

Press Release

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South African Institute of Race Relations

The power of ideas

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Draft Constitution Eighteenth Amendment Bill risks violating “most important guarantee of freedom” – IRR

Contrary to all the assurances provided by the ANC – and the mandate given to the Ad Hoc Committee charged with formulating the amendment – the Draft Constitution Eighteenth Amendment Bill does far more than merely ‘make explicit that which is implicit’ in the existing wording of Section 25 of the Constitution.

This is one of the key points Dr Anthea Jeffery, head of policy research for the Institute of Race Relations (IRR), made at a media briefing today on the Bill’s likely costs and consequences.

First, the Draft Bill makes it clear both land and 'any improvements thereon' are to be subject to expropriation without compensation (EWC). However, the Ad Hoc Committee's mandate is to deal with land alone. Buildings are, of course, immovably attached to land that may be expropriated, but the additional value of these structures can always be calculated. Compensation for such investments must be paid to strike the 'equitable balance' required by Section 25.

Second, the Draft Bill empowers Parliament to adopt any number of subsequent statutes (all of which could be passed by a simple – 51% – majority), which will set out 'specific circumstances where a court may determine that the amount of compensation is nil'.

This sub-section vastly extends the circumstances in which 'nil' compensation could be paid. In fact, it opens up an endless vista of potential EWC takings. For this reason too, the sub-section does far more than make 'explicit that which is implicit' in the existing Section 25.

If the Draft Bill is enacted into law, at least three possible statutes could be adopted under Subsection 3(A). First, Parliament could enact the current Expropriation Bill of 2019, which has a vague and easily expandable list of five instances in which nil compensation may be paid.

Second, in keeping with proposals put forward by the Presidential Advisory Panel and Land Reform, the current Expropriation Bill could be amended in two ways. Its vague and expandable list could be doubled from five to ten instances where nil compensation is merited. In addition, a new clause could state that 'nil' compensation may be paid whenever a local municipality has identified land as suitable for redistribution, but its owner has refused either to donate it, or to sell to the municipality at a 'minimal' price.

Third, Parliament could enact an additional statute, also by a 51% majority, which vests the custodianship of all land in the state – and adds this expropriation is a 'specific instance where a court may determine that the amount of compensation is nil'.

“The Draft Bill is a constitutional blank cheque that any current or future majority in parliament could cash on a simple 51% majority in Parliament. This Draft Bill offers an open doorway to the EFF’s ambition that all land be state-owned. One must conclude that the ANC shares that ambition,” said Hermann Pretorius, campaigns co-ordinator for the IRR.

“The proposed changes in the Draft Bill are anything but minimal,” Dr Jeffery noted, “nor are they consistent with the Ad Hoc Committee’s mandate. In addition, the way in which Section 25 is being amended is contrary to Section 74 of the Constitution, which with its important procedural rules for amending the Bill of Rights.

“Expropriation without compensation and this Draft Bill will empower the state, and not ordinary South Africans who were previously disadvantaged by the apartheid state.”

Dr Jeffery cited Friedrich Hayek in emphasizing the importance of property rights.

Hayek argued: “The system of private property is the most important guarantee of freedom, not only for those who own property, but ... [also] for those who do not. It is only because the control of the means of production is divided among many people acting independently that nobody has complete power over us.”

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