WRITTEN SUBMISSION ON THE
DRAFT CONSTITUTION EIGHTEENTH AMENDMENT BILL OF 2021

Dear Mr Ramaano,
I would like to thank the Ad Hoc Committee for the opportunity it has given the public to make written submissions on the draft Constitution Eighteenth Amendment Bill of 2021 (the Bill) by 13th August 2021.

1 Introduction

The Draft Constitution Eighteenth Amendment Bill of 2021 ('the Bill') has four core provisions:

- it empowers the government to pay 'nil' compensation on the expropriation of both land and accompanying 'improvements' (which may include homes, shops, offices, and factories);
- it obliges Parliament to enact additional statutes setting out the circumstances, in the land reform context, where 'the amount of compensation is nil';
- it identifies land as 'the common heritage of all citizens that the state must safeguard for future generations'; and
- it requires the government to adopt further legislation aimed at 'enabling state custodianship of certain land'.

2 What the Bill says

As noted, the Bill has four main provisions:

2.1 'Nil' compensation for both land and improvements

The Bill proposes that sub-section 25(2) of the Constitution be amended to include the underlined words. In this changed form, it will then state: [Clause 1(a), Bill]

> Section 25(2): Property may be expropriated only in terms of law of general application –
> (a) for a public purpose or in the public interest; and
> '(b) subject to compensation, the amount of which and the time and manner of payment of which have been agreed to by those affected or decided or approved by a court: <u>Provided that where land and any improvements thereon are expropriated for the purposes of land reform,…the amount of compensation may be nil'</u>.

This makes it clear that both land and 'any improvements thereon' may be subject to expropriation without compensation (EWC). However, the EWC amendment to Section 25 is supposed to deal with land alone. Instead, this wording will allow EWC to extend to improvements such as houses, office blocks, shopping centres, hotels, hospitals, factories, mining shafts, and dams. These structures accede to the land on which they stand, but their additional value can always be calculated. At the very least, appropriate compensation must

be paid for these structures to achieve a 'just and equitable' balance between the public interest in land reform and the legitimate interests of expropriated owners.

The main difference between the current clause and the equivalent provision in the 2019 Bill initially put forward by the Ad Hoc Committee is that the courts are no longer expressly required to decide whether compensation should be nil. The ANC claims this difference is immaterial – for the courts will still have the power to 'decide or approve' the compensation to be paid if no agreement on this point can be reached between the state and the expropriated owner.

The change is nevertheless important. On the earlier wording, nil compensation could not apply without a specific court order to this effect, obtained prior to the expropriation. Under the current clause, expropriated owners wanting more than 'nil' compensation will have to seek out the help of the courts after being expropriated – but may often find it difficult and prohibitively costly to embark on such litigation.

2.2 Parliament's power to decide when 'nil' compensation will apply

According to a new sub-section 25(3A), 'for the furtherance of land reform, national legislation must, subject to subsections (2) and (3), set out circumstances where the amount of compensation is nil'. [Clause 1 (c), Bill]

Parliament will be compelled to adopt national legislation of this kind and will do so by the usual 51% majority. The Bill thus opens the way for the enactment of various EWC statutes over time, though these will need to be framed in the land reform context.

This sub-section greatly erodes the protection for property rights the Constitution is supposed to provide. At the very least, the amended Section 25 should itself set out the land reform circumstances in which nil compensation may apply. It should not give Parliament a blank cheque to decide this by simple majority from time to time.

Again, moreover, there is an important difference regarding the role of the courts. Under the 2019 wording, the national legislation Parliament was required to adopt would have had to set out 'circumstances where *a court may determine* that the amount of compensation is nil' (emphasis supplied). Under the 2021 Bill, however, this reference to the courts falls away.

Though the jurisdiction of the courts has not been ousted, court approval for nil compensation will no longer be required. Instead, as discussed in the context of sub-section 25(2)(b), owners wanting more than nil compensation will have to seek out the help of the courts – and will often find it difficult to afford such litigation.

2.3 Land as 'the common heritage' of all citizens

Under a new sub-section 25(4A), 'the land is the common heritage of all citizens that the state must safeguard for future generations'. [Clause 1(d), Bill]

This sub-section presumably refers to all land in the country. It is clearly intended to provide a moral justification for the effective nationalisation of land under the rubric of custodianship, as outlined below. It clearly echoes a similar formulation used to justify custodianship of the nation's mineral resources: 'Mineral…resources are the common heritage of all the people of South Africa and the State is the custodian thereof for the benefit of all South Africans.' [Section 3(1), Mineral and Petroleum Resources Development Act of 2002]

2.4 State custodianship of certain land

Under a revised sub-section 25(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'. [Clause 1(e), Bill]

The crucial change here is the insertion of words effectively requiring the state to take custodianship of 'certain' land. How much land might in time be taken into state custodianship under this sub-section is unclear. However, 'certain' land could comprise all land other than that which is already owned by the state. This would include all privately-owned land in both urban and rural areas, as well as all land held in customary tenure.

Though the Bill does not spell this out, it is unlikely that any compensation on the taking of custodianship will be payable. Once the Bill has been enacted into law, Parliament could use its powers under subsection 25(3A) to adopt, by simple 51% majority, a statute vesting all privately-owned land in the custodianship of the state. The new statute could also go on to provide that this vesting of custodianship in the state is one of the 'circumstances', aimed at 'furthering land reform', in which 'the amount of compensation is nil'.

3 Ramifications of the Bill

3.1 State custodianship

The state's taking of custodianship will extinguish all current ownership rights. Title deeds to all affected property will 'mean nothing' (as the Economic Freedom Fighters have put it) and all individuals and businesses will need revocable land-use licences from the government for the homes or buildings in which they live or work.

The taking of custodianship will amount to the uncompensated confiscation or nationalisation of all affected land. This will destroy the property market, prevent the use of land as collateral for bank loans, and undermine the stability of the banking system. It could also trigger a Zimbabwe-style economic implosion that would be devastating to the country and all its people.

Resources previously nationalised under the guise of 'custodianship' include the country's water and mineral resources. Both these resources have been terribly mismanaged under the custodianship of the state and it is all but certain that land would be similarly mismanaged. Government custodianship over all mineral resources – coupled with the gradual ratcheting up of unduly onerous black economic empowerment (BEE) requirements for companies

seeking to retain or acquire mining rights – has also made the mining sector all but 'uninvestable' over time.

3.2 Upending property rights and any hope of economic prosperity

The violent disturbances that began on 9th July 2021 have given South Africans some inkling of what awaits them if the Bill is passed. The events of that week saw looters swarm out across towns in KwaZulu-Natal and Gauteng, breaking into shops and warehouses, stealing goods and setting fires. If the Bill is passed, the state's proposed confiscation powers will also result in citizens being deprived of their possessions without payment – but this time under the cover of the law.

The mere adoption of the Bill by Parliament (even before any further custodianship or EWC laws are adopted) will give moral sanction to the notion that people's belongings may be taken from them without their consent and without compensation. This is likely to encourage land invasions (and other forms of lawlessness) and to stoke social conflict.

The Bill profoundly threatens the property rights of all South Africans. It will take away all hope of acquiring ownership from those yet to enjoy the benefits of this fundamental right. In time, it will also remove existing ownership rights from:

- the 1 million white families who own houses;
- the 10 million black, coloured and Indian families who also own homes, though often without the formal title deeds the government should by now have provided;
- the 18 million or so black people with customary plots; and
- the thousands of black South Africans who have bought more than 6 million hectares of land in both urban and rural areas since the repeal of the Land Acts in 1991.

The Bill will also hurt the struggling economy. It will further torpedo business confidence, deter fixed investment, undermine the banking sector, and prompt a still faster flight of capital and skills. This will cripple growth, curtail tax revenues, increase public debt, raise borrowing costs, worsen the unemployment crisis, and push millions more people into poverty.

3.3 No resolution for land reform problems

The ANC has repeatedly claimed that the Bill will help 'return' the land to 'the people', but this is not so. Land expropriated or taken into state custodianship without compensation will be owned or controlled by the government, not by individual black South Africans. It will be used by the state as a patronage tool, and to help strengthen the ANC's faltering grip on power.

In addition, it is not the Constitution that is to blame for either land reform failures or bottlenecks in the state's delivery of RDP houses. Changing Section 25 by means of the Bill will therefore not address these problems.

In the land reform context, the High Level Panel of Parliament made it clear in its 2017 report that amending the Constitution to allow EWC would not 'address the slow and ineffective pace of land reform'. The real obstacles to success lay not in land acquisition costs but rather in a failure to transfer ownership to land reform beneficiaries, coupled with 'increasing evidence of corruption by officials, the diversion of the land reform budget to elites, a lack of political will, and a lack of training and capacity'.

In the urban context, the Bill will not address the inefficiency, corruption, and poor policy choices responsible for failures in housing delivery. Municipalities lack the engineering and administrative skills needed to service vacant land, while the allocation of building contracts and completed houses is often riddled with corruption. The state's delivery of 'free' RDP houses has also slowed sharply, dropping from a peak of some 235 600 in 1998 to fewer than 77 600 in 2018. In addition, most RDP houses are so small and badly built that people have been saying for years that the government should transfer the housing subsidy directly to them – as they could do far better at building their own homes.

4 No SEIA assessment

According to the government's own Guidelines for the Socio-Economic Impact Assessment System (SEIAS), every proposed bill must be subjected to 'an initial assessment' aimed at identifying different 'options for addressing the problem' and making 'a rough evaluation' of their respective costs and benefits.

In addition, any bill released for public comment must be accompanied by a 'final impact assessment' giving details of its likely implementation and compliance costs. If a bill seems likely to generate 'excessive costs for society' – say, in the form of 'disinvestment by business or a loss of skills to emigration' – then the final SEIA report must point this out.

Despite the massive economic damage this Bill is sure to trigger, no SEIA report on it has been made public. Instead, the Memorandum on the Objects of the Bill makes the astonishing claim that the measure has 'no' financial implications for the state. In fact, it is likely to reduce the tax take, add to public debt and a heavy interest burden, and make it increasingly difficult for the government to pay public service salaries, sustain social grants, and keep providing education, healthcare, and other essential services.

The absence of a proper SEIA report is a fundamental procedural defect. It also makes it difficult for people to 'know about the issues' raised by the Bill – and hence for the public to participate effectively in the legislative process, as the Constitution requires.

5 The way forward

The Bill is so damaging that it must simply be abandoned. The sanctity of property rights should instead be strongly reaffirmed, while the government should find sound practical ways to resolve the land reform and housing problems that EWC and state custodianship will worsen, rather than improve.

The ANC should also abandon the socialist goals that underpin the National Democratic Revolution (NDR) to which it has been committed for the last 50 years. If it has any real regard for the welfare of the country and its people, it should withdraw all NDR policies, clamp down on corruption, improve public sector efficiency, strengthen law and order, uphold the rule of law – and strongly embrace the market-friendly reforms that are supposed to have been the hallmark of President Cyril Ramaphosa's bright 'new dawn'.

Sincerely,
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