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# Undoing 26 Years of Progress: Property Rights in South Africa

*Case Study*

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## *Abstract*

In February 2018, the South African Parliament resolved to amend South Africa's Constitution to allow government to expropriate private property without being required to pay compensation. This marks the most radical departure from South Africa's post-Apartheid liberal democratic legal dispensation that came to be between 1993 and 1996. The mere threat of expropriation without compensation has already led to the low-cost housing market and agricultural sector to contract. Experiences across the world (Venezuela) and on South Africa's borders (Zimbabwe) with the same policy should engender extreme caution among South Africa's political class.

But it is not only corporeal property, but also intellectual property that is under threat. The Copyright Amendment Bill was introduced in May 2017 as an evident attempt to weaken the protection of copyrighted material through the introduction of a 'fair use' regime, amongst other things. International experience, specifically in the United Kingdom and Canada, has shown that the introduction of such a regime imposes severe costs on the economy, specifically in the educational publishing industry, and leads to the elimination of numerous jobs. If introduced in South Africa, the effects would likely be the same, and would reduce the strength of the economy even further; something which the country can ill afford considering the extensive socio-economic pressures already faced by citizens.

Jacques Jonker and Martin van Staden summarise and attempt a cursory quantification of both threats to property rights in South Africa and warn that government proceeding with these interventions will yield disastrous results.

**Keywords:** South Africa, Constitution of South Africa, expropriation without compensation, intellectual property rights, private property rights

# Undoing 26 Years of Progress: Property Rights in South Africa

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## I. Introduction

In 1994, South Africa's interim Constitution was adopted, and with it, for the first time in South African history, property rights were elevated from a common law right enjoyed by only a few to an entrenched constitutional right protected for all.<sup>3</sup> This was confirmed in the current Constitution of 1996.<sup>4</sup> This constitutional protection extends both to corporeal and intellectual property.<sup>5</sup>

Since before the 1913 Natives Land Act came into operation, successive South African governments excluded or attempted to exclude non-whites from owning corporeal property in so-called white areas. The Natives Land Act represented a formalisation and consolidation of this racist policy. It laid the groundwork for excluding non-whites from some 80% of South Africa's surface area and confining them to the remainder, which would largely later become the so-called black "homelands".

Many blacks, coloureds,<sup>6</sup> and Indian-descended South Africans, however, preferred to be near the urban centres, where jobs and opportunities abounded. Their exclusion from owning property and enterprises in these areas cemented non-white South Africans as an economically disadvantaged class, as the downstream benefits of private property rights were denied them.

Intellectual property rights (IPRs) are rights that serve to protect inventions that stem from an author's or inventor's mind.<sup>7</sup> IPRs are crucial to the smooth functioning of a modern economy, especially where intangible inventions are playing an ever-larger role in the globalised market. IPRs not only protect the interests of inventors and innovators but also serve to reward experimenters for the value of their experiments to others<sup>8</sup> as well as promote foreign direct investment and innovation.<sup>9</sup>

According to many economic historians, including Nobel Prize recipient Douglas C North, the unprecedented economic growth that occurred over the last two centuries was not solely due to the shift from feudalism to capitalism and the abolition of a lot of rules and regulations that prevented free enterprise, but also due to the emergence of legal protection of intellectual property rights, which served to improve the incentives for private production by ensuring a private return on the effort exerted in developing ideas.<sup>10</sup>

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3. Section 28 of the Constitution of the Republic of South Africa Act (200 of 1993).

4. Section 25 of the Constitution of the Republic of South Africa, 1996. Hereinafter 'the Constitution'.

5. Section 25(4)(b) of the Constitution; Van der Walt, A.J. and R.M. Shay. 2014. Constitutional analysis of intellectual property. *Potchefstroom Electronic Law Journal* 2.

6. "Coloured" is a political term referring to South Africans of mixed, usually black and white, racial heritage.

7. Gregory, S. 2008. *Intellectual Property Rights and South Africa's Innovation Future*. Johannesburg: South African Institute of International Affairs. 7.

8. Bardhan, P., and C. Udry. 2013. *Development Microeconomics*. Oxford: Oxford University Press. 159.

9. Tanaka, H., and T. Iwaisako. 2014. Intellectual property rights and foreign direct investment: A welfare analysis. *European Economic Review* 67:107-124. 107.

10. Sørensen, P.B., and H.J. Whitta-Jacobsen. 2010. *Introducing Advanced Macroeconomics: Growth and Business Cycles*. Berkshire: McGraw-Hill Education. 249-250.

The constitutional dispensation that came into being in the 1990s in South Africa changed both corporeal property rights and IPR regimes for the better. Twenty-six years after the end of Apartheid, however, this progress stands to be undone.

This study sketches the constitutional *status quo* in South Africa by analysing the current protection for both corporeal property rights and IPRs. The authors then provide context and details of threats to this *status quo* being introduced and advocated by government and its political allies. The study concludes by recommending that South Africa follow a pro-property rights path into the future rather than continuing with the ill-fated interventions of expropriation without compensation and weakened IPRs.

## II. Constitutional Safeguards

Presently, section 25 of the Constitution prohibits arbitrary deprivation of property but allows for expropriation in the public interest or for a public purpose. Such expropriations must be subject to "just and equitable" compensation that considers the current use of the property, the history of the acquisition of the property, its market value, the extent of State subsidisation and investment, and the purpose of the expropriation. Land reform "to bring about equitable access to all South Africa's natural resources" is a recognised public-interest justification for expropriation, and the Constitution notes that property is not limited to land.

In full, this section provides:

### "Property

25. (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application—

(a) for a public purpose or in the public interest; and

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—

(a) the current use of the property;

(b) the history of the acquisition and use of the property;



(c) the market value of the property;

(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and

(e) the purpose of the expropriation.

(4) For the purposes of this section—

(a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and

(b) property is not limited to land.

(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order 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).

(9) Parliament must enact the legislation referred to in subsection (6)."

Section 25 of the Constitution thus serves two purposes. Firstly, sections 25(1)-(3) concern the protection of private property against interference by the State; and secondly, sections 25(4)-(9) concern the State enacting measures to *extend* property rights and redressing the consequences of anti-property rights Apartheid law through a land reform process.

### III. Expropriation Without Compensation

#### POLITICAL CONTEXT

Expropriation without compensation (EWC) was adopted as a policy plank of the African National Congress (ANC), South Africa's ruling party, at its December 2017 leadership conference. Two months thereafter, in February 2018, Parliament, where the ANC controls an absolute majority, adopted a resolution in support of EWC and directed Parliament's Constitutional Review Committee to investigate and make recommendations surrounding a potential amendment to the Constitution to make EWC a reality.

The militant Marxist-Leninist party, the so-called Economic Freedom Fighters (EFF), introduced the motion for EWC, which had been a central pillar of the party's platform since its founding in 2014. The ruling ANC, then desperate to win back some votes from the EFF in the 2019 general election, also supported the motion with minor amendments to make it slightly more moderate. After the 2019 election, the EFF and ANC together had sufficient parliamentary votes to adopt a constitutional amendment.<sup>11</sup>

According to government, sections 25(2) and (3) of the Constitution, which provide that the government must provide just and equitable compensation to owners when it expropriates their property, subject to the considerations and factors listed above, is problematic. It is said that the requirement to pay compensation has hindered government from implementing substantive land reform and righting the wrongs of Apartheid, and hence, the requirement should be abolished or otherwise modified. The draft Constitution Eighteenth Amendment Bill, published in late 2019 and discussed below, significantly changes the constitutional compensation regime.

#### RESTITUTION AND REDISTRIBUTION

In the years immediately after Apartheid ended in 1994, the South African government adopted a relatively pro-market paradigm known as Growth, Employment, and Redistribution (GEAR). According to Leon Louw, the GEAR period was characterised by liberalisation and privatisation in agricultural and transport, lower tax rates, reduction in budget deficits, outsourcing of governmental functions, fewer and reduced subsidies, and a smaller civil service.<sup>12</sup>

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11. Section 73 of the Constitution provides that amendments to the Bill of Rights may only be made with the support of two-thirds of the members of the National Assembly (the lower house of Parliament) and six out of the nine provincial delegations in the National Council of Provinces (the upper house of Parliament).

12. Louw, L. 1999. Privatisation in South Africa and Africa. Free Market Foundation, 20 September. <http://www.freemarketfoundation.com/article-view/privatisation-in-south-africa-and-africa>.



Part of this new liberal democratic order, and in light of South Africa's history of property dispossession along racial lines, was that those who have been deprived of their property, or their descendants, were entitled to have their property restituted. Anything less would have amounted to a denial of justice; justice being imperative and at the heart of normative private property doctrine.

The 1994 Restitution of Land Rights Act therefore provided that victims of legal dispossession could claim their property back. One would be entitled to restitution if they, a deceased estate, their direct ascendants, or their community, were dispossessed of a right in property after 19 June 1913<sup>13</sup> due to racially discriminatory laws or practices. If they did not wish to stay on that particular property – given that in some cases the dispossession and claim were separated by a century if not more – they could opt to take “comparable redress”, which is usually the payment of an amount of money comparable to the value of the property.

Mark Oppenheimer writes that since 1994, the Land Claims Court has resolved over 95% of restitution claims, meaning over 1.8 million South Africans have either received back the property to which they are rightfully entitled, or have opted to take money instead.<sup>14</sup>

Unfortunately, the post-Apartheid government has not concerned itself exclusively with the justice of restitution. Instead, the government has engaged in depriving true owners of their property as part of its land reform program for various constitutionally unjustifiable reasons. The GEAR policy was largely abandoned and replaced with the National Development Plan, which contains ill-fated commitments to State-led development.

In property relations, government has gone beyond restitution to *redistribution*, and even *nationalisation*.

An example of this anti-property thinking is the 2017 Regulation of Agricultural Land Holdings Bill, which, if enacted, will disallow foreign ownership of agricultural land and create a race and gender registry of landowners. The bill is a redistributionist measure designed to take from some and give to others – or, what Frédéric Bastiat called, “plunder”.

Redistribution in South Africa is ahistorical, unlike restitution, as it does not inquire into the history of acquisition of the property in question. Instead, it identifies property on the basis of arbitrary factors such as whether it is owned by foreigners or whether the owner owns “too much” property, and on that basis forcefully acquires it. The property is then given to others who have no objective relationship with the property but are usually politically connected.

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13. The date on which the Natives Land Act commenced.

14. Oppenheimer, M. 2018. Six myths about land reform. *Politicsweb*, 17 May. <https://www.politicsweb.co.za/opinion/six-myths-about-land-reform>.

## NARRATIVE OF EWC

The radical black supremacist organisation Black First, Land First (BLF) provides more insight into the ideological undercurrents of redistribution and nationalisation that the ANC or EFF often do not wish to make explicit. BLF claims that “all the land held by whites in South Africa is stolen property” and that “all black people have a right to land in South Africa without any payment”.<sup>15</sup> Such radical organisations often argue that whites cannot own landed property legitimately anywhere in South Africa because of the history of property acquisition in general. More moderate socialist organisations claim that there is a need to make sure whites own a more proportionally appropriate amount of landed property.<sup>16</sup>

This approach ignores the facts and focuses on thematic narrative. Indeed, it is conceivable, and exceedingly likely, that much of the land in white hands was acquired legitimately and without first violently seizing it from others. The standard of legitimacy until proven illegitimate must be observed to ensure that justice is done, otherwise many people's property and livelihoods will be taken from them on the strength of narrative rather than fact.

In line with the restitution process, therefore, it needs to be *proven* where stolen land is possessed, and it is in fact provable. South Africa has always had a relatively sophisticated deeds registry system. The Apartheid regime never ‘covered up’ when and why it forcefully took property from non-whites, particularly blacks, since it sincerely believed it was doing the right thing. The evidence, in other words, is available, in thousands of catalogued *Government Gazettes* since 1913. To adopt the BLF's position would be to assume that any land owned by whites has been stolen, when such an assumption is simply unnecessary, authoritarian, and destructive of property rights.

The government itself has engaged in this kind of narrative trickery. It has fabricated a narrative around EWC that very few involved in the discourse seem to be capable of escaping.

The President and his ministers have gone around South Africa and the world saying – and often implying – in essence, that EWC will:

- only apply to *land* – it is strongly implied that they mean only agricultural land;
- only apply to land owned by *whites*;<sup>17</sup> and
- not harm the *economy*, harm *food security*, or harm South Africa's prospects for attracting *investment*.

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15. Black First, Land First. 2017. The Anti-Racism Bill of 2017. <https://blf.org.za/the-anti-racism-bill-of-2017/>.

16. The government's land audit claims that whites own 72% of the land in South Africa, followed by coloureds at 15%, Indians at 5%, and blacks at 4%, despite the former groups representing only about 10% of the country's total population. See Phaliso, S. 2018. Blacks own the least land – report. *Cape Times*, 7 February. <https://www.iol.co.za/capetimes/news/blacks-own-the-least-land-report-13145254>. The veracity of the audit has been questioned, for example, by Leon Louw. See Louw, L. 2018. Confusing land audits cannot be the basis of land reform. Free Market Foundation, 22 November. <https://www.youtube.com/watch?v=5RVdDXGF8pY>.

17. Although, when the President speaks to white audiences, he says the policy will not amount to racial discrimination.



These assurances have been, on the whole, believed. The last assurance, especially, has been gobbled up by the international community after President Cyril Ramaphosa wooed the likes of the former British prime ministers Theresa May<sup>18</sup> and David Cameron.<sup>19</sup>

## CONSTITUTION EIGHTEENTH AMENDMENT BILL

The government's proposed amendment to the Constitution takes the form of the Constitution Eighteenth Amendment Bill, published in December 2019. As of September 2020, it provides as follows:

"Amendment of section 25 of Constitution

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

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

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

(b) by the substitution in subsection (3) for the words preceding paragraph (a) of the following words:

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

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

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

18. Phakathi, B. 2018. Theresa May backs approach to land reform. *Business Day*, 28 August. <https://www.businesslive.co.za/bd/national/2018-08-28-theresa-may-supports-ramaphosas-land-policy-provided-there-are-no-smash-and-grabs/>.

19. Morris, M. 2018. David Cameron misinformed on South Africa – IRR. *Politicsweb*, 6 November. <https://www.politicsweb.co.za/politics/david-cameron-misinformed-on-south-africa--irr>.

At the time of writing, it had been suggested by the ANC that the courts' power to determine when expropriation may take place at no compensation will be replaced with an executive authority, with the courts only retaining the power of judicial review.<sup>20</sup>

## THE REALITY OF EWC

It comes as no surprise that the Constitution Eighteenth Amendment Bill's provisions apply not only to land, but also improvements standing thereupon and will apply to any and all South Africans. Indeed, as we have seen in section 25 above, the Constitution is clear that "property" is *not* limited to "land". The section applies to intellectual property, residential property, bank accounts, pension funds, the money under South Africans' mattresses, the clothing on their backs, and their treasured heirlooms. All property.

While the current draft amendment speaks only of land and improvements, it no doubt sets a precedent that could be expanded to all manner of other property. That EWC will be economically destructive speaks for itself.

Expropriation without compensation will also not simply apply to the shrinking white minority in South Africa. This is a myth the international media – especially the alternative media – has spread and, in so doing, has done more harm than good to the cause of non-racial property rights in South Africa.<sup>21</sup> It is in the government's interest to make the discourse around property ownership a black-versus-white issue, so as to divert attention away from the fact that the government's biggest constituency – black South Africans – are in just as much trouble, if not more, as everyone else.

Section 1(b) of the Constitution provides that South Africa is founded on non-racialism. While this has rarely been respected by the government, the fact is that the Constitution cannot be – and is not being – amended to provide for EWC along racial lines. If EWC is adopted, it will be non-racial, meaning not only property owned by whites will be at risk. This intervention threatens all South Africans' interests.

It is also possible that the South African government's foreign relations may be playing a larger role than one would expect in driving the cause of EWC. This is illustrated by the example of a farm that was expropriated at only 10% of its value, far below market rate (the policy of EWC is not yet law), to make way for companies associated with the Chinese government to gain control of the land.<sup>22</sup>

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20. Merten, M. 2020. ANC's executive proposal on expropriation without compensation obscures already vast ministerial powers. *Daily Maverick*, 28 January. <https://www.dailymaverick.co.za/article/2020-01-28-ancs-executive-proposal-on-expropriation-without-compensation-obscures-already-vast-ministerial-powers/>.

21. See, for example, Berrein, H. 2018. SHOCKING: South African Parliament votes to seize land owned by all white farmers. *Daily Wire*, 28 February. <https://web.archive.org/web/20181119112309/https://www.dailywire.com/news/27688/shocking-south-african-parliament-votes-seize-land-hank-berrien>; Pollak, J.B. 2018. Donald Trump tackles murder, expropriation of white farmers in South Africa. *Breitbart*, 22 August. <https://www.breitbart.com/politics/2018/08/22/donald-trump-tackles-murder-expropriation-of-white-farmers-in-south-africa/>.

22. Opinor. 2020. China in Africa: What the US should know about Africa's turn to China. AfriForum, June. <https://www.afriforum.co.za/wp-content/uploads/2020/06/Report-China-in-Africa.pdf>. 12



The repeated assurances by the President that EWC will not be harmful to the economy or food security are not only false, but also irrelevant.

It is false because, as South Africans have already seen, the economy has started to contract before the amendment to the Constitution has even been made.

In August 2018, *BusinessTech* reported that the affordable home market has been hit hard by the prospect of EWC, with the demand for affordable housing declining by 40%. This is due to the fact that those poor and middle-class people who would usually be purchasing property in this market believe they will be given property for free in the future by the government after it has seized property from others.<sup>23</sup>

Furthermore, in November 2018, *Business Report* ran a story showing that "most commercial farmers have scaled back on expansion [projects] because of [uncertainties surrounding EWC]." Among other things, farmers have stopped purchasing new equipment and investing in their property, simply because they now foresee the property being taken from them sometime in the future.<sup>24</sup>

Alexander Hammond writes that during the period when the EWC was announced, South Africa's 2017-2018 ranking declined on the protection of property rights metric in the Fraser Institute's *Economic Freedom of the World* report. This decline started before EWC was on the table, and will significantly worsen if the amendment is enacted. Before 2013, South Africa had some of the stronger protections for property rights, but thereafter slipped significantly, causing economic contraction and destitution. Hammond writes:

"If EWC is enacted, South Africa's already weak property rights will be decimated even further, and so too will any hope of an economically prosperous future. As I've noted before, South Africans need only look north to Zimbabwe to see the catastrophic consequences of this kind of policy."<sup>25</sup>

To say EWC won't harm the economy when it is enacted, when it is *already* harming the economy *before* it has been enacted, is a fantasy. Similar policies of government seizing property arbitrarily have inflicted economic devastation in Zimbabwe and Venezuela. The economic disaster wrought on South Africa by government's COVID-19 lockdown has rendered the economy all the more vulnerable to ill-conceived interventions such as EWC.

But the President's assurance is also irrelevant, simply because assurances *are not enforceable in law*. They provide no security or peace of mind; these assurances are simply a (term-limited) politician's empty promise.

23. *BusinessTech*. 2018. People have stopped buying cheaper homes and paying rent – because they expect to get free land: report. 29 August. <https://businesstech.co.za/news/property/267963/people-have-stopped-buying-cheaper-homes-and-paying-rent-because-they-expect-to-get-free-land-report/>.

24. Mkentane, L. 2018. Land reform uncertainty stalls investment in agricultural industry. *Business Report*, 4 November. <https://www.iol.co.za/business-report/markets/land-reform-uncertainty-stalls-investment-in-agricultural-industry-17759122>.

25. Hammond, A. 2020. The latest economic freedom report shows a worrying decline of property rights in SA. *City Press*, 17 September. <https://www.news24.com/citypress/voices/the-latest-economic-freedom-report-shows-a-worrying-decline-of-property-rights-in-sa-20200917>.

If section 25 of the Constitution is amended, the change will empower this government, future governments, and all spheres of government, to engage in EWC, for as many years as the Constitution persists. The President and his Cabinet's assurances about the here-and-now are useless.

Expropriation without compensation, as a constitutional device, will apply to *all property, all people, all the time*, if it is enacted. The government has expertly crafted a misleading and deceitful narrative around the policy that most people seem to accept, and this acceptance will haunt South Africa for many years to come. The eternal vigilance that is said to be the price for freedom is not being paid.

## IV. Intellectual Property

### OVERVIEW

On 16 May 2017, the Copyright Amendment Bill (CAB) was introduced to the National Assembly (NA),<sup>26</sup> the lower house of the South African Parliament.<sup>27</sup> The NA passed a revised version of the original CAB on 5 December 2018 and subsequently transmitted it to the National Council of Provinces, the upper house,<sup>28</sup> for concurrence.<sup>29</sup>

On 28 March 2019, both houses of Parliament passed the revised version of the CAB and sent it to the President for assent.<sup>30</sup> However, as of the time of writing, the President had not assented to the CAB due to procedural and substantive reservations.<sup>31</sup>

Most notably, the CAB sets out to amend the Copyright Act of 1978 to allow for further limitations and exceptions regarding the reproduction of copyright works,<sup>32</sup> also known as "fair use/fair dealings" provisions.

Married to the CAB is the Performer's Protection Amendment Bill (PPAB), which was introduced to the NA on 11 November 2016, passed by both houses on 28 March 2019, and sent back to the NA on 16 June 2019 by the President.<sup>33</sup>

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26. Parliamentary Monitoring Group. Copyright Amendment Bill (B13-2017). <https://pmg.org.za/bill/705/>.

27. Parliament of the Republic of South Africa. 2020. How Parliament is Structured. <https://www.parliament.gov.za/how-parliament-is-structured>.

28. Ibid.

29. Ibid.

30. Ibid.

31. Ibid.

32. Ibid.

33. Parliamentary Monitoring Group. 2020. Performers' Protection Amendment Bill (B24-2016). <https://pmg.org.za/bill/677/>.

The President sent both the CAB and the PPAB back to the NA partially based on the following constitutional concerns: (1) retrospective application of the sharing of royalties, (2) the delegation of certain legislative powers to the minister, and (3) the possibility that the CAB's exceptions on the rights of copyright holders constitutes arbitrary deprivation of property.<sup>34</sup>

These issues relating to the constitutionality of the CAB incited the Minister of Trade, Industry, and Competition, Ebrahim Patel, recommend to the trade and industry committee that they reconsider the retrospectivity provisions. It also removes powers assigned in the two bills to the minister,<sup>35</sup> though Minister Patel defended the main thrust of the CAB.<sup>36</sup>

In its 2017 submission on the CAB made to the Department of Trade and Industry (DTI), The Free Market Foundation (FMF) correctly asserted that the CAB constitutes an outright violation of intellectual property rights because it appears to operate on the assumption that section 25 of the Constitution (the property rights clause) is not applicable to intellectual property.<sup>37</sup> Furthermore, the FMF criticised the CAB on the grounds of poor drafting quality and incorrect/confusing terminology.<sup>38</sup>

It must be noted that neither the CAB nor the PPAB included a socio-economic impact assessment (SEIA), even though the Cabinet of South Africa implemented a 2007 decision of theirs on 1 October 2015 that makes it mandatory for all Cabinet memoranda seeking approval for draft policies, bills, or regulations to include an impact assessment. Not only that, the impact assessment must have been signed off by the SEIA System Unit. The SEIA requirement also extends to policies and regulations that are signed internally by ministers.<sup>39</sup> The only exception to the SEIA requirement as it pertains to the amendment of primary legislation is with respect to matters affecting national security.<sup>40</sup>

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34. SANEWS. 2020. Patel urges changes to controversial copyright bill. *TechCentral*, 20 August. <https://techcentral.co.za/patel-urges-changes-to-controversial-copyright-bill/100603/>.

35. Ibid.

36. Phakathi, B. 2020. Patel defends main thrust of copyright bill. *Business Day*, 18 August. <https://www.businesslive.co.za/bd/national/2020-08-18-patel-defends-main-thrust-of-copyright-bill/>.

37. Van Staden, M. 2017. Submission to the Department of Trade and Industry on the Copyright Amendment Bill, 2017. Free Market Foundation. 4. <https://www.freemarketfoundation.com/dynamicdata/documents/20170707fmfsubmissiononthecopyrightamendmentbill.pdf>.

38. Ibid 10-11.

39. Department of Planning, Monitoring and Evaluation. 2015. *Socio-Economic Impact Assessment System (SEIAS) Guidelines*. 3. <https://www.dpme.gov.za/keyfocusareas/Socio%20Economic%20Impact%20Assessment%20System/SEIAS%20Documents/SEIAS%20guidelines.pdf>.

40. Ibid 8.

## FOREIGN STUDIES ON THE ECONOMIC IMPACT ON FAIR USE AND FAIR DEALINGS PROVISIONS

Two major studies have been carried out in Canada and the United Kingdom on the impact of the promulgation of fair use and fair dealings provisions. Below follows a summary of the negative impacts identified by the two separate studies:<sup>41</sup>

### 1. Canada<sup>42</sup>

- » Virtual elimination of royalties on the copying of content traditionally paid over to the non-profit organisation Access Copyright;
- » A decline in the earnings of small and medium educational publishers before interest, tax, depreciation and amortisation of 81% between 2008 and 2012 due to loss in revenues obtained from licensing as compensation for administering the reproduction of educational works;
- » Lower levels of competition due to a high number of firms exiting the market;
- » More than half of the publishers surveyed in Canada indicated that they would limit the number and variety of works they publish, which would lead to a decline in the quantity and quality of educational content;
- » Decline in the knowledge economy;
- » Impairment of publishers' financial ability to invest in the latest technological advancements;
- » Large losses in licensing revenue leading to reductions in turnover;
- » Increased reliance on importation of relevant education material;
- » Layoffs of staff;
- » Disproportionate effect on industries with high distribution costs;
- » Higher prices for quality learning material due to reduced economies of scale and less competition in the publishing sector; and

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41. PricewaterhouseCoopers. 2017. The expected impact of the 'fair use' provisions and exceptions for education in the Copyright Amendment Bill on the South African publishing industry. 27-31. <https://www.publishsa.co.za/file/1501662149slp-pwcreportonthecopyrightbill2017.pdf>.

42. Ibid 28-29.



- » Regional disparities in the quality of learning material.

## 2. United Kingdom<sup>43</sup>

- » An estimated 200% to 1000% increase in transaction costs;
- » Lowered economic viability of collective management organisations;
- » An estimated 20% decline in output from a 10% decline in collective licensing agreements;
- » Lower levels of investments in new products due to a reduction in CLA income;
- » Lower exports of academic material;
- » A loss of roughly 18% in writing income on the part of education authors and publishers;
- » Job losses;
- » No incentive for the development of digital-based learning resources; and
- » Diminished economic viability of publishing textbooks.

## IMPACT ON LOCAL PUBLISHING INDUSTRY

The introduction of the CAB will have a debilitating impact on the protection of IPRs in South Africa. More specifically, the local publishing industry will be negatively affected because of the new fair use exceptions for education included in the CAB.

According to an analysis by PricewaterhouseCoopers, the following effects in the domestic publishing industry can be expected if CAB is promulgated:<sup>44</sup>

- A decrease in sales revenue of 33%, equalling R2.1 billion (\$1.25 million);
- A decrease in value added by the sector to the South African economy of R946 million (\$56 million) per year;
- A decrease in purchases of intermediate inputs from upstream suppliers of R789 million (\$47 million) per year;

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43. Ibid 30-31.

44. Ibid 26.

- A decrease in employment in the sector of 30%, translating into 1,250 full-time jobs being lost;
- An increase in imports of material for the education sector and a concomitant reduction of exports of such material from South Africa; and
- An average reduction in the income of authors in the education sector of around 25%.

## IMPACT ON INTERNATIONAL TRADE AGREEMENTS

The CAB also poses a threat to international trade agreements. In April 2019, the International Intellectual Property Alliance (IIPA) lodged complaints with the United States Trade Representative (USTR) because they believe that the CAB threatens the protection of U.S. copyrights.<sup>45</sup> This followed a recommendation by the IIPA in 2018 that the CAB and the PPAB be significantly improved, as well as calling on the South African government to ratify and fully implement the WCT and WPPT.<sup>46</sup> If South Africa is declared ineligible for the Generalised System of Preferences (GSP), it could lose up to R34 billion (\$2 billion) in export revenue.<sup>47</sup>

The IIPA requested that the USTR review South Africa's eligibility as a beneficiary of the GSP,<sup>48</sup> which provides duty-free treatment to about 3,500 goods to designated beneficiary countries.<sup>49</sup> The IIPA believe that South Africa is not meeting the eligibility criteria as it fails to provide adequate and effective protection of American copyrighted works and sound recordings, as well as failing to provide equitable and reasonable access to its markets for American producers and distributors of creative materials.

The IIPA made explicit reference to the CAB and the PPAB, stating that these bills fell short of international norms for the protection of copyrighted works "in the digital era".<sup>50</sup> According to the IIPA, these two bills, if

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45. International Intellectual Property Alliance. 2019a. Re: 2019 Generalized System of Preferences (GSP): Notice of Annual GSP Product and Country Review; Request for Review of the Intellectual Property Rights Practices of South Africa, 84 Fed. Reg. 11150 (March 25, 2019). 18 April. <http://infojustice.org/wp-content/uploads/2019/11/IIPA-South-Africa-GSP-Review-Petition-2019.pdf>.

46. International Intellectual Property Alliance. 2018. 2018 Special 301 Report on Copyright Protection and Enforcement. 8 February. [https://iipa.org/files/uploads/2018/02/2018\\_SPECIAL\\_301.pdf](https://iipa.org/files/uploads/2018/02/2018_SPECIAL_301.pdf).

47. *BusinessTech*. 2020. South Africa could lose up to R34 billion because of planned copyright law: coalition. 16 January. <https://businesstech.co.za/news/business/366798/south-africa-could-lose-up-to-r34-billion-because-of-planned-copyright-law-coalition/>.

48. International Intellectual Property Alliance 2019a. 1.

49. U.S. Customs and Border Protection. 2020. Generalised System of Preferences (GSP). 26 February. <https://www.cbp.gov/trade/priority-issues/trade-agreements/special-trade-legislation/generalized-system-preferences#:~:text=The%20Generalized%20System%20of%20Preferences,implemented%20on%20January%201%2C%201976>; African Growth and Opportunity Act (AGOA). 2019. US announces a review of South Africa's place in its biggest preferential trade scheme (GSP). 26 October. <https://agoa.info/news/article/15680-us-announces-a-review-of-south-africa-s-place-in-its-biggest-preferential-trade-scheme-gsp.html>.

50. International Intellectual Property Alliance 2019a. 6.

enacted, would violate South Africa's international obligations. Specifically, it would violate the Berne Convention for the Protection of Literary and Artistic Works, and the World Trade Organisation's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).<sup>51</sup>

The IIPA shed light on numerous problematic aspects of the two above-mentioned bills,<sup>52</sup> including but not limited to severe intrusions into contractual freedom,<sup>53</sup> inadequate protection of performers' rights,<sup>54</sup> fair use exceptions that exceed the scope of exceptions and limitations permitted under South Africa's international obligations,<sup>55</sup> exceptions and limitations that are not aligned with international norms and has been successfully challenged in European Union Courts,<sup>56</sup> and inadequate penalties for infringement of copyright.<sup>57</sup>

It is therefore heartening that President Ramaphosa has referred the proposed CAB back to Parliament for reconsideration, citing constitutional concerns.<sup>58</sup> It remains to be seen whether Parliament will take the necessary action to bring the bill in line with established property rights norms.

## Conclusion

South Africa has a long and tumultuous history of violent dispossession of property rights. The democratic transition of the 1990s was meant to represent a break with this shameful past. That the South African government has seen fit, not three decades later, to start reversing gains made during the transition is unfortunate, and this trend ought to be stopped. Only with a healthy respect for corporeal and intellectual property rights can South Africa escape the economic malaise caused not only by the recent COVID-19 lockdown, but by decades of dirigiste economic policy.

The greatest injustice of Apartheid was the denial of private property rights to the majority of South Africans on the basis of their race. This injustice threatens South Africans again today, but this time will be detrimental to everyone. The fact that Apartheid was a heinous crime against liberty and property has been mixed with the lie that all white South Africans possess stolen property, and that EWC by government is the only vehicle by which to achieve social justice.

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51. Ibid.

52. International Intellectual Property Alliance. 2019b. 2019 Special 301 Report on Copyright Protection and Enforcement. 7 February. 68-75. <https://www.polity.org.za/article/iipa-2019-special-301-report-on-copyright-protection-and-enforcement-2019-10-29>.

53. Ibid 68-70.

54. Ibid 70.

55. Ibid 70-71.

56. Ibid 71-72.

57. Ibid 73.

58. Villette, F. 2020. Ramaphosa sends copyright bill back to National Assembly. *Cape Times*, 22 June. <https://www.iol.co.za/cape-times/news/ramaphosa-sends-copyright-bill-back-to-national-assembly-49736118>.

It is obvious that some large measure of rectification is required to redress the injustices of the past. The Apartheid regime identified plots of land on the basis of the race of their owners and expropriated those properties. Those people, or their descendants, who had their property taken by the regime are therefore entitled to claim the property back subject to compensation for the current possessor if they did not know the property was being held illegitimately.

One might read this case study and conclude that the authors oppose land reform. This is not the case. For land reform to be effective, it must be undertaken on the basis of respect for private property rights; otherwise it serves no purpose other than to entrench political power at the direct expense of citizen empowerment.

Under a property rights-respecting regime, every black South African whose ancestors were forcefully driven from their property, and who can prove that this happened, will be entitled to claim that property back. Alternatively, they can, and probably will, seek to be compensated in money instead, since they, like most people around the world, wish to live in urban areas and not in rural areas. Restitution, not redistribution or nationalisation, is the proper vehicle for land reform that the government should pursue.

On top of the severity of EWC, the predicted economic consequences of the enactment of the CAB would also be dire. This is especially worrying in the current economic environment where the harsh, almost extra-judicial COVID-19 lockdown has wreaked havoc on the livelihoods of millions of South Africans. Considering that the country could lose R34 billion (\$2 billion) in export revenue if declared ineligible for the GSP by the United States government, on top of a decrease in sales in the domestic publishing industry amounting to R2.1 billion (\$1.25 million), the CAB in its current form would be disastrous if assented to by the President.

Parliament should abandon EWC and adopt a resolution re-committing the government to the existing structure and protections of section 25 of the Constitution. The notion of EWC must never again arise in South Africa given this country's and government's history with dispossession.

It is unfortunate that the South African Parliament has shown contempt for intellectual property rights by having passed the CAB, notwithstanding President Ramaphosa's hesitance to assent to the bill. With the President having returned the bill to Parliament, it now has an opportunity to rectify this regrettable state of affairs. We strongly recommend that Parliament remove the problematic provisions in the CAB and re-entrench respect for existing intellectual property rights.

With these two ill-considered and ill-fated interventions abandoned, South Africa can attempt to resume its post-Apartheid trajectory of respect for individual rights. Without abandoning these interventions, however, South Africans' future might be sealed as one of poverty and despair.



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