

Legislating Expropriation without Compensation will not address past injustices

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Expropriation of property for a public purpose is not a new concept in South African law. In fact, the Bill under discussion today, seeks to repeal an existing piece of legislation that deals with expropriation of property, namely the Expropriation Act 63 of 1975. The Expropriation Bill 2020 has been drafted with a view to aligning expropriation by the state with the Constitution.

What is new in our law, is the concept of public interest as a basis for the expropriation of property. Public interest relates to our commitment as a country to bring about redress for past injustices through mechanisms such as land reform.

As we know, Parliament failed to pass an amendment to Section 25 of the Constitution last year which would have entrenched expropriation without compensation in the property clause. In spite of this, the ANC have insisted that the exact clause that they failed to pass be retained in the Expropriation Bill. It is our contention that this a brazen attempt by the governing party to amend the Constitution through the back door using ordinary legislation. It cannot be countenanced that a clause that was deemed so pivotal as to require a constitutional amendment, should now just be adopted in the House by a simple majority.

Section 25(2) of the Constitution stipulates that expropriation must be subject to compensation that has been agreed to or has been decided on by the court. Section 12(3) of the Expropriation Bill before this House clearly contravenes this by providing specific instances where nil compensation is already deemed to be just and equitable – no consensus, no court determination.

Our proposed amendment to Section 12(3) of the Expropriation Bill stipulates that nil compensation should only be the starting point in two instances – where land is owned by the state and is no longer needed by the department or organ of state. And where state property that was previously expropriated and paid for, is needed for another purpose. Expropriation without compensation should never be the basis for the commencement of negotiations between the state and private property owners. It places the state in a position of greater strength than the private property owner which is contrary to the foundations of a constitutional democracy.

In his book, “Land Matters”, Adv. Tembeka Ngcukaitobi states that “Just compensation, which has not been defined, is based on the idea of justice. Expropriation in the public interest is not intended to cause future injustices but rather to reverse past injustices”. He states further, “The focus should be on striking the proper equilibrium between the interests of the nation in land reform, the landless and those who must ultimately give up the land”.

The Expropriation Bill before us, with the inclusion of the current Clause 12(3) is not a tool for land reform, but rather a mechanism for punishing private property owners using arbitrary criteria that are not easily measurable nor address historical spatial disadvantage.

The Democratic Alliance has further proposed an amendment to the definition of expropriation to include “indirect expropriation”. This includes custodianship of property, as well as what is termed regulatory takings. In both instances, the state is entitled to take control of a person’s property and limit the owner’s rights to use and enjoy that property, without paying any form of compensation. While ownership of the property is not transferred to the state, the extreme nature of the curtailment of rights in the property is nothing short of expropriation without compensation. For this reason, the inclusion of indirect expropriation in the definition of expropriation would afford some compensatory remedy to the owners of property who have been affected by these actions of the state.

The ANC have used the Expropriation Bill to sell a lie to the people of South Africa. They have allowed our people to believe that the biggest obstacle to having their own property is the greediness of land owners demanding compensation. It is patently untrue. The biggest obstacle to land reform in this country is the governing party. There are a number of legislative mechanisms and tools available to ensure meaningful land reform. There is just no political will to implement them. Instead, the expropriation without compensation catch-phrase has been used to cover the failure of the ANC to deliver on its promises. And to create an illusion that property ownership for all is just one piece of legislation away.

The Expropriation Bill is certainly one of the tools that can be used for land reform. However, its primary purpose is to allow government to expropriate property to further its own objectives. So while we do not want to stymie the state in pursuing its mandate, we must ensure that we protect private property rights against the potential abuse that this Bill, in its current form, would lead to, particularly with respect to the inclusion of specific instances allowing for expropriation without compensation.

The Democratic Alliance does not support this Bill.

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