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**REPORT OF THE SECOND CALL FOR WRITTEN SUBMISSIONS ON THE REVISED CONSTITUTION EIGHTEENTH AMENDMENT BILL**

**ADHOC COMMITTEE TO INITIATE AND INTRODUCE LEGISLATION AMENDING SECTION 25 OF THE CONSTITUTION**

**26 AUGUST 2021**

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1. **INTRODUCTION**

Parliament is constitutionally obligated to involve the public in the activities of its Houses and committees. The involvement of the public also applies to the legislative processes undertaken by its committees. The Ad Hoc Committee to Initiate Legislation to Amend Section 25 of the Constitution is thus one other committees established by the National Assembly to initiate and introduce legislation to amend section 25 of the Constitution. Thus, it is expected of it to adhere to the constitutional prescripts with regards to public participation.

It is generally accepted and a norm for parliamentary committees to involve or encourage public participation in the legislative process. Failure to do so may render the process flawed and in breach of the Constitution and parliamentary rules with regards to public participation. The repercussions of not ensuring public participation, Parliament may be taken to court and consequently be found wanting in fulfilling its obligation to ensure public participation in its processes.

Following the deliberations on the bill, the ad hoc committee on section 25 made amendments to the bill. Consequently, the committee advertised a revised bill making a second call for public submissions on the amendments it made on the bill. The closing date for this second call for submissions was 13th August 2021. The purpose of this report is thus to reflect on issues raised by the public on the committee’s amendments to the bill.

**2. MANDATE OF THE AD HOC COMMITTEE TO INITIATE LEGISLATION TO AMEND SECTION 25 OF THE CONSTITUTION**

The ad hoc committee derives its mandate from the resolution of the National Assembly taken on 25th July 2019. The National Assembly resolved to establish an Ad Hoc Committee to Initiate Legislation to Amend Section 25 of the Constitution. As the name explicitly explains, the Ad Hoc Committee was mandated to initiate legislation to amend section 25 of the Constitution.

In doing so, the ad hoc committee had to note the recommendations of the Constitutional Review Committee to amend section 25 of the Constitution to make explicit that which is implicit in the Constitution, with regards to expropriation of land without compensation, as a legitimate option of 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 programs which was adopted in the 5th Parliament.

Furthermore, the House noted that the ad hoc committee was originally established to this effect but could not complete its task by the time of the dissolution of the 5th Parliament and that it recommended that the matter be concluded in the 6th Parliament (ATC, 15 March 2019, p92). The ad hoc committee was established in terms of Rule 253 to initiate and introduce legislation amending section 25 of the Constitution. The ad hoc committee was to have regard to the work done and recommendations as contained in the reports of the Constitutional Review Committee (CRC) and the previous ad hoc Committee on Amendment of Section 25 of the Constitution.

1. **SUMMARY OF SUBMISSIONS**

The committee considered the report on public participation as prepared by the Committee Section of Parliament. Furthermore, it received a response to issues raised during the public participation process from the Parliamentary Legal Services for consideration. Consequently, it deliberated on these matters in a series of meetings it held. On the 16th July 2021, the committee took a decision to re-advertise the bill as it made amendments by inserting new clauses to the original bill.

The new amendments to the bill that sought to amend the Constitution so as to provide for the following:

* That national legislation must provide circumstances where the amount of compensation is nil.
* Land should be a common heritage of all citizens that the State must safeguard for future generations.
* Conditions should be fostered to enable State custodianship of certain land in order for citizens to gain access to land on an equitable basis.

The bill was advertised for three weeks as agreed to by the committee with the closing date of the 13th August 2021. The bill was advertised in national, regional and local newspapers taking into consideration the official languages of the country.

The call submissions attracted 148 891 submissions for consideration by the committee. A review of submissions suggests that the committee received submissions as follows:

* Committee received submissions that were submitted to the Constitutional Review Committee in 2018. The submissions were in response to the question of whether to amend section 25 of the Constitution or not. Thus, these submissions are not relevant for the purposes of the bill before the committee.
* A resubmission of written submissions that were sent to the committee during the first call for submissions. A report on public participation was produced for consideration by the committee before further amendments were made to the bill which was subsequently advertised in the second call for written submissions. Thus, the readers should read this report together with the first report on public participation.
* The committee received submissions meant for the PC on Public Works which is currently considering the Expropriation Bill. These submissions were not considered for this process.
* The committee received submissions from bulk email address endorsing a submission. The examples of these kind of submissions are those from IRR (submissions from irr-bulk email were resubmissions. Emails from the Institute of Race Relations are new submissions on the revised bill), DearSA and AfriForum. These submissions reject amendments to section 25 of the Constitution in part and/or its entirety.
* Substantive submissions on the amendments were received from organizations and individuals.

1. **MATTERS EMANATING FROM THE SUBMISSIONS**

**4.1 Preamble of the Bill**

The preamble to the amendment is misleading. According to the preamble to the amendment, expropriation of land without compensation is 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 programs. However, statistics based on surveys and government reports dispute these claims. They show that the vast majority of people in South Africa regard the need for land reform as a very low priority. Government reports indicate that between 1995 and 2014 over 1,8 million people received compensation in the form of either land or money. This was achieved without the need to expropriate land without compensation. The strong inference is therefore that the reminder of land claims can also be resolved without interfering with the Constitution. It is also a well-documented fact that more than 90% of land claimants choose money over land.

Therefore, there is no evidence that the amendment of s25 of the Constitution will ensure equitable access to land, as declared in the Bill, nor that it would empower the majority of South Africans. Instead, it will damage the economy, which has already been badly hit by Covid 19 and drive away foreign investors.

The land reform programme mandated by s 25 (5) to (8) should not be equated to an agricultural programme and food security as it is not the underlying objective. The underlying objective is to correct the historical imbalance in ownership that was divided along racial lines during apartheid, which also applies to urban properties. It is therefore inappropriate to refer to “productive participants” as not all land reform programmes are aimed at agricultural land. Likewise, references to food security and agricultural reform programmes is misplaced in a Bill seeking to amend section 25.

Proposal to amend the last paragraph of the Preamble as follows:

“AND WHEREAS…further empower the majority of South Africans to be productive participants in ownership, food security, agricultural **and other** land reform programs.”

The preamble mistakenly implies that the slow pace of land reform is only viewed as problematic by the dispossessed. This in fact is an opinion widely held socially, politically and in the courts. The preamble should speak to all people in South Africa as a successful and orderly land reform program which brings lasting change to our society is in the interest of all South Africans.

With regards to the first paragraph of the preamble, it is viewed as problematic because it suggests that the slow pace of land reform is only viewed as problematic by the dispossessed when this is instead a widely held opinion. This is pointed out in many judgments including the Rakgase, Mwelase, and District Six Committee. Rather, the Preamble should speak to all people of South Africa, as a successful and orderly land reform programme that brings real change to people is in the interest of all South Africans.

The focus on “dispossessed” seems to negate the important place of tenure reforms of land rights. Land reform is not only focused on the dispossessed. It also incorporates laws that aim at securing tenure or programmes that aim to broaden access to land that is not necessarily linked to whether the person was dispossessed or not. This paragraph is therefore limiting. It is further limiting as “skewed land ownership pattern” suggests that land reform should exclusively focus on ownership instead of also promoting land tenure.

“(4A) The land is the common heritage of all citizens that the state must safeguard for future generations.” It is unclear why this clause was added and suggested that such a statement should be in the preamble and not in the text. Such a clause indicates big policy choices rather than a constitutional provision.

The Preamble also refers to ‘empowering’ people to be “productive participants”. It is unclear why the word productive is used, but it is submitted that this is problematic in that it implies a restriction on access to land – only those that are productive, may access it.

**4.2 State Custodianship**

The concept of state custodianship was objected to on the basis that it must be clearly defined and clarified with clear roles and responsibilities. The amendments must take into account the people’s right to own property. Therefore, full state custodianship of land was rejected as an unworkable solution to the land question in South Africa.

The full state custodianship of land was likened to the Ingonyama Trust model which was described as dysfunctional and therefore cannot be replicated throughout the country. In this model, people are subjected to eternal leasing of land thus depriving them of full ownership of land. Further, the recent Ingonyama Trust judgment highlights the dangers inherent in a system of centralised land ownership, where one relies on the state to act in your best interests. State custodianship may also place an impossible burden on the state as property rights should not be seen in isolation. The Constitution provides for the right to administrative action that is lawful, reasonable, and procedurally fair. All forms of land governance must be transparent, accountable and procedurally fair to pass constitutional muster.

If all property becomes State asset and is leased to people who have no vested interest in keeping the entity profitable, it will not only be devastating to the victims of EWC but also to the State. For one, the taxes generated by these entities will fall away; the products and services generated from these entities will fall away. The pride we all have about being proudly South African will be decimated.

Concerns are expressed regarding expropriation of land without compensation coupled with the current proposed amendment’s suggestion of land custodianship by the State in effect equates to nationalization of land. The Committee’s attention is drawn to the Universal Declaration of Human Rights which guarantees property rights. Further, that property rights are a key pillar of the rule of law which is one of the founding values of the Constitution. EWC and land custodianship present a potentially fatal threat to property rights and would have a devastating impact on agriculture, food security, the banking sector, investment, economic growth, employment, national unity and South Africa’s constitutional accord. In response to these concerns, the ad hoc committee and Parliament are advised to:

* Conduct a comprehensive assessment of all the likely political, economic, and social consequences of the Bill by authoritative and independent experts.
* Seek an authoritative legal opinion to ascertain whether the proposed legislation would have to be considered within the framework of the rule of law in section 1 of the Constitution.

Furthermore, it is suggested to the committee to do the following:

* + Ensure policy coherence and a proper legislative framework for land reform/redistribution without amending the Constitution;
  + Tenure reform laws provide inadequate legal protection and can be amended;
  + Secure informal land rights in both urban and rural areas (including redistributed and restored land);
  + An accredited, widely accepted and accurate national land audit be conducted; and
  + A special purpose vehicle must be established to extend property rights to all South Africans effectively (which could be preceded by a national land reform conference)

Land redefines as the “common heritage” of all South Africans, and introduces “state custodianship of certain land”. This is regarded as concerning from a religious freedom point of view. It is concerning especially in a diverse nation with many minority religions because it is impossible to guarantee that the State will not favour some religions over others. Thus, private property ownership must be respected by removing concepts such as “common heritage” and “State custodianship” from the bill.

Government has used custodianship to deny full property rights to, inter alia, Black farmers resettled on land (e.g. the case of Patrick Rakgase – who won in court). The constitutionally sanctioned power to subject various categories of land to custodianship at the whim of the State will not only defeat the declared object of section 25(5); given the abysmal performance of the State to date. Further, it would further complicate and delay the granting of freehold title to new property owners. Thus the whole idea of custodianship should be scrapped and section 25(5) should not be amended.

Clause 4A is a new insertion that was not included in the previous version of the Bill published for public comments. Its purpose is not entirely clear. By stating that land is the common heritage and that the state must safeguard it for future generations, it appears to refer to land as a natural resource rather than regulating ownership of land. Whilst the intention to safeguard land for future generations is noble, property rights cannot vest in generations that are yet to be born. Hence this clause may be better suited in another section of the Constitution which deals with the protection and sustainable use of natural resources as section 25 only regulates the ownership of natural resources. In particular, section 24 of the Constitution places an obligation on the state to preserve our environment for the benefit of future and present generations whilst subsection 24 (b) (iii) speaks to the sustainable use of natural resources to ensure sustainable development. The objective of this provision may therefore already be implicit in section 24 of the Constitution and its inclusion in section 25 seems misplaced.

Section 25 (5) is regarded as the empowering provision for the land redistribution, a pivotal leg of the land reform programme. It ensures that land ownership is extended to the majority but allows the State freedom to develop policy and legislation that it believes will best achieve this. The proposed insertion severely limits this discretion as it restricts the State to a single model of state-ownership to achieve equitable access. This amendment is unduly limiting and runs the risk of handicapping the State when policy changes need to be made to effectively achieve land redistribution. An alternative solution would be to retain the current discretion contained in the enabling provision as this would allow the State to self-correct when policies do not achieve their desired result. The proposed amendment will effectively entrench State custodianship as the only manner in which land redistribution will take place. If State custodianship is entrenched indefinitely, beneficiaries will always be reliant on the State for direct financing as they will not be able to get finance from commercial banks, and such a situation will be unsustainable.

Section 25 must also not be read in isolation from the rest of the Constitution. Section 33 provides for the right to just administrative action. This means that any decision of the State must be lawful, reasonable and procedurally fair. This is a high threshold to uphold and any affected party can challenge the State if it does not uphold this standard. An alternative would be to devolve the decision-making rights that come with ownership to the beneficiary. By devolving decision making authority, empowerment is achieved and sustainability ensured.

This subsection 25 (5) explicitly provides for the State custodianship of land. The words “certain land” places no real limitation on the land that can be targeted for custodianship and gives no reassurance to investors. Thus, State custodianship will severely constrain private enterprise and entrepreneurship. It will lead to a system of licencing and permitting which will water down property rights and create a huge additional administrative burden for landowners and farmers. It will also create further opportunities for corruption. Further, there is no tenure security under a system of State custodianship as evident in the Pro-active Land Acquisition Strategy (PLAS).

The current proposed amendments reflect a dilution of property rights and the preference for State ownership over private ownership, which is in stark contrast to policy reforms aimed at promoting economic development and upliftment. Further, by introducing the clause “state custodianship of certain land” without clearly defining what is meant by this paves the way for legislators to implement legislation which could potentially lead to the nationalisation of land, which poses a significant risk to the banking industry and have a far reaching socio economic impact on the country, including the poor and vulnerable.

Clarity is required on what is meant by the words ‘safeguard for future generations’. At a minimum, it should be made clear that this cannot infringe on citizens’ rights under s25(1) regarding ‘deprivation of property’ to avoid infringing on private property rights and limiting wealth creation for citizens who own / use the land. The new insertion into this section is of concern. While it may seem innocuous, the wording could be interpreted as synonymous with state custodianship as proposed in s25(5). The purpose of the insertion is vague and may result in the violation of other constitutional rights. At a minimum, clarity on the meaning and intention of the proposed clause is therefore required.

It is unclear whether state custodianship refers to perpetual state ownership of land, which is a concern and defeats the purpose of the proposed amendment, namely the equitable redistribution of land. In addition to this, the State, through its provincial and national departments as well as municipalities, is the holder of large tracts of undeveloped land which could be targeted for redistribution. This further mitigates against state custodianship of additional land.

**4.3 Nil Compensation vs Without Compensation**

***On Nil Compensation***

According to Section 2 of the Constitution (Supremacy of the Constitution), the Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled. It is argued that the current text of section 25 of the Constitution sets out the circumstances to be considered when determining how much compensation should be paid when land is expropriated. The amendment Bill thus bypasses these factors and refers to national legislation to determine when nil compensation is payable. Instead of the Constitution reigning supreme, it is made subservient to national legislation. Therefore, the amendment is viewed to be in breach of section 2 of the Constitution.

With regards to land and improvements thereon expropriated for the purposes of land reform, the amount of compensation payable may be nil, this clause is not supported. Nil compensation is regarded as confiscation and it means no compensation for property taken away from current owners. Expropriation of land with nil compensation will therefore be unjust and will deprive owners of fundamental human right to own private property. Thus, the State is urged to pay compensation for any improvement on land that will be expropriated.

The inclusion of improvements under the proposed amendment should be reconsidered. Although in principle they are opposed to nil compensation as a means to effect land reform, it is understood that the underlying argument in favour of nil compensation relates to social justice. If circumstances are such that an owner's property rights came about solely as a result of forced dispossession and is in no way attributable to the application of own capital and labour, social justice considerations could carry a great deal of weight. It is difficult to imagine the same rationale being applied to improvements, especially those made to the property by subsequent owners and successors in title. Improvements that have no link to a historical dispossession should not be treated the same.

The farming sector rejects the proposed constitutional amendment to expropriate land without compensation. Farmers contend that nil or zero compensation for all property will result in no one willing to make investment on property if the ownership of that property cannot be guaranteed for the duration of the investment. Section 25 of the Constitution as it is, properly applied using market prices as a bases, can achieve a just and equitable land reform as required.

Expropriation without compensation will reduce both domestic and foreign investment because investors will not want to risk being expropriated with nil compensation. Following from reduced investment is reduced economic growth and increased unemployment.

The provision should be aligned to the proposed amendment to s 25(2)(b) by replacing the work “is” with the word “may” to clarify that nil compensation is merely a possibility but remains discretionary. Should the legislation prescribe nil compensation as an absolute requirement by using the term “is” instead of “may”, it will inadvertently oust the jurisdiction of the courts to determine what is just and equitable.

By allowing primary legislation to define which categories of properties are entitled to just and equitable compensation versus nil compensation, it undermines the constitutional safeguard provided for in s74. The proposed amendment will allow primary legislation to redefine the scope and application of the compensation guarantee between different categories of property. One should guard against creating the impression that the proposed amendments will give Parliament a 'blank cheque' to exempt the state from paying compensation for properties that fall within the circumstances listed in the primary legislation. By replacing "circumstances" with "factors" that must be considered, this risk can be mitigated.

The compensation clause cannot be reduced to a mere formula or technical calculation. Whilst factors such as the property's value and the value of historic subsidies can be numerically calculated, they are merely indicative and must be weighed up against a host of other factors to determine what is just and equitable. The over-arching requirement remains the balance between the interests of the State and the individual. It is for this reason that the word “may” should be retained to ensure that the courts have the discretion to weigh up normative factors and decide if and when nil compensation may be just and equitable.

Whilst the banking sector welcomes the obligation on the Legislator to set out circumstances in National Legislation where compensation may be set at nil, this new provision still does not place any limitation to restrict regulatory provisions to specific circumstances (as is the case with s12 of the Expropriation Bill (2020) that references ‘including but not limited to’ and this may result in the updating of other legislation to align with s12 of the Expropriation Bill (2020), thus creating further uncertainty and insecurity).

***On Expropriation Without Compensation (EWC)***

Some submitters were not sure if the challenge with land reform is within the legislative framework as it is recognized that it has been too slow. Instead, government had been incapable of facilitating a prosperous economy and using populous politicking to garner support in the guise of development. They pleaded with government to use undeveloped land that could be used for economic development instead of taking productive land away from people and businesses. They further noted that those who have been given productive businesses often lacked requisite skills to run them.

The objects to the “circumstances where the amount of compensation is nil” and EWC being permissible as long as it is “for purposes of land reform as contemplated in subsection (8)” are rejected because for something to be regarded as “land reform” not being expressly set out as a closed list within the Bill of Rights. Furthermore, the objects that property used for religious purposes is not excepted as property that cannot be expropriated. The absence of any exception will have unintended and potentially disastrous consequences. The proposal for rewriting the clause as follows:

*“Land that is owned and used in connection with the exercise of the constitutional right to religious freedom and the rights of religious communities, is hereby exempted from the application of section 25(2).”*

EWC will not be the first time that the South African Government has taken land without paying for it. Different pieces of legislation were cited to support the view, from Glen Grey Act (1894) to Groups Areas Act (1950), that enabled expropriation without compensation during colonial and apartheid regimes. Dispossession caused physical, financial, psychological, mental and religious devastation. So, land restitution is a way of trying to make right a historical injustice; entailing recognition that a wrong has been committed; that there were perpetrators who applied the injustice or who were somehow complicit in it; that the ramifications of these injustices continue to be felt; and that giving back is the essential next step.

Further, the submission makes reference to the Truth and Reconciliation Commission (TRC) recommendations to the faith community; that religious communities should help to bring healing to the many in our country who are hurting. Restitution processes which the church can pursue immediately and decisively may include, provision of housing, land for farming, Primary and high school education, and creation of Jobs. The Church should play a leading role in restitution.

The expropriation without compensation is seen as an unlawful social experiment of a totalitarian land grab that always, where implemented, ended in (i) famine, (ii) economic devastation and (iii) despair for the citizens. Thus, it must be handled with care by the legislators in efforts to deal with the land question in South Africa.

Expropriation of land without compensation is objected to as it is believed that it is a racially motivated endeavor and undermines international law and fundamental rights of persons enshrined in the Constitution of the country. If Government continues with the expropriation without compensation, it will be committing offence against humanity, which will expose it to all applicable sanctions of International and South African law.

Expropriation without compensation will inhibit access to finance and, by extension, access to housing as enshrined in s 26 of the Constitution (remembering that a sizeable proportion of bank-financed properties are residential homes). South Africa can ill afford to implement a measure that will exacerbate an already dire and acute housing crisis.

**4.4 Role of Courts**

There is concern about the removal of judicial oversight. Its removal contravenes, amongst other things, s 41(1)(g) of the Constitution, which requires each sphere of Government to exercise their powers in a manner that does not encroach on the functional or institutional integrity of other spheres of Government.

Section 25 of the Constitution mandates the courts to use the existing scheme as set out in s 25(3), to determine the amount of compensation and the time and manner of payment.

For Parliament to interpose itself by taking over this role and determining categories of property which could be expropriated for nil compensation is arrogant and shows a disregard for the courts and the entire South African legal system. This proposal must be scrapped.

The latest draft Bill is distinctly Orwellian in the sense that the separation of powers has disappeared altogether. In s 25(2)(b) and 25(3)(a) of a previous draft Bill, the role of the courts to act as arbiter between the Executive Arm of government and the private citizen who is about to be dispossessed was at least paid lip service too.

In the previous iteration of the Bill, it stated that *"a court may"* determine that the amount is

nil. The words “*a court*” has now been removed. Despite this removal, the understanding is that compensation must still be approved or decided by a court under s 25 (2) (b) and that this amendment simply emphasises that amendment can be reached on nil compensation. The fact that the word *"may"* has been retained, it provides guidance without being prescriptive as it may violate s 34 of the Constitution. However, there is an inconsistency as the proposed s 3A states “…*circumstances where the amount of compensation is nil*”. This inconsistency may violate s 34 of the Constitution and it should be amended to use the word “may”.

The determination of just and equitable compensation is not a technical exercise nor can it be reduced to a simple mathematical equation. It is a contextual exercise in which the rights of the individual must be weighed up against the interest of the fiscus where normative elements such as fairness and equity hold sway. Our courts are best placed to make this value judgement and it is critical that the courts retain discretion as compensation may even differ between properties of a similar value depending on the circumstances of the owner and the expropriation.

With regards to amending s 2(b), the court should always arbitrate where the state advocates that the land needs to be expropriated for land reform at nil compensation. There must be finite and prescriptive circumstances where land may be expropriated for land reform and such expropriation should not have an adverse effect on landowners or financial institutions in respect of all property types (residential, commercial, industrial and agriculture), and should not apply to land that is commercially productive, improved and privately or commercially owned and occupied. Nil compensation should always be discretionary, to be decided by a court of law after considering all circumstances (including land reform versus the rights of current owners and financial institutions).

Clause 1(a): Amendment of s25(2) The envisaged amendment is confusing as to the role of the courts in determination of compensation. The first and unchanged aspect of s 25(2)(b) seems to envisage that a court may decide the amount of compensation. However, the proposed insertion appears to reduce the role of the courts in instances where land is expropriated for the purpose of land reform where the amount of compensation is nil.

No court order necessary prior to expropriation without compensation. In the 2019 version of the Draft Bill nil compensation could not apply without a court order that was obtained prior to the expropriation. In the current version, courts are no longer expressly required to decide whether compensation should be nil. Thus, expropriated owners wanting more than ‘nil’ compensation will have to seek legal redress after being expropriated. The LRC has assisted clients in expropriation cases that demonstrate how difficult and costly such litigation against the state is.

The Revised Eighteenth Amendment Bill removes the proviso that a court may determine nil compensation where land is expropriated for land reform. It proposes to amend s 25(2)(b) of the Constitution to provide for expropriation with compensation, provided that where land is expropriated for purposes of land reform nil compensation may be payable subject to clause 25(8) of the Constitution – in other words, subject thereto that nothing may impede the state from taking legislative and other measures to achieve land reform. Clause 25(8) is itself subject to the limitations of rights clause in s 36(1) of the Constitution.

In addition to removing the provision regarding judicial oversight, the proposed amendment also means that the Expropriation Bill, which carefully set out factors which were to be considered by a Court when considering expropriation without compensation, can be amended or replaced, adding to uncertainty as to which properties may be expropriated without compensation. There is accordingly a risk that decisions as to whether land falls within a category identified for expropriation without compensation, are subjective and arbitrary.

**4.5 Comments Against the Bill**

Submitters who rejected the bill in its entirety advanced the following reasons for such rejection:

*Amendment to the Constitution as unacceptable and theft:* the amendments pose a risk to individual civil liberties and human rights. Such an amendment will have a negative impact on all forms of private property rights. Opposes expropriation of any form of private property without compensation. Instead, property rights must be expanded to be accessible for all South Africans. The only way to achieve this is through free market principles.

The passing of this bill will promote theft of land. Without the unquestioned and unchallenged right to ownership, this country is over. Ownership of property is a source of pride and a motivation to dedication and diligence. Property owned in South Africa is purchased, paid for and made profitable for the benefit of all the people in this country.

*Secure land rights are an important pillar for agriculture:*In the face of [an increasing global demand for food, there is a need for](https://twitter.com/intent/tweet?text=As+populations+and+consumption+continue+to+grow%2C+the+global+demand+for+food+will+continue+to+increase+as+well.&url=https://blogs.worldbank.org/voices/7-reasons-land-and-property-rights-be-top-global-agenda/?cid=SHR_BlogSiteTweetable_EN_EXT&via=worldbank) a comprehensive global strategy necessary to ensure sustainable and equitable food security. This strategy will need to include secure land titles because it provides incentives for farmers to invest in land, borrow money for agricultural inputs and improvements to their land, and enable land sale and rental markets to ensure full utilization of land.

*Secure land rights are essential for urban development:*it is estimated that by 2050, more than 6 billion people will be living in urban areas, especially [in Africa and Asia.](https://twitter.com/intent/tweet?text=Most+of+the+increase+in+urban+areas+will+occur+in+Africa+and+Asia.&url=https://blogs.worldbank.org/voices/7-reasons-land-and-property-rights-be-top-global-agenda/?cid=SHR_BlogSiteTweetable_EN_EXT&via=worldbank) Cities must create more affordable and liveable urban environments to formalize land markets, clarify property rights, and institute effective urban planning.

*Secure property rights help protect the environment:*Government needs to develop policies that improve tenure security in forest areas and allow the transfer of land used in non-environmentally-sensitive areas to agriculture or other production.

*Secure property rights and access to land are crucial for private sector development and job creation:*The private sector needs land to build factories, commercial buildings, and residential properties. The top constraints to the private sector’s contribution include the lack of access to land as well as issues related to land titling and registration.

*Secure property rights are important for empowering women:*Government must develop a legal framework that fully supports equal access to property ownership or use of land titles as collateral without a male guardian.

*Secure property rights help secure indigenous peoples’ rights***:** Recognise indigenous peoples’ land rights as a human rights issue, which also makes economic and environmental sense. Once their land rights are recognized, indigenous peoples will be able to use the resources on their land more sustainably and improve their economic and social status as a constructive force in society.

It is believed that an amendment of s 25 to allow for EWC and nationalization of land will:

* + have extremely negative political implications for the country;
  + lead to further policy uncertainty and political instability in South Africa and all but destroy the national accord reached in 1994 and 1996;
  + harm agricultural production and food security;
  + pose a serious threat to the banking sector; and
  + discourage foreign and domestic investment that are essential for the sustained economic growth on which the future wellbeing of all South Africans depend;

In rejecting the bill, it was noted that the current/proposed s 25 of the Constitution and a proper legislative framework can and should be used to speed up the land reform process and extend property rights to all. Thus, s 25 of the Constitution has not been properly utilised to effect land reform and property rights for all. Furthermore, freely held title and property (specifically the security of private property and ownership) is a cornerstone of almost all the economies in the world. Diluting the security of ownership will further weaken South Africa’s economy and diminish the State’s ability to effect a more equal distribution of wealth.

A political party currently represented in Parliament objected to the process followed by the Constitutional Review Committee (CRC) and the main argument was that if you want to change the constitution, or an entrenched section of the constitution or the Bill of Rights, the ad hoc committee cannot make a single procedural error. It noted that the CRC process was flawed from the start and the establishing of the Ad Hoc Committee is also fundamentally flawed as well. Also, it argues that there is no credible data to show who owns what land in SA. Due to lack of credible data used for the land audit by the DRDLR, the figures used in the motion to substantiate for EWC and the establishment of the Ad Hoc Committee are flawed and inaccurate.

***Consequences of land expropriation where the amount of compensation is nil:***

* Amendment of s 25 to provide for EWC will make all property rights null and void and create uncertainty which will inevitably divert potential investment away from SA’s agricultural sector; and ultimately result in economic failure.
* Implementation of EWC contravenes Article 17 of the Universal Declaration of Human Rights, as contained in the International Bill of Human Rights of the United Nations, which states that: “1. *Everyone has the right to own property alone as well as in association with others,* and 2. *No one shall be arbitrarily deprived of his property.”*
* Other international treaties/agreements that will be breached include: The Protection of Investment Act, Act No. 22 of 2015 which determines that investors have the right to property in terms of s 25 of the Constitution.
* The impact on the agricultural sector can be summarised as follows:
* The sector owes approximately R170 billion to banks and credit providers. EWC will collapse the banks and no one will be able to provide the essential working capital for farmers; in the end it will collapse the agricultural sector thereby endangering food security.
* South Africa has an unemployment rate of 29,1% and a youth unemployment rate of 58%. If agricultural sector, a major provider of employment in South Africa, is jeopardised, it will result in major job losses.

The amendments exceed the recommendations by the Constitutional Review Committee and limit the scope of the constitutional amendment in two important ways. First, it provides for only a change that makes explicit that which is already implicit. This means that the amendment can clarify the existing powers to expropriate land which the state already has, as well as its obligations to pay compensation. It cannot provide the state with any new powers that it does not currently have. The amendment goes beyond mere clarification. Its effect is to bypass the relevant circumstances that currently determine compensation (set out in s 25(3) of the Constitution) and to replace these with circumstances that have yet to be determined by national legislation. This grants Parliament carte blanche to pass a law (at the lower voting threshold of 50% plus one) to set out when nil compensation is payable. Second, the recommendations only use the term land. However, the amendment goes beyond this by referring not only to land, but also any improvements on the land.

The amendment is a breach of s 36 of the Constitution, which states that: The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society. It further in subsection states that no law may limit any right entrenched in the Bill of Rights, except in cases as provided in subsection (1) or in any other provision of the Constitution. Therefore, the amendment is a limitation of the existing right to receive compensation for land that was expropriated, it is argued.

The amendment to the Constitution, if passed is tantamount to legalized looting. Also, South Africa has a history of state-sanctioned land dispossession. The law was used as a weapon to the detriment of citizens in order to take their land. It was used as a weapon to the detriment of poor, vulnerable non-white citizens for a long time. As South Africans, we must not allow that to happen again where South Africans are subject to the whims of the State and for the law to be used against them to perpetrate further injustice.

According to the government’s own Guidelines for the Socio-Economic Impact Assessment System (SEIAS), every proposed bill must be subjected to ‘an initial assessment’ aimed at identifying different ‘options for addressing the problem’ and making ‘a rough evaluation’ of their respective costs and benefits.

**4.6 Comments in Support of the Bill**

Some submitters support the amendment of Section 25 of the Constitution in order to redress the 1913 land dispossession, where government of the day took indigenous people’s land without compensation. The submitters equate such land dispossession to land theft. The land dispossession therefore need to be reversed using the law.

There is an urgent need to allocate land to the dispossessed people of the country. Government can do so by a transfer of all land under traditional leadership to owners with full title deeds; especially women. Also, unused State land should be allocated to people closer to the areas (including all vacant State land); people owning an RDP house should have land and property tenure.

The submitters assert that expropriation of land in Zimbabwe, South Korea, and China resulted in radical increase in GDP and national productivity. Redistribution of land and wealth has a positive impact on the overall economy of the nation when allowed to flourish without negative pressures from illegal international embargo like that which occurred in Zimbabwe.

Further, some submitters cited the importance of land as a basic resource, the need for the correction of historical injustices of land dispossession, the failure of the land reform programme and the lack of effective land planning as matters for consideration when deliberating on the Bill. Submitters also, submitted some suggestions for land expropriation without compensation citing that the State earmarks land for creation of new cities and towns; co-ordination between the National Departments and municipalities on available State owned land; allocation of productive land to emerging farmers; and facilitation of produce to commercial markets.

Some of the submitters contend that the land claims before the 1913 date be considered by stating that qualifications to be set must be in compliance with UN Declaration for Indigenous and Tribal People. Furthermore, that it is consistent with both the Customary law and the Constitution not to consider the Native Title matters.

Submissions were made against the 1913 Land Act due to taking 80% of the land by colonisers without compensation. The expropriation of land without compensation occurred in other countries like Zimbabwe, South Korea and China and resulted in increase of the GDP. Therefore, the redistribution of land has a positive impact on the economy when allowed without negative pressure of international embargo as was done in Zimbabwe. The return of stolen land as required by the UN 1945 ban on illegal annexation and occupation is consistent with democratic and Christian principles.

The expropriation of land should begin from the arrival of the Whites in South Africa and the Land act of 1913 must not be used as the baseline for returning the land to the lawful owners.

It is noted that State currently has no adequate budget to speed up land restitution in order to redress the injustice that took place almost three centuries ago. Allowing the courts to play a major role in determining the amount of compensation will result in further delays as court processes can take up to 20 years to conclude. The Bill will ensure that the Land Restitution Act and Expropriation Act are implemented programmatically without any hindrances. All debts incurred by current land owners at various banks must be scrapped and that banks must contribute to this transformation process by scrapping these debts. Finally, the new owners must not incur any debt after receiving transfer of the land.

The amendment Bill argues that the current legislation demanding payment of compensation delays the process of land restitution to its owners. Property valuations and other related processes costs government a lot of money and have proven to be costly. The current legislation is unfair and unjust to a person whose land was forcibly taken without compensation by the colonisers, who now demand to be paid compensation for returning back that land to its rightful owners. The Bill should make a provision for giving tittle deeds to people who live in rural areas and farms as well as their residential and business areas. This will make it easy for such people to access financial assistance in order to participate meaningfully in the economy.

1. **COMMENTS ON CONTRADICTORY AND RESTRICTIVE LANGUAGE WITHIN THE PROPOSED BILL**

The text is deemed to portray significant contradictions and inappropriate wording that would create challenges if retained in the Constitution, the document that guides all legal interpretation were indicated as follows:

* The Preamble refers to ‘empowering’ people to be ‘participants in ownership’. This appears to contradict the rest of the Bill that emphasises state custodianship and the notion that “the land is the common heritage of all citizens that the state must safeguard for future generations”. How should this be read alongside a promise to lead all South Africans to ‘ownership’ of land?
* The Preamble also refers to ‘empowering’ people to be “productive participants”. It is unclear why the word productive is used, but it is submitted that this is problematic in that it implies a restriction on access to land – only those that are productive, may access it.
* The right to restitution does not rely on whether the claimants will or can use the land ‘productively’.
* The same restrictions do not apply to common law ownership in South Africa at all: the common law owner of land can do on that land what they please (within applicable zoning and regulation). It would be inequitable to require certain South Africans, in particular restitution claimants, to use their land productively, while other farm owners may do with their land what they want. (There may be an argument that access to redistributed land should be tied to productivity, but the text does not specify that. In any event, that is a policy decision that should not be dictated by the Constitution.)

1. **CONCLUSION**

The report is a reflection of the views of the public on the second call for submissions on a revised Constitution Eighteenth Amendment Bill. The report is to be used to direct and influence debate on the Bill to enable Members of the committee to take informed decisions on the bill.