PROPOSED AMENDMENT TO SECTION 25 OF THE CONSTITUTION

On 6 December 2019, Parliament’s Ad Hoc Committee published the Constitution Eighteenth Amendment Bill (Amendment Bill) for public comment. In terms of Parliament’s Notice, the public has until 31 January 2020 to submit written submissions on the proposed Bill.

The Ad Hoc Committee is tasked with the drafting of the amendment to section 25 of the Constitution - the property clause - to make “explicit that which is implicit in the Constitution, with regards to expropriation of land without compensation, as a legitimate option for land reform”.

The Foundation is concerned about the fact that such a critically important Amendment Bill is being published for public comment during the festive season. It appears that these concerns were specifically discussed at a meeting of the Ad Hoc Committee on 3 December 2019, but Parliament’s legal services informed the Committee that a similar process had been followed with Bills in the past. The Amendment Bill is apparently to be sent to the House of Traditional Leaders and provincial legislatures in December, and will also be published again in a national newspaper early in January 2020.

It must be emphasised that although there have been 17 Amendment Bills proposing amendments to the Constitution, it is the first time that South Africa’s young democracy has to deal with an amendment to a right in the Bill of Rights. The Bill of Rights forms the “cornerstone of democracy in South Africa” and it enshrines the “rights of all people in our country and affirms the democratic values of human dignity, equality and freedom” in terms of section 7 of the Constitution. It is therefore vital to ensure meaningful public participation.

The Amendment Bill essentially proposes the following:

- an amendment to section 25(2) of the Constitution, to provide that in accordance with a new 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.” The new subsection 25(3A) provides that “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”.

In a nutshell, the proposed amendment provides that the Court may determine that in certain specific circumstances, which have to be provided for in ordinary legislation, it will be just and equitable in terms of section 25(3) of the Constitution that the amount of compensation for expropriation of land and any improvements thereon for land reform to be nil.

And there’s the catch. The Amendment Bill - which requires passage by a two-thirds majority (and possibly by a 75% majority if it is considered to breach the Rule of Law, protected under section 1), will be adopted to establish the principle of the payment of zero compensation in expropriation cases related to land reform. It will then leave the determination of the circumstances in which zero compensation may be paid to be stipulated in ordinary legislation that can, of course, be adopted or amended by a simple majority.
In December 2018, the Minister of Public Works published a draft *Expropriation Bill*. The *Expropriation Act* of 1975 predates the Constitution and is notoriously not aligned with the Constitution. The *Expropriation Bill*, amongst other things, provided that it may be “just and equitable” for “nil compensation where land is expropriated in the public interest in certain circumstances (such as land held for speculative purposes and land owned or occupied by a Labour Tenant, amongst others) but it did not limit the circumstances and it only related to land. The proposed amendments in the 2018 *Expropriation Bill* preceded any amendment to section 25 of the Constitution and it has not been tabled in Parliament. Concerns have also been raised by certain political parties during the 3 December meeting of the Ad Hoc Committee that the amendment cannot be agreed upon without knowing the exact circumstances or conditions justifying nil compensation.

The Foundation also rejects the insinuation in the Preamble to the Amendment Bill that all land in South Africa was subject to “arbitrary dispossession”.

The Foundation supports the constitutional goal of an equitable process of land reform but is fundamentally opposed to the amendment of section 25 of the Constitution. It agrees with the High Level Panel chaired by former President Kgalema Motlanthe that the present wording of section 25 and a proper legislative framework can and should be used to speed up land reform and extend property rights to all. The Foundation does not believe that section 25 of the Constitution has been properly utilised to effect land reform. The Foundation will be carefully studying the procedure undertaken by Parliament and the content of the proposed Bill, and will be preparing to oppose the proposed constitutional amendment with all the resources at its disposal.

**Link to Bill:** [https://pmg.org.za/call-for-comment/885/](https://pmg.org.za/call-for-comment/885/)

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