on these proposed circumstances in the 2019 Expropriation Bill, or at least deliberate on the conditions that the *Final report of the Presidential Advisory on Land Reform and Agriculture* considered, which might justify "*expropriation*

[31] Section 74(2)(B) read with section 74(5) on the requirements regarding a proposed amendment to a right in the Bill of Rights.
[32] At paragraph 36 of the judgment.
[33] Published by the Department of Public Works on 21 December 2018.
[34] See clause 12(3)(a) to (e) of the Bill.

without compensation".[35] The failure to do so and the failure to indicate in the Bill's memo what circumstances might be envisioned, is a glaring omission.

1.9.31. It is also critical to take into account that any such proposed legislation stipulated in section 25(3A) is also subject to section 36 of the Constitution, the limitation of rights provision. A pertinent question that arises with the proposed amendment - and in light of the fact that the Committee provided no indication of what circumstances might justify "*nil compensation*" - is the impact of the proposed amendment on the constitutional right to housing. The proposed amendment includes the proposal of "*nil compensation*" for "*land and <u>improvements</u> thereon*", which therefore arguably could include a person's primary house. The failure of the Committee to apply its mind to this potential infringement is a further failure of the Committee to fulfil its mandate.

1.9.32. We also note that the Committee, according to reports of its deliberations, were alerted to the fact that "*expropriation without compensation*" could potentially be considered confiscation of property.[36] However, it does not appear that the Committee applied its mind to the matter. There appears to have been no consideration given to the fact that technically confiscation is also a regulatory deprivation of property (obviously no compensation is paid) and it also has to conform to the requirements of section 25(1).[37] How do you distinguish "*expropriation without compensation*" from confiscation?

1.10. *Expropriation and Compensation under a new constitutional dispensation: Compensation does not equal market value*

1.10.1. We submit it is critical to understand the purpose of why the State is obligated to compensate once it exercises its legislative power to expropriate and, secondly, to understand the nature of compensation under our new constitutional dispensation.

1.10.2. The determination of compensation for expropriation under the Constitution has dramatically changed from the pre-constitutional focus on the market value of the property as the primary factor, in terms of section 12 of the *Expropriation Act*. Market value was determined by considering what a *"willing buyer*" would pay a "*willing seller*" for the property in question.

1.10.3. Section 25(3) of the Constitution now provides that the amount of compensation must be "*just and equitable*" listing a non-exhaustive list of factors that must be taken into account when determining the amount reflecting an "*equitable balance between the public interest and the interests of those affected*." In terms of section 25(3)(c), market value of the property is only but one of the factors that can be considered.

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[35] The majority looked at conditions at page 72 of the report.

[36] According to Parliamentary Monitoring Group's summary of the deliberations of the Committee on 13 November, the point was raised at a land dialogue workshop by an expert in property law.

[37] See note 15 above at page 313.

1.10.4. One needs to look no further, to clarify that the Constitution deviated from the pre-constitutional focus on the market value as the primary determinative factor, than the *First Certification of the Constitution of the Republic of South Africa*[38] judgment (First Certification judgment).

1.10.5. The Constitutional Court, in the First Certification judgment, specifically dismissed the objection that the new constitutional text should stipulate that compensation should be calculated on the basis of market value.[39] The Constitutional Court held - after considering international conventions and foreign constitutions - that a wide range of criteria for expropriation and the payment of compensation exist and, with the nature of compensation, adjectives such as "*fair*"; "*adequate*" "*equitable*" and "*just*" are often used. The Constitutional Court also specifically looked at article 14(3) of the German Basic Law, which provides that the "*amount of compensation should seek to obtain an equitable balance between the public interest and the interest of those affected*."[40] The constitutional text adopted is therefore very much in line with foreign law approaches regarding the determination of the amount of compensation.

1.10.6. The contention, however, exists that despite the Constitution's clear intention to break away from the centrality of market value on determining the amount of compensation, the *Expropriation Act* has not been amended to provide interpretative guidance on the factors stipulated in section 25(3) of the Constitution. The *Expropriation Act* - in the calculation of compensation - prescribes market value, contrary to the Constitution, which provides for "*just and equitable*" compensation reflecting an "*equitable balance*" between the interest of those affected by the expropriation and the public interest.[41]

1.10.7. Although the *Expropriation Act* must be interpreted in line with Constitution, the supreme law of the Republic, the Courts in general use the market value as a starting point in assessing the compensation and then take the other factors in section 25(3) into consideration to adjust compensation accordingly. This despite the fact that <u>the Constitution does not favour market value</u>.

1.10.8. In *Du Toit v Minister of Transport,*[42] the majority judgment noted that there is a clear difference between the *Expropriation Act* and the Constitution, potentially impacting the "*fairness*" of the determination, but it still held that it was the "*most practicable*" in the circumstances to start with the market value, which is "*readily quantifiable*" and then to proceed to apply the section 25(3) factors. This approach appears to afford market value supremacy in determining the amount of compensation, which the minority judgment in Du Toit also noted.[43] The reality is that there is an urgent need to provide

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[38] Certification of the Constitution of the Republic of South Africa 1996(4) SA 744 (CC).

[39] See paragraph 73 of the judgment.

[40] See paragraph 73 of the judgment.

[41] See *Du Toit v Minister of Transport* 2006(1) SA 297 (CC) the majority specifically noted the contrast between the Act and the Constitution but as the Act has not been specifically constitutionally challenged it did not elaborate on this point.

[42] 2006 (1) SA 297 (CC).

[43] ACJ Langa did not agree with the analysis between the relationship between section 12(1) of the *Expropriation Act* and section 25(3) of the Constitution and held at paragraph 84 that "*It seems to me that our Constitution expressly avoided the approach to the calculation of compensation set out in the Expropriation Act, which has been the approach in South Africa for many years*."

interpretative guidance to the Courts on how to apply the factors in section 25(3)(a) to (e) to make it more quantifiable. This is where the focus should be.

1.10.9. A clear opportunity was presented to the Supreme Court of Appeal in *Uys N.O. and Another v Msiza & Others*[44] *(Msiza SCA judgment)* to emphasise that market value is not supreme on determining the amount of compensation. The Land Claims Court in *Msiza v the Director-General of Department of Rural Development and Land Reform and Others*[45] (Msiza Land Claims Court judgment) unequivocally held that - "*Market value is simply one of the considerations to be borne in mind when a Court assesses just and equitable compensation. It is not correct to submit, as was done on behalf of the landowners, that the jurisprudence of this Court has installed market value as a preeminent consideration*."[46] The Land Claims Court in Msiza declined the offer by the State to pay the market value and reduced the offer by R300 000.

1.10.10. The Msiza Land Claims Court decision was however overturned by the SCA and the Court endorsed the approach that market value, objectively determinable, is the "*convenient starting point*" in determining what is "*just and equitable*" compensation. The Msiza SCA judgment has not been appealed by the State and this approach to the determination of "*just and equitable*" compensation currently remains unchallenged.

1.10.11. The High Level Panel report has also emphasised that "*government has not used the power it already has to expropriate land for land reform purposes effectively, nor used the provisions in the Constitution that allow compensation to be below market value in particular circumstances*."[47] Both former Deputy Chief Justice Dikgang Moseneke and Justice Albie Sachs in their submissions to the High Level Panel stated that "*the willing buyer, willing seller formulation*" is not included in the Constitution, and that there are various factors that could "*considerably reduce the amount of compensation"*.[48]

1.10.12. As is clear from the above it is undoubtedly possible that after weighing up all the factors in section 25(3)(a) to (e) that it may be "*just and equitable*" in a specific case that the amount of compensation to be paid, **can be much less than market value, even a nominal amount. The State, however, needs to effectively apply this power.**

1.10.13. It also raised the question, why does the State compensate a property owner? What is the purpose of compensation? The European Court of Human Rights held in *James and Others v The United Kingdom*[49] that compensation "*is material to the assessment*" to determine if there is a "*fair balance between the various interests at stake*" and critically whether "*it does not impose a disproportionate burden*" on the

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[44] 2018(3) SA 440 (SCA).
[45] 2016(5) SA 513 (LCC).
[46] At paragraph 29 of the judgment.
[47] At page 51 of the report.
[48] At page 206 of the report.
[49] European Court of Human Rights. Application case number 8793/79.

person.[50] Therefore compensation ensures there is not a "*disproportionate burden*" on the individual property owner, who is required to give up his property to advance a public purpose, such as building a dam or advancing social justice.

1.10.14. If the burden on the property owner is disproportionate, then the property owner is indirectly being punished. The Constitutional Court has unequivocally stated in *Florence v Government of the Republic of South Africa* (Florence judgment)[51] that compensation within the scheme of the Restitution Act is - "*neither punitive nor retributive. It is not likened to a delictual claim aimed at awarding damages that are capable of precise computation of loss on a "but-for" basis. It is a constitutionalised scheme paid out of public funds in order to find equitable redress to a tragic past. Ultimately what is just and equitable must be evaluated not only from the perspective of the claimant but also of the state as the custodian of the national fiscus and the broad interests of society as well as those who might be affected by the order made.*"[52] (own emphasis)

1.10.15. According to AJ van der Walt there also appears to be a general duty in foreign case law "*to pay compensation for expropriation, even in the absence of an explicit constitutional provision to that effect*".[53]

1.10.16. On the question whether it might ever be "*just and equitable*" for nil compensation to be paid, we acknowledge that the judgment of the Land Claims Court in *Nhlabathi and Others v Fick*[54] held that there "*can be circumstances where the absence of a right to compensation on expropriation is reasonable and justifiable, and in the public interest (which includes the nation's commitment to land reform)*".[55]

1.10.17. We however submit that the Nhlabathi judgment cannot be used as blanket authority to justify the constitutional amendment as proposed. Firstly, the Land Claims Court in the Nhlabathi judgment " assumed" but importantly " did not decide" that the "*appropriation of a grave in terms of section 6(2)(dA) of the Extension of Security of Tenure Act 62 of 1997 is a de facto expropriation of a servitude over the land concerned*."[56] Secondly, as pointed out by AJ van der Walt on analysis of this judgment, many factors were taken into account, such as the fact that the right did not constitute a major intrusion on the landowner's property, the right only existed where there was established practice and the right would enable occupiers to comply with their cultural beliefs.[57]

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[50] See above note for full reference of case.
[51] 2014(6) SA 456 (CC).
[52] At paragraph 125 of the judgment.
[53] See note 15 at page 505.
[54] 2003 (7) BCLR806 (LCC).
[55] At paragraph 33 of the judgment.
[56] At paragraph 31 of the judgment.
[57] Note 15 above at page 507.

1.10.18. The proposed amendment in the Bill, however, in effect, goes against the very nature of finding an "*equitable balance*" between the "*public interest*" and the "*interest of those affected*" in section 25(3) on the determination of the amount of compensation.

1.10.19. The proposed amendment indirectly singles out one criterion, namely the "*purpose of the expropriation*" (which in terms of section 25(4) includes the State's commitment to land reform) to justify "*nil compensation*". It therefore, from the start, places the "*purpose of expropriation*" and the commitment of land reform above all the other criteria in terms of section 25(3)(a) to (e) that have to be given equal recognition, such as "*the current use of the property*"; "*the history of the acquisition and use of the property*"; "*the market value*"; "*the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property*" and lastly "*the purpose of the expropriation*". AJ van der Walt has questioned whether a single factor can justify the absence of compensation and he has held that "*since the purpose (e.g. land reform) is already taken into account in justifying expropriation, it should not be enough to override other factors in determining the amount of compensation*".[58]

1.10.20. We submit that instead of obligating the Legislature to provide interpretative guidance on the application of the factors in section 25(3)(a) to (e), to ensure that the amount of compensation truly reflects an "equitable *balance*", we instead see a complete dismissal of the "*equitable balance*" structure.

1.10.21. We also submit that from the starting point there is a "*disproportionate burden*" on a property owner, as the amount of compensation is not only limited to land but also automatically "*any improvements thereon*". There is no provision made for a separate analysis. The Constitutional Court in the Florence judgment emphasised that compensation does not have a punitive nature but considering the potential disproportionate burden a property owner could carry in this instance, it does appear to be punitive in nature.

1.10.22. We submit that the approach of the Committee to simply provide for the insertion of "*nil compensation*" in section 25(2)(b) and (3) - in light of the above examination - goes fundamentally against the equitable balance approach the Constitution envisions.

2. ***Legal procedural concerns on publication of Bill***

2.1. *Public participation on the Bill is simply a "box-ticking exercise"*

2.1.1. Public participation in the legislative process forms the foundational basis of our constitutional participatory democracy.[59] The Constitutional Court in *Doctors for Life International v Speaker of the*

[58] Note 15 above at page 506.

[59] The right is guaranteed in section 59(1)(a) and 72(1)(a) of the Constitution.

National Assembly and Others[60] (Doctors for Life matter) held that public participation - *"… must be understood as a manifestation of the international law right to political participation*".[61]

2.1.2. The Constitutional Court in Doctors for Life furthermore held that this right includes a duty on the State to ensure that citizens have the *"... necessary information and effective opportunity to exercise the right to political participation*."[62]

2.1.3. The Constitutional Court in *City of Tshwane Metropolitan Municipality v AfriForum and Another*[63] also emphasised that public participation should be "*objectively genuine*" and it "*should never be a sheer box-ticking exercise*".[64]

2.1.4. The Bill, which proposes to amend a right in the Bill of Rights - the chapter containing the fundamental rights of all people in our country affirming human dignity, equality and freedom - triggers very specific public participation requirements and a much higher threshold.

2.1.5. Section 74 of the Constitution stipulates the requirements for Bills amending the Constitution and section 74(5)(a) stipulates that "*At least 30 days before a Bill amending the Constitution is introduced in terms of section 73(2), the person or committee intending to introduce a Bill must publish in the national Government Gazette, and in accordance with the rules and orders of the National Assembly, particulars of the proposed amendment for public comment*." Part 4 of the Rules of the National Assembly[65] gives further practical effect to this constitutional requirement, in specific Rule 295 read with Rule 275(a).[66]

2.1.6. An invitation calling on the public to provide written submissions on the Bill was only published in the *Government Gazette* on 13 December 2019[67], and the public was asked to provide written submissions by 31 January 2020.

2.1.7. The Centre for Constitutional Rights (the Centre), a unit of the Foundation, wrote to the Chairperson of the Committee on 14 January 2020 (14 January 2020 letter), requesting an urgent extension for comment on the Bill. The Centre pointed out that this critically important Bill was published at the start of the festive season, when most businesses and civil society organisations close for the year and only re-opened in January 2020 (a copy of the letter and acknowledgment of receipt can be provided to the Committee if so requested).

2.1.8. The Centre pointed out in its 14 January 2020 letter that this is the first time the public is faced with an amendment to a right in the Bill of Rights. This process is distinct from the public hearings the JCRC held

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[60] 2006(6) SA 416 (CC).
[61] At paragraph 107 of the judgment.
[62] At paragraph 105 of the judgment.
[63] 2016(6) SA 279 (CC).
[64] At paragraph 52 of the judgment.
[65] Rules of the National Assembly, 9th Edition.
[66] Rule 295 provides for the "Requirements prior to introduction of Constitution amendment Bill" and Rule 275(a) stipulates that before introducing a Bill, the Committee "Must give interested persons and institutions a period of at least three weeks after the draft Bill or particulars of the draft Bill have been published in terms of Rules 276 or 295 to comment on the proposed legislation".
[67] *Government Gazette* Notice *42902* in *Government Gazette*, 13 December 2019.

in 2018 to gather the views of the public on the necessity of expropriation without compensation. It was only on publication of the Bill that the public for the first time could effectively test the constitutionality and legality of the proposed formulation of the amendment.

2.1.9. The Centre was not alone in raising concerns on the timing of the publication of the Bill but despite this reasonable request, the Committee only informed the Centre on Friday 24 January 2020 that the request was denied, as the invitation to comment had already been published in December 2019. No further reasons were provided.

2.1.10. We submit that the failure of the Committee to adhere to a practical and reasonable request for an extension to comment - without adequate reasons - seriously jeopardises public engagement on the Bill. Public participation cannot in this instance be said to be "*objectively genuine*" and the Committee is simply adhering to a "*sheer box-ticking exercise*", contrary to the standard that the Constitution envisions in terms of the Tshwane judgment.

2.1.11. If one considers the Committee's programme in 2019, it is apparent that there were delays in constituting the Committee after the 6th Parliament was established. The Committee's report of 13 March 2019, during the 5th Parliament, made it clear that the Committee was far from fulfilling its mandate and that there was still much to do.[68]

2.1.12. It appears the Committee only elected a chairperson on **5 September 2019** in the 6th Parliament, despite members of both houses of Parliament having been sworn in on 22 and 23 May 2019, following the national elections on 8 May 2019.[69] This delay had a clear knock-on effect on the work of the Committee and could explain the rush to conclude its work by 31 March 2020, at the cost of not ensuring adequate public participation.

2.1.13. Furthermore, the Foundation submits that the public - in addition to having been given very little time to comment on the Bill - is also not in the position to engage with the Bill, due to critical information lacking in the Bill. The Doctors for Life judgment emphasised the need to ensure the public has the "*necessary information*" to reasonably engage on the content of proposed legislation.

2.1.14. As noted earlier, no information has been provided to the public on what the Committee understands under "*nil compensation*" and what circumstances might justify the payment of "*nil compensation*" in terms of the proposed section 25(3A). There is no indication that the Committee deliberated on these circumstances and the Bill's memo is glaringly silent on these proposed circumstances.

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[68] The Report of the Committee, dated 13 March 2019, recorded what the Committee had done since its first sitting on 12 February 2019 when it elected a chairperson following the National Assembly Resolution. It appears that effectively the Committee had four meetings before adopting the 13 March 2019 report and effectively it heard a presentation by Parliamentary legal services on the process to amend section 25; it was provided with a summary of the JCRC's report and it had asked seven experts to present their views on the sections to be amended.

[69] According to the Parliamentary Programme, second term members were sworn in on 22 and 23 May 2019 already.

2.1.15. We submit that it does not only bring into question whether the Committee is attempting to circumvent the strict public participation and voting requirements on a constitutional amendment in this manner; it also deprives the public of the opportunity to test whether the proposed amendment might constitute an arbitrary deprivation; and whether it complies with the criteria provided for in section 25(3)(a) to (e). It also denies the public of the opportunity to test whether it might infringe on other constitutional rights. This is a critical failure on the part of the Committee.

2.2. *Failure of Committee to apply its mind to its mandate*

2.2.1. The JCRC's report of 15 November 2019 held that "*section 25 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, so as to address the historic wrongs caused by the arbitrary dispossession of land, and in doing so ensure equitable access to land and further empower the majority of South Africans to be productive participants in ownership, food security and agricultural reform programmes*."[70] (JCRC's recommendation/Committee's mandate)

2.2.2. In order to give effect to the above mandate the Committee arguably had to investigate:

- what is "implicit" in the current formulation of section 25 regarding compensation for expropriation and the parameters thereof;
- How do you make the above explicit? What does "explicit" mean - does it simply mean inserting "*without compensation*" in the text of section 25? Could that which is "implicit" be made "explicit" by requiring national legislation (i.e. the *Expropriation Act*) to provide interpretative guidance on the criteria in section 25(3)(a) to (e)?
- What does the Committee understand under "*expropriation without compensation*", the legal nature thereof?
- What did the JCRC's understand under "*land*" and did it involve "*improvements thereon*"?
- Importantly how will "*expropriation without compensation*":
  - "*ensure equitable access to land;* **and**
  - *further empower the majority of South Africans to be productive participants in ownership, food security **and** agricultural reform programmes*"? (own emphasis)

2.2.3. The Committee simply quoted their mandate in the Bill's memorandum without indicating how the proposed amendment actually meets the criteria of their mandate. For instance, how will the **literal insertions of the words "nil compensation**" in the text of section 25 (as proposed in section 25(b) and section 25(3A)) **ensure "equitable access to land"** as per the Committee's mandate? What evidence did the Committee consider that supported the proposal?

[70] See note 11 for the full reference of the report.

2.2.4. The Foundation acknowledges that the public cannot dictate to the Committee how it should have undertaken its work. The Committee had a wide discretion in the manner it approached the work.

2.2.5. However, the Committee needs to show that it fulfilled its functions rationally. It must show that the **decision on the formulation of the proposed amendment is rationally connected to the information the Committee considered**. The Foundation submits that this is not evident from the Bill's memorandum or the content of the proposed amendment.

2.2.6. In *Minister of Constitutional Development and Another v South African Restructuring and Insolvency,*[71] the Constitutional Court reiterated that the rationality test requires "*that a measure be rationally related to the information available to its designer/formulator at the time of making his/ her decisions' and 'must bear a rational relationship to its objectives'*".[72] (own emphasis).

2.2.7. Considering the Committee's wide discretion and the fact that Committee's mandate was couched on the work and evidence heard by the JCRC, nothing precluded the Committee from further investigating the JCRC report's findings and evidence considered by the JCRC, to understand the criteria their mandate is based on. This would not have undone the work of the JCRC or re-opened the debate on whether section 25 had to be amended.

2.2.8. The above reasonable approach, the Foundation submits, would also have been in line with Parliament's legal services' presentation to the Committee on the process to amend section 25 (publicly available on Parliamentary Monitoring Group).[73] The presentation made it clear that the Committee had to consider "*What is the mischief? (i.e. JCRC report; Challenges experienced in achieving the objective etc.) and also What is the best solution (i.e. should s25 be amended? If so, how? Which subsections should be amended? Should anything be expanded on I deleted I added?).*" There is no evidence that the Committee actually investigated the "*mischief*" i.e. the systemic failures of land reform or the fact that the Courts lacked interpretative guidance on the application of the criteria in section 25(3)(a) to (e).

2.2.9. The Foundation submits that in light of the above, the Committee failed to apply its mind rationally to its mandate.

2.3. *Failure to obtain legal opinion on impact of proposed amendment on South Africa's international law obligations*

2.3.1. A glaring concern revealed in the Committee's internal deliberations, which were reported on, is the Committee's failure to obtain a legal opinion on the potential implications of the proposed amendment on South Africa's international obligations in terms of Bilateral Investment Treaties ("BITs").

2.3.2. Although one can raise concerns that the Committee failed to invite any economic experts, agricultural economists or members of the Banking Association of South Africa to share their views on the nature of

[71] 2018(5) SA349(CC).
[72] At paragraph 8 of the judgment.
[73] It appears that the presentation was given to the Committee on 21 February 2019.

the amendment, the fact that no legal opinion was sought regarding South Africa's international law obligations if the amendment is passed, is critical.

2.3.3. The presentation by the Deputy Director-General of the International Trade and Economic Development Division in the Department of Trade and Industry to the Committee on 27 November 2019 (DG's presentation), highlighted that South Africa might face legal challenges from foreign investors who are citizens of countries which have Bilateral Treaties with South Africa. The DG also emphasised that the presentation was not a legal opinion, and it appears that the Committee was urged to obtain a legal opinion.

2.3.4. Bilateral Investment Agreements form part of Customary International Law. The 2011 *United Nations Conference on Trade and Development's series on issues in International Investment Agreements*[74] (UNCTAD's Expropriation Issue) emphasises that - "*Through IIAs (International Investment Agreements) States have established a guarantee for foreign investors against expropriation of their investments without compensation. Today virtually all bilateral investment treaties (BITS) contain an expropriation provision."*

2.3.5. The UNCTAD's Expropriation Issue also makes it clear that States have a right to expropriate property (investment) for "*economic, political, social or other reasons*" but in order to be "lawful" under international law it has to be "*taken for a public purpose, on a non-discriminatory basis, in accordance with due process of law and accompanied by compensation*".

2.3.6. Furthermore, the UNCTAD's Expropriation Issue also makes it clear that that one of "*the salient trends among IIAs is that most of them incorporate the standard of prompt, adequate and effective compensation, also known as the Hull standard*". The UNCTAD's Expropriation Issue makes it clear that it does not necessarily mean that the only standard of compensation is the market value of the property, the emphasis appears to be on "*appropriate compensation*".

2.3.7. As highlighted in the DG's presentation to the Committee, South Africa recently terminated many BITs (especially with Europe) but they contain "survival clauses", which protect those investments under the BITs for a period of time. It will be critical to know which BITs are still in force and what the time periods are in the survival clauses of each BIT terminated. The possibility remains open that foreign investors whose investments are still protected under such survival clauses could be in the position to legally challenge the State's decision to pay "nil compensation" on expropriation of their investments at an international arbitration tribunal.

2.3.8. We also noted that the European Commission was highly concerned about South Africa's decision to terminate BITs with EU Member States, especially in light of talks of "*expropriation without compensation*" and the recent adoption of the *Protection and Promotion of Investment Act* 22 of 2015*,*

[74] UNCTAD/DIAE/IA/2011/7.

which provides significantly weaker protection to foreign investors.[75] In an August 2019 written question to the European Parliament, the European Commission was specifically asked what steps the Commission would take to protect EU investors once the "*sunset clauses*" of cancelled BITs expired. On reply the Commission held that some sunset clauses might expire as soon as 2022, while others will cease 20 years after termination and that the Commission will closely follow the situation.[76]

2.3.9. The above concerns not only discourage new foreign investments, as will be elaborated on further below, they also speak directly to the fact that the Committee did not have all the reasonably necessary information before it when proposing this amendment - questioning again the rationality of the Committee's approach in formulating this amendment.

B. THE ECONOMIC IMPLICATIONS AND CONSEQUENCES OF THE PROPOSED AMENDMENT

3. ***Preamble of the Bill deviates from the original conditions set out in the ANC's 2017 NASREC Resolution and Parliamentary motion***

3.1. The Foundation submits that it must be noted that in both the December 2017 NASREC resolution of the African National Congress[77] (NASREC resolution) (where the concept of the amendment originated), and the 2018 Parliamentary motion[78] (where it was formalised), there were conditions set for the wording and implementation of any proposed amendment to section 25.

3.2. The NASREC resolution stipulated that any amendment should not be implemented in such a way as to harm agricultural production, food security, future investment in the economy and also not harm other sectors of the economy.[79] The 2018 Parliamentary motion reduced the four factors to two: the amendment must be implemented in a manner that increases agricultural production and improves food security.[80]

3.3. These essentially economic factors speak to the nature of the amendment and must therefore form part of the consideration in the wording of the amendment.

3.4. Yet, in the Preamble of the Bill, there is not a single word about economic growth, agricultural productivity, food security, investment or job creation. The emphasis is purely that the amendment should *"contribute to address the historic wrongs caused by the arbitrary dispossession of land*"; and "*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 programmes*".

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[75] See https://www.europarl.europa.eu/doceo/document/E-9-2019-002587_EN.html.
[76] See https://www.europarl.europa.eu/doceo/document/E-9-2019-002587-ASW_EN.html.
[77] ANC 54th National Conference Report and Resolutions.
[78] National Assembly, Minutes of Proceedings on Tuesday 27 February 2018[No3 -2018: Fifth session, Fifth Parliament at page 9.
[79] At page 11. See note above for full reference.
[80] At page 9. See note above for full reference.

3.5. The Foundation submits that this is a serious deficiency, and a deviation from both the NASREC resolution and the 2018 Parliamentary motion.

3.6. The ruling party has therefore deviated from its own decisions and is thereby ignoring the serious and even dire consequences for the economy and the country if the amendment is passed.

4. ***The economic implications of the proposed amendment***

4.1. It is widely accepted internationally that investors will only invest in a country where their investment and its fruits are safe from arbitrary dispossession, and most certainly not where expropriation with nil compensation is provided for in legislation. If they suspect or fear that this may happen, they will seek another country to invest in, or just keep their money in cash or shares. The same is true of domestic investors such as farmers with regards to investment in their farms, whether in planting crops, buying cattle or doing structural improvements.

4.2. What should also be borne in mind, is that the test of whether implementation of the amendment to provide for nil compensation, is not an objective one. Parliament and the ruling party cannot by any objective standard or law decide that the implementation of the amendment would not be harmful. Because investment and agricultural production are voluntary actions, the test is a subjective one.

4.3. If the implementation of the amendment is perceived as such that it would not render an investment safe, the investor would go somewhere else - and the economy would be harmed. The slightest perception that the title deed to a farm is not safe against expropriation with nil compensation would cause a farmer to consider stopping farming - with harmful effects to food security. This applies to South African farmers from all communities, as well as foreign farmers. This subjectivity is part of any economic decision, and as a consequence of the effects of the proposed amendment.

5. ***The plans to have "expropriation without compensation" or "nil compensation" implemented have already harmed investment in South Africa***

5.1. The World Bank's 2020 Report on *Global Economic Prospects: Slow Growth, Policy and Challenges* (World Bank Report) held that - "*In South Africa, growth remained anemic in 2019 as it fell to an estimated 0.4 percent. Weak growth momentum has reflected an array of overlapping constraints. These include persistent <u>policy uncertainty</u>, constrained fiscal space, <u>subdued business confidence</u>, infrastructure bottlenecks - especially in electricity supply - and weakening external demand, particularly from the Euro Area and China*."[81] (own emphasis)

5.2. The World Bank Report goes on to say that - "*weakening global demand and ongoing domestic challenges - including large macroeconomic imbalances and <u>domestic policy uncertainty</u> - continue to*

[81] World Bank. 2020. *Global Economic Prospects, January 2020: Slow Growth, Policy and Challenges*. Washington, DC: World Bank. DOI: 10.1596/978-1-4648-1468-6. Page 141 of the report.

discourage investment and delay recovery in many commodity exporters (Nigeria, South Africa; World Bank 2019h)".[82] (own emphasis)

5.3. The World Bank Report furthermore states that in - "*In South Africa, growth is expected to firm to 0.9 percent in 2020, before strengthening to an average of 1.4 percent in 2021-22. This assumes that the new administration's structural reform agenda gathers pace, that policy uncertainty wanes, and that investment - <u>both public and private - gradually recovers</u>). The outlook is, however, markedly weaker than previous projections. Increasingly binding infrastructure constraints - notably in electricity supply - are expected to inhibit domestic growth, while export momentum will be hindered by weak external demand*".[83] (own emphasis)

5.4. The World Bank uses three key terms in its report: domestic policy uncertainty, subdued business confidence and investment in the economy. They directly link policy uncertainty to a lack of investment.

5.5. It can therefore be stated without fear of contradiction that policy uncertainty (related to the sanctity and protection of property rights) leads directly to a lack of investment - and therefore harm to the economy.

5.6. It is also linked to a lack of business confidence, which is the other side of the coin of lack of investment. If businesspeople do not have policy certainty (including certainty about the protection of their investment) they will not have confidence and they will not invest. And that will harm the economy. This fact is clear from the less than 0.5% growth expected in 2019.

5.7. The influential World Heritage Foundation recently published its 2019 *Index of Economic Freedom*[84]. In it, they rank all countries worldwide on the degree of economic freedom they experience (the Index of Economic Freedom).

5.8. The Index of Economic Freedom focuses on four key aspects of the economic and entrepreneurial environment over which governments typically exercise policy control: Rule of Law (including property rights), Government size, Regulatory efficiency, and Market openness.

5.9. The following is stated about "*property rights*" in the Index of Economic Freedom:

> "*The property rights component is an assessment of the ability of individuals to accumulate private property, secured by clear laws that are fully enforced by the state. It measures the degree to which a country's laws protect private property rights and the degree to which its government enforces those laws. It also assesses the likelihood that private property will be expropriated and analyses the independence of the judiciary, the existence of corruption within the judiciary, and the ability of individuals and businesses to enforce contracts. The*

[82] At page 14 of the report.
[83] At page 143 of the report.
[84] See: https://www.heritage.org/index/explore.

more certain the legal protection of property, the higher a country's score; similarly, the greater the chances of government expropriation of property, the lower a country's score".[85]

5.10. The Index of Economic Freedom furthermore puts countries into five categories, namely:

- "*Free*" (8 countries; an index point of between 100-80);
- "*Mostly free*" (29 countries, index point of between 79.9-70);
- "*Moderately free*" (59 countries, index 69.9-60);
- "*Mostly unfree*" (64 countries, index 59.9-50); and
- "*Repressed*" (22 countries, index 49.9-40).[86]

5.11. For 2019, the Index rated South Africa 102 out of 186 countries, with an index point of 58.3 and in the category "*mostly unfree*". More importantly, South Africa has fallen 4.7 index points in one year from the category "*moderately free*". The biggest reason for the lapse, according to the Index, is the fall in the perception about property rights.

5.12. At the end of 2018, the property rights index was at 67.7. At the end of 2019 it had fallen by 8.9 points or 13% to 58.8.

5.13. In the same year, the world average for property rights increased from 51.5% to 52.3% and that of sub-Saharan Africa from 38.3% to 38.9%. Yet South Africa decreased with 13%. This is a dramatic fall for any country, and it can only be attributed to plans to amend section 25 to allow for nil compensation for expropriation.

5.14. The decline in SA's economic freedom (read: property rights) is the third biggest in the index.

5.15. Only a little-known country called Vanuatu (an island in the South Pacific) fell more, namely 13.1 index points, while Tonga fell with 5.4. Other countries with a decline in economic freedom are not the best company to keep: Tajikistan (2.7), Tunisia (3.5); Zimbabwe (3.6), Sierra Leone (4.3), Cuba (4.1) and Kiribati (3.5).

6. ***Why is South Africa's ranking on the Index of Economic Freedom important?***

6.1. Investment, and therefore economic growth and job creation, is first and foremost an issue of perception. Will my investment grow and provide a dividend? Is my investment safe? If there is the slightest doubt, I will go somewhere else. Will I go to the country that fell 13% in the protection of property rights in one year and third most in the world in one year? The answer is a resounding "No".

6.2. South Africa's fall on the Index happened while the process of amending section 25 was not yet completed. Think of what will happen when the proposed amendment succeeds.

6.3. There is an almost 100% correlation between economic freedom (of which property rights is a very important aspect) and economic growth and prosperity.

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[85] See https://www.heritage.org/index/property-rights.

[86] See note above.

6.4. Consider this: the top 35 countries (free and mostly free) also have the best economic growth, investment and lowest unemployment in the world. And these are not only highly developed countries like Switzerland (4) and Singapore (2), but also developing countries like Georgia (16), Chile (18) and Rwanda (32).

6.5. The bottom 10 countries (repressed) have the worst unemployment, highest inflation and squalid living conditions, for example Zimbabwe (175), Eritrea (177), Cuba (178) and Venezuela (179).

6.6. One must be (ideologically) blind not to see the correlation between the protection of property rights and economic growth, investment and prosperity.

7. ***The potential economic impact of South Africa failing to qualify the USA's African Growth and Opportunity Act's preferences***

7.1. Under our legal considerations of the Bill, we pointed out that it was a critical failure of the Committee not to obtain a legal opinion on the potential impact of the proposed amendment on BITs of which South Africa is a party to.

7.2. We are furthermore concerned about the impact of the proposed amendment on South Africa's eligibility to qualify in terms of the USA's *African Growth and Opportunity Act*[87] (AGOA). The legislation essentially enhances market access to the United States of America (USA) for qualifying sub-Saharan African countries, once a set of criteria has been met.

7.3. AGOA authorises the President of the USA:

> "…*to designate countries as eligible to receive the benefits of AGOA if they are determined to have established, or are making continual progress toward establishing the following: market-based economies; <u>the rule of law</u> and political pluralism; elimination of barriers to U.S. trade and investment; protection of intellectual property; efforts to combat corruption; policies to reduce poverty, increasing availability of healthcare and educational opportunities; protection of human rights and worker rights; and elimination of certain child labour practices. These criteria have been embraced overwhelmingly by the vast majority of African nations, which are striving to achieve the objectives although none is expected to have fully implemented the entire list*."[88] (own emphasis)

7.4. In October 2019 it was reported that South African exports to the United States were worth some R35 billion.[89] If the proposed amendment is passed, these exports will potentially be in jeopardy.

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[87] Public Law 106 of the 200th Congress.

[88] See: https://agoa.info/about-agoa/country-eligibility.html.

[89] See: https://www.businessinsider.co.za/agoa-and-more-south-african-exports-threatened-by-us-gsp-review-2019-10.

7.5. If the South African government does not adhere to the Rule of Law in respect of the protection of property rights, the President of the USA may have no choice but to withdraw South Africa's eligibility to participate in the benefits of AGOA.

7.6. If South Africa is deemed ineligible to participate in AGOA because of the proposed amendment, the harmful effects on the automotive, steel and aluminum industries will be devastating - especially in the loss of much needed jobs.

7.7. We furthermore submit that any unconstitutional interference with property rights, which is directly prohibited in terms of many international conventions which South Africa is a party to (as mentioned before) will also have an enormous negative effect on South Africa's reputation as a reliable international partner in protecting property rights. This will, inevitably, lead to South Africa being seen as a less than desirable investment destination - and thereby cause irreparable harm to the economy.

C. BROADER POLITICAL OBSERVATIONS

8. ***The correlation between property rights, political and civil freedoms and developmental outcomes***

8.1. We submit that not only is respect for property rights a key factor in attracting investment as indicated above, there is an equally absolute correlation between property rights and political and civil freedoms. Possession of property empowers citizens and gives them autonomy and the ability to resist dictatorial governments.[90]

8.2. Respect for property rights also has a clear impact on social and developmental outcomes. According to the *United Nations Development Program Human Development Report* [91] (HDI), the top countries that respect property rights have an average HDI score of .89 (where 1.00 is a perfect score). The bottom quintile has an average HDI of .56.

8.3. There is also a strong correlation between securing property rights and good governance. The Index of Economic Freedom, referred to earlier, indicates that top-quintile property-respecting countries have an average mark of 71/100, while the bottom quintile scores only 25.1/100.[92]

9. ***Understanding the genesis of the property clause during the constitutional negotiations***

9.1. In our legal analysis we have discussed in detail the structure of section 25 to emphasise that it serves both a "*protective*" and "*reformative*" purpose. We do, however, submit that in addition to the legal analysis, it is also important to study the intentions of the authors of the Constitution and the political and ideological factors that have given rise to the Bill.

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[90]The top quantile of countries that respect property rights have an average score of 87/100 (well into the "free category") and those that least respect property rights have an average score of only 30/100 - which classifies them as " not free" according to Freedom House's Freedom in the World 2019 report (own interpretation).

[91]United Nations Development Programme. *Human Development Report. 2019. Beyond income, beyond today: inequalities in human development in the 21st century* (own interpretation).

[92] Own interpretation of index.

9.2. The success of South Africa's historic constitutional negotiations depended on a continuous search for balance between the often diametrically opposed demands of the main parties. All reasonable participants accepted that the new Constitution would need to have a strong transformational character. Any attempt to cast in stone the then prevailing social, economic and political relations would be neither acceptable nor tenable. The new Constitution had to offer hope of a better and more just dispensation for the disadvantaged majority - but it had to do so in an equitable and sustainable manner that would not unfairly threaten the core interests of minorities.

9.3. We submit that the search for finding a balance was at the heart of the negotiations on the key question of property - which is reflected in the final constitutional text adopted. However, we submit, that the current ruling party's long-term ideological goals only became clear in subsequent *Strategy and Tactics* documents of the ruling party and that the ruling party has little intention of maintaining a reasonable balance on property. It appears that at the organisation's National General Council meeting in June 2005,[93] the organisation decided to review the question of property relations before the next National Consultative Conference in 2007. It complained that property rights were proving to be an obstacle to wealth redistribution.[94]

9.4. Subsequent documents, such as the Department of Rural Development and Land Reform's *2011 Green Paper on Land Reform* (the Green Paper), also spelled out the ruling party's intentions regarding property rights, emphasising that "*all anti-colonial struggles are, at the core, about two things: repossession of land through force or deceit; and, restoring the centrality of indigenous culture*."[95] The Green Paper's solution to the land problem was '*Agrarian Transformation'* - which was "*a rapid and fundamental change in the relations (systems and patterns of ownership and control) of land, livestock, cropping and community*." [96]

9.5. We submit that in finding solutions to fast-track land reform, one also needs to challenge the perception of ownership patterns in South Africa and not feed into dangerous narratives. According to a 2017 report by the organisation, Agri SA, titled "*Land Audit: A transactional approach*"[97] (Agri SA's report), ownership shares of "*Previously Disadvantaged Individuals*" on a national level in terms of the land's value and the land's potential have increased significantly since 1994.[98] Agri SA's report held that on a "*national level: in terms of value, the share is 29.1% and in terms of land potential, the share is 46.5%*".[99]

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[93] African National Congress: National General Council 2005, 29 June - 3 July 2005, Discussion Document: Guidelines on discussion of Strategy and Tactics. Sourced from Polity.org.

[94] See above note.

[95] At page 1 of the Green Paper.

[96] At page 1 of the Green Paper.

[97] See note 2 for full reference of Agri SA's report.

[98] For more detail see chapter 2 on the method and data used in the report.

[99] In the Executive Summary of the report.

9.6. Land Reform, if handled correctly, could be the most positive development since 1994. However, if handled unjustly and with an expectation that the proposed amendment will be the solution to land reform challenges, it will be a catastrophe for all South Africans

10. ***Concluding remarks***

10.1. The future of property rights is one of the core questions that will determine the future success or failure of our young democracy.

10.2. It requires renewed and frank communication between the State, agricultural stakeholders, NGOs, the public and the private sector. On the one hand, there is a clear need - and a constitutional imperative - for balanced, effective and sustainable transformation. On the other hand, we must avoid the implementation of failed ideologies that will destroy our constitutional democracy, our economy and any vestige of national unity.