



Amendment to Section 25 of the Constitution

Public Submission of the Democratic Alliance

January 2020

1. Introduction

The Democratic Alliance (DA) strongly opposes amending section 25 of the Constitution to allow for expropriation of property without compensation.

The proposed amendment in this instance will fail to address the real constraints in land reform as identified by the *High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change*, chaired by former President Kgalema Motlanthe. The report stated that “the need to pay compensation has not been the most serious constraint on land reform in South Africa to date.” It identifies

- evidence of corruption by officials;
- diversion of the land reform budget to the political elite;
- a lack of political will; and
- a lack of training and capacity.

These are all factors that the government has control over without need for recourse to constitutional amendments.

The failure of land reform over the past 24 years has been the lack of action by government to ensure justice is served and land ownership patterns are addressed. This explains why the government has enthusiastically embraced the ill-thought-out amendment to section 25 – it provides perfect cover to avoid having to explain its rank failure over two decades to take land reform seriously.

The land reform process in South Africa has been characterised by:

- Very slow progress in terms of the volume of land transferred. A clear example of this is the inexcusable incapacity issues at the Land Claims Commission. At the present rate of finalisation of 560 claims a year, it will take 35 years to process all old order claims, as currently there are 7 000 unsettled and more than 19 000 unfinalised “old order” claims;
- A tenure reform programme which has not addressed the insecurity of tenure in communal land areas;
- An unacceptably high failure rate in terms of agricultural activity on land transferred through the land reform programme due to poor government support to resettled farmers;
- Continued uncertainty in terms of the true state of land reform in South Africa in the absence of a land audit which could quantify the contributions to land reform by the private sector.

The DA has shown its commitment to responsible land reform – both rural and urban. The Western Cape’s land reform audit found that the provincial government’s pioneering Commodity Approach and innovative solutions like the share equity schemes has led to the success of 62% of all land reform projects in the Western Cape. By comparison, the national government’s success rate of land reform projects is currently standing at 8%.

Land restitution figures recently released by the Commission on the Restitution of Land Rights (CRLR’s) in their annual report, shows that the Western Cape has the country’s highest number of settled land claims, in total, 194 claims to the value of R1.5 billion.

The Western Cape has also increased its budget to our implementation agency, Casidra (Cape Agency for Sustainable Integrated Development in Rural Areas) by almost 44% in order to speed up land reform across the agricultural sector.

While the DA fights for the preservation of individual property rights and freedom from state interference, the current bill increases tenure insecurity and weakens protection for property rights in South Africa. Removing property guarantees from the Constitution will have the effect of weakening legal protection for property owners, which is a slippery slope to nationalisation of all land in South Africa and giving the state exclusive control over who gets access to it.

2. Why are we making this submission?

While drafting this Bill in the committee, it was clear that the ANC, in collaboration with the EFF, have chosen to take a populist approach to the land reform debate that could have a detrimental effect on South Africa’s food security, jobs in the agricultural sector and the economy. In this hysteria, the DA has chosen to take a considered rational approach that will not only ensure that land redistribution occurs more expeditiously than before, but that it is implemented in a manner that will protect the sustainability of our agricultural sector.

DA representatives on the section 25 committee have made compelling contributions on why the proposed amendment in its current form will not pass constitutional muster and could negatively affect the country’s comatose economy. Their work on the committee has been the collective voice that stands between rationality and complete anarchy.

The DA’s petition asking South Africans to raise their objections to the proposed amendment has garnered over 57 000 signatures to date. It is patently clear that people are anxious about the impact that this amendment will have on their future. As the integrity of our constitution is at stake, the DA will use its presence in Parliament to ensure that the voice of every South African is heard and taken into account to stop this amendment from seeing the light of day.

South Africans have watched in dismay as the ANC/EFF alliance in this committee has sought to discard the Bill of Rights, which protects the property rights of every citizen, in order to impose their populist fervour on land reform. The DA, as the official opposition, has an obligation to ensure that we fight to defend the integrity of our constitution and the sustainability of our agricultural sector. We therefore make this submission on behalf of all South Africans.

3. Disregard for full public participation on the amendment

The DA objects to the limited time which has been set aside by the committee for written submissions on the proposed amendment. This is in direct conflict with the provisions of the Constitution which require that the National Assembly (section 59) “facilitate public involvement in the legislative and other processes of the [legislature] and its committees”.

The DA holds the view that if this committee proceeds to recommend that constitutional amendments are necessary, it runs the risk of the resulting legislation running the same route as did the *Restitution of Land Rights Amendment Act*. In that case, ***Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others 2016 (5) SA 635 (CC)***, the Constitutional Court found that the NCOP pushed the Bill through on a tight four-week schedule and its consultation process was unreasonable. Even though substantial issues had been raised at the majority of the public hearings in that instance, they were hardly deliberated on in the NCOP and eight of the nine provinces voted in favour of the Bill. This rendered the public participation process quite meaningless.

4. Constitutional deficiency of the amendment

To make it possible for the state to expropriate land in the public interest without compensation, section 25(2)(b) of the Constitution specifically would have to be amended. This section requires that expropriation be subject to compensation.

Such an amendment will infringe on other rights in the Bill of Rights. These include (but are not necessarily limited to):

- Section 25(1), which determines that “no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property”;
- Section 26(3), which determines that “no one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions”;
- Section 33(1), which determines that “everyone has the right to administrative action that is lawful, reasonable and procedurally fair.”

It is in this regard especially that the proposal to change the constitution fails to measure up to the requirements of the limitations clause. If expropriation without compensation is implicit in the Constitution (academic opinions to this effect does indeed exist), then a test case, or an application to the Constitutional Court directly will be able to confirm this and amending the Constitution will not be necessary.

The proposed constitutional amendment has far-reaching potential implications, which can be avoided altogether by taking a test case to court in order to determine and/or confirm whether our law already allows for expropriation without compensation.

Even if a test case should prove that zero Rand compensation is not already implicit in the Constitution, the DA still believe that no Constitutional amendment is necessary and that the determination of what is fair and equitable compensation should be left up to the courts.

5. Rejection of expropriation of land without compensation

The DA fundamentally disagrees with the ANC position to expropriate land without compensation, because no Constitutional amendment is necessary for substantive land reform. This would take away value and ownership from all South Africans.

The High Level Panel report stated as follows:

'The Panel is of the view that government has not used the powers it already has to expropriate land for land reform purposes effectively, nor used the provisions in the Constitution that allow compensation to be below market value in particular circumstances. Rather than recommend that the Constitution be changed, the Panel recommends that government should use its expropriation powers more boldly, in ways that test the meaning of the compensation provisions in Section 25 (3), particularly in relation to land that is unutilised or underutilised. The lack of well-situated land for urban settlement remains a stark legacy of apartheid planning and discrimination. Well-situated state-owned land needs to be made available for housing for the poor, and well-situated privately owned land targeted for expropriation.'

The Panel found that there exists no fault with the Constitution as is, and found that *'evidence of corruption by officials, the diversion of the land reform budget to elites, lack of political will, and lack of training and capacity'* were the major stumbling blocks to effective land reform in South Africa.

It is therefore undeniable that there is no Constitutional failure, but there most certainly is a **governance failure**. If we do not stand up and stop Parliament from ramming through this disastrous amendment to section 25, we will be complicit in giving government more power to fail us again.

6. Conclusion

Amendment of section 25 of the Constitution to allow for expropriation of land without compensation will not address the systemic challenges currently facing the land reform process in South Africa. What is needed is a pragmatic and rational approach that will operate within the confines of the current constitutional provisions on land redistribution.