

Submission on the Expropriation Bill



Centre for Development and Enterprise

7 September 2021



Introduction

- Presentation departs from written submission made in Feb 2021
 - Written submission made on the basis of the Ex. Bill read with the proposed amendment of s25 that was current in February
 - Since then, there have been significant changes to proposed amendment to s25
- Presentation in two parts
 - Comments on Bill assuming no amendment made to s25
 - Comments on Bill assuming that current proposed amendment may pass
- Important to state up front: **CDE believes that it is undesirable and unnecessary to change the constitution**



Expropriation is a necessary evil

- Without the power of expropriation, development can be held hostage by land-owners, so forced sale to govt must be legally possible
- BUT: **expropriation is a dangerous power**
 - If over-used, it can dramatically undermine economic growth by deterring investment
- Expropriation must be used sparingly and in full accordance with the law that permits expropriation only in the public interest
- Compensation must be just and equitable
 - This is essential for expropriated owners and for confidence in property rights
 - Paying compensation also constrains the use of expropriation



Assuming no change to the Constitution, the Expropriation Bill is broadly workable

- Bill does a reasonable job of balancing the need for power of expropriation and imposing limitations on that
- **The critical challenge: provisions will be misunderstood by expropriating authorities and/or deliberately abused**
- CDE proposes vital amendments to:
 - Tighten the Bill
 - Increase clarity about what it does and does not provide
 - Sanction misuse/abuse of expropriation



Nil compensation in the Bill

- Bill makes it clear that nil compensation intended to be the exception, not the rule
- NB: The Bill does **not** limit expropriation for nil compensation to expropriations effected for purposes of land reform (which was in the Constitutional amendment)
- This deficiency must be rectified if there is no Constitutional amendment:
 - Nil compensation should **NOT** be permissible for expropriation except for land reform and in circumstances that are exceptional
 - Bill should define “land reform” by reference to restitution and redistribution as contemplated in s25 of the Constitution



The danger of misuse/abuse of expropriation power

- Likely that some officials will think the law empowers more expropriation than it does
- Also, a real danger of corrupt misuse
- The problem cannot be resolved solely through legal amendment, **but Bill should be strengthened** to make the limits more explicit and sanction misuse
- Make clear in Bill:
 - That availability of funds has no bearing on the determination of “just and equitable” compensation
 - Require compensation of expropriated holders for the costs imposed by the expropriation itself, e.g. of a new home, moving
 - Severe legal consequences (criminal and civil) if officials expropriate male fide
 - Procedures defined in Bill apply only to immoveable property

Notes

Given the extent of the intrusion entailed, the legislature ought to err on the side of even greater attention to considerations of fairness than it might normally apply.

The Bill could signal the inauguration of a period of much more frequent use of the powers of expropriation in circumstances where it is neither desirable nor necessary to do so.

The risk of abuse can be minimised, in our view, by strengthening s27 of the Bill by criminalising acts or omissions by officials of an expropriating authority should they either misrepresent purposes of an expropriation or who transfer the expropriated land to any party other than the intended beneficiary. Such officials, and the expropriating authority, should also be required to compensate the expropriated party

We submit that nil compensation should be limited to expropriations intended to address the injustices visited on individuals and communities through restitution or redress.

We have drafted amendments, based on extensive legal advice – details at end of our presentation today.



But what if s25 is amended?

- **Our view: no amendment to s25 is needed and it is bad policy to change the Bill of Rights**
- 2020 - draft amendment would not have made fundamental changes to the basic architecture of property rights
- 2021 - draft amendment is badly drafted and will result in serious adverse consequences
- Two significant changes
 - New subsection 4A
 - State custodianship of certain land

Notes:

Current draft two significant changes/problems:

- New subsection 4A – “The land is the common heritage of all citizens that the state must safeguard for future generations.”
- Proposed insertion of the underlined words into subsection 5 – “The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable state custodianship of certain land in order for citizens to gain access to land on an equitable basis.”



Subsection 4A: “Safeguarding the land as common heritage for future generations”

- Abstract and ambiguous language will create enormous uncertainty about how case law will develop.
 - What does this mean?
 - For e.g. Does it mean state has a duty to stop development that might derogate from the use that future generations might obtain from the land?
- Will generate a lot of litigation that will slow development and make development more risky, raise costs and reduce investment
 - How do courts decide in the face of complex, contradictory, legal and scientific evidence?



Subsection 5A: State custodianship over “certain land”

- The idea of custodianship over land is novel.
 - If state owns land, it has all the rights that a custodian would have
 - “State custodianship” over “certain land” must imply custodianship over land that someone else owns
- This is completely undefined in law. What does it mean?
 - Can owners still sell their land if they can find a buyer? Would there be any buyers?
 - Can their children inherit land and family home?
 - Can owners decide how to use the land (within the confines of existing zoning rules)?
 - Who is responsible for maintaining the land?
- **Amendment would create enormous uncertainties, reducing investment in land and immovable property, and reducing the value of all land and property**



If subsection 5A is bad, the EFF's proposals are catastrophic

- State custodianship over all land would turn everyone into a tenant
- Tenants do not invest in property that belongs to their landlord
- The state does not have the financial or technical capacity to invest in land and property: investment would collapse
- **State custodianship would reduce the value of land as an asset to zero, wiping out the balance sheets of households, businesses and banks**
 - Overnight, millions of people would become insolvent
 - A deep recession would be inevitable, and it may be hard to avoid a failure of one or more banks



The new Sec 25 amendment matters for this Bill. Why?

- CDE's February 2021 submission was based on the amendment to Sec 25 proposed at that time
- If the new Sec 25 amendment is passed, SA will have a new and radically different property rights regime
- The Expropriation Bill operates within the context/ the umbrella of the country's constitution and bill of rights
 - If that is changed, the interpretation and operation of this draft Bill could change significantly

SA's land reform challenge is NOT about expropriation

Notes:

This bill does nothing to address the underlying problems of government capacity, competence and integrity.

And, to the extent that officials have themselves misunderstood what the bill allows and what it does not, it could make things considerably worse.



Concluding remarks

- Expropriation should be fair, legal and rare
- Changing the constitution is undesirable and unnecessary
- Bill is workable balance of competing imperatives, but needs strengthening
 - Limit nil compensation to land reform and then only in exceptional circumstances
 - Budget availability is not a factor in considering what is “just and equitable”
 - Compensate expropriated owners for out of pocket costs
 - Limit the act to immovable property
- Enormous risk that officials will over-use and abuse
 - Severe legal consequences for this, including personal civil liability to expropriated owners
- State custodianship of land must not be introduced into the constitution

CDE Amendments

Section	Rationale	Proposed amendment
§12(3)	Clarify that nil compensation can be just and equitable only in cases of land reform as per the proposed amendment to the Constitution. Clarify that "land reform" is defined by the provisions of §25(6) and §25(7) of the Constitution	Insertions: §12(3)- It may be just and equitable for nil compensation to be paid where land is expropriated in the public interest for the purposes of land reform as envisaged in §25(6) and §25(7) of the Constitution, having regard to all relevant circumstances, including but not limited to:- §25(2)(b) in the constitutional amendment: "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 <u>as envisaged in sections 25(6) and 25(7),</u> determine that the amount of compensation is nil.";
§12(3)(a)	Holding land in anticipation of changes in its value should not be considered a grounds for the payment of nil compensation	Delete §12(3)(a): "where the land is not being used and the owner's main purpose is not to develop the land or use it to generate income, but to benefit from appreciation of its market value;
§12(2)	The allocation and size of the budget made available to an expropriating authority cannot be considered by a court in assessing what level of compensation is just and equitable	Insert §12(2)(g): <u>"the availability or otherwise of funding for the purposes of effecting expropriation and paying just and equitable compensation;"</u>

CDE Amendments (2)

Section	Rationale	Proposed amendment
s27	Officials involved in abuses of an expropriating authority's powers of expropriation are guilty of a criminal offense and are civilly liable for damages incurred	<p>Insert s27(6)</p> <p>"A person who, being an official in the employ of an expropriating authority, willfully furnishes false or misleading information in any written instrument in the course of effecting an expropriation, is guilty of an offence and liable on conviction to be punished as if he or she had been convicted of fraud."</p> <p>Insert s27(7)</p> <p>"A person who, being an official in the employ of an expropriating authority, willfully furnishes false or misleading information in any written instrument in the course of effecting an expropriation, shall be civilly liable for damages suffered by the expropriated party."</p>
s1	The Bill's provisions should apply only to immovable property	<p>Amend s1:</p> <p>"property" means immovable property or any right in immovable property as contemplated in section 25 of the Constitution</p>
s12[1]	Explicit inclusion in the Bill of a provision that "just and equitable" compensation should include an amount to the value of the financial costs of an expropriation to the owner.	<p>Amend s12[1]:</p> <p>"The amount of compensation to be paid to an expropriated owner or expropriated holder must be just and equitable reflecting an equitable balance between the public interest and the interests of the expropriated owner or expropriated holder, having regard to all relevant circumstances, including—</p> <p>(f) the financial costs of expropriation."</p>