



t +27 21 556 5502

a P.O. Box 50110
West Beach
Cape Town 7441

e info@forsa.org.za
www.forsa.org.za

To: Mr Vhonani Ramaano
Ad Hoc Committee to Initiate and Introduce Legislation Amending Section 25 of the Constitution
Per e-mail: section25@parliament.gov.za

Re: **DRAFT CONSTITUTION 18TH AMENDMENT BILL (Section 25 Amendment)**

Date: 28 February 2020 (**Deadline for comment: 29 February 2020**)

INTRODUCTION:

1. We refer to the invitation by the *Ad Hoc Committee to Initiate and Introduce Legislation Amending Section 25 of the Constitution* (“the Committee”) for comments on the *Draft Constitution 18th Amendment Bill* (“the Bill”).
2. We hereby submit our concerns relating to the Bill.
3. In a nutshell, our submissions are as follows:
 - 3.1. No exceptions for certain types of land, specifically land used for religious purposes, are provided.
 - 3.2. The Constitution protects the fundamental right to religious freedom,¹ which includes the right to practise one’s faith in a community – a right one may not be denied.²
 - 3.3. No criteria are included for consideration before expropriation without compensation (“EWC”) can occur. The Bill only states that such circumstances must be set out in legislation. We strongly object to the circumstances not being set out as a closed list within the Bill of Rights (as part of the Constitution itself), but only in national legislation (which is easily amendable and subject to change).

¹ Section 15 of the Constitution of the Republic of South Africa, 1996.

² Section 31(1) The Constitution of the Republic of South Africa, 1996.

3.4. Furthermore, we object that there are no exemptions to property that can be expropriated.

3.5. Although well-intended, the absence of any exceptions will have unintended and potentially disastrous consequences, including the potential expropriation of church land / land used for religious purposes.

4. In the circumstances, we propose that:

4.1. The proposed sections of the Bill be more narrowly drafted: i.e. that a closed list of criteria for EWC be included in the Constitution itself;

Alternatively,

4.2. That a clause containing land which is exempt from EWC be inserted. Here we specifically propose: ***“Land that is owned and used in connection with the exercise of the constitutional right to religious freedom and the rights of religious communities, is hereby exempted from the applicability of section 25(2).”***

5. We request an opportunity to make verbal submissions in this regard during any (further) consultations that may be held in relation to the Bill.

ABOUT FOR SA, AND OUR INTEREST IN THE BILL:

6. *Freedom of Religion SA NPC (2014/099286/08) (FOR SA)* is a non-profit organisation, working to protect and promote the constitutional right to religious freedom in South Africa.

7. *FOR SA* currently has an endorsement base of religious leaders representing 6 million+ people in South Africa. Its constituency spans across various denominations, churches and faith groups in South Africa.

8. *FOR SA's* interest in the Bill lies therein that millions of believers in South Africa (across different denominations, churches and faith groups), meet together in buildings located on land in the exercise of their constitutional rights to religious freedom (sections 15 and 31).

9. The State has a duty to respect and protect the religious convictions and beliefs of those believers who choose to meet together to practise their faith.

10. As such, and because the constitutional right to freedom of religion, belief and opinion (section 15) and the constitutional right of religious communities (section 31) are directly affected by any

proposed amendment which would possibly result in church land being expropriated (without compensation), we (and indeed our constituency) have a direct interest in this matter.

PROCEDURAL CONCERNS:

11. The impact of this proposed amendment to the Bill of Rights in the Constitution – the first of its kind.
12. The public engagement on this Bill (**on the nature and proposed wording of the amendment to change the Constitution's Bill of Rights**) needs to be seen and treated as separate and distinct from the public engagement that was undertaken by the Joint Constitutional Review Committee to ascertain the **broad views of the public** on EWC.
13. *FOR SA* does wish to point out that in addition to this current Bill, there are a number of bills and policies pertaining to land underway currently. These bills and policies each consist of distinct, yet, parallel processes for simultaneous engagement which highly **confuses matters for the public**. These bills and policies include:
 - 13.1. The Draft Expropriation Bill by the Department of Public Works (no doubt the national legislation envisaged by the current Draft Constitution 18th Amendment Bill); and
 - 13.2. The Beneficiary Selection and Land Allocation Policy by the Minister for Agriculture, Land Reform and Rural Development; and
 - 13.3. The Land Donations Policy by Minister of Agriculture, Land Reform and Rural Development.
14. As such, it is unlikely that the average member of the public will be aware of all four (4) processes or make submissions on all four (4).
15. Furthermore, it is highly unclear, even to Parliament,³ how all four (4) are envisioned to dovetail or “talk to one another”. As such, how can an average member of the public be expected to participate in such a convoluted and muddy process?
16. These four (4) separate processes should be brought the public's attention and explained. This has not happened (sufficiently) under the current procedure followed, thereby having a direct impact on the public's ability to engage with and make a meaningful contribution to these discussions.

³ When asked telephonically on 17 January 2020.

SUBSTANTIVE OBJECTIONS:

THE LEGAL FRAMEWORK - INTERNATIONAL LAW:

17. In terms of section 39(1)(b) of the Constitution, a court “*must consider international law*” when interpreting the Bill of Rights. It would thus be prudent for the Department and Parliament to do so when drafting legislation that affects these rights.

TREATIES AND DECLARATIONS:

18. South Africa has signed the following international and regional treaties and declarations protecting religious freedom:

- 18.1. The International Covenant on Civil and Political Rights (ICCPR);⁴
- 18.2. The African Charter on Human and People’s Rights (Banjul Charter);⁵
- 18.3. Universal Declaration of Human Rights;⁶
- 18.4. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief;⁷ and
- 18.5. Durban Declaration and Programme for Action which promotes an inclusive society where all participate on the basis of equality.⁸

⁴ Article 18 of the ICCPR provides that everyone has the right to religious freedom and that **this includes the freedom to meet in community with others** to manifest such belief in worship, observance, practice and teaching. Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

⁵ Article 8 guarantees that freedom of conscience, the profession and **free practice of religion** shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms. Article 14 further states that the **right to property shall be guaranteed**. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

⁶Article 17 states that everyone **has the right to not be arbitrarily deprived** of his property. Article 18 states that everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or **in community with others** and in public or private, **to manifest his religion** or belief in teaching, practice, worship and observance.

⁷Article 1 states that everyone shall have the right to freedom of thought, conscience and religion, and that this right shall include the freedom to have a religion or whatever belief of his choice, and freedom, either individually or **in community with others** and **in public** or private, **to manifest his religion** or belief in worship, observance, practice and teaching.

⁸Article 14 *Urges States* to recognize the particularly severe problems of religious prejudice and intolerance that many people of African descent experience and to implement policies and measures that are designed to prevent and eliminate all such discrimination on the basis of religion and belief, which, when combined with certain other forms of discrimination, constitutes a form of multiple discrimination; and Article 79 *Calls upon* States to promote and protect the exercise of the rights set out in the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, proclaimed by the General Assembly in its resolution 36/55 of 25 November 1981, in order to obviate religious discrimination which, when combined with certain other forms of discrimination, constitutes a form of multiple discrimination.

THE LEGAL FRAMEWORK - THE LEGAL POSITION IN SA:

THE CONSTITUTION:

The right to freedom of religion, belief and opinion (section 15) and rights of religious communities (section 31):

19. Every week, millions of believers (across different denominations, churches and faith groups) believe that the Scriptures command their meeting together and doing so is an integral part of practising and living out their beliefs.
20. In this regard, the Constitutional Court has repeatedly held that religious freedom includes not only “*the right to entertain such religious beliefs as a person choose, [but] the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious beliefs by worship and practice or by teaching and dissemination*”⁹. [Own emphasis.]
21. Thus, the places where such meetings happen are of central and indeed, critical importance to the living out of believers’ section 15 and section 31 constitutional rights.
22. Having regard to the same definition (and guarantee), and as a matter of principle, every believer should be free to believe, and practise (within the bounds of the law), what they believe the religious texts to command and to live out their faith in community with others, meeting together to worship and teach etc.
23. In light of the above, places of worship are a critical part to the exercise of the right to religious freedom. To open such places up to EWC would be to **directly limit the right to religious freedom**, which is a fundamental right in the Bill of Rights. Thus, should a place of worship be the subject of EWC, it would be required to balance the competing rights, namely religious freedom (sections 9(3), 15, 31) and property (section 25), against one another by a court – the costs of which can be prohibitive for religious institutions!

⁹ *Christian Education SA v Minister of Education* 2000 (4) SA 757 (CC), para 36 citing *S v Lawrence*; *S v Negal*; *S v Solberg* 1997 (4) SA 1176 (CC); 1997 (10) BCLR 1348 (CC).

RECOMMENDATION:

24. In the circumstances, we propose that:

- 24.1. The proposed sections of the Bill be more narrowly drafted - i.e. that a closed list providing the clear and only circumstances for EWC be inserted;
- 24.2. *Alternatively*, that a clause describing explicitly which land is exempt from EWC be inserted. Here we specifically propose a clause such as the following:

“Land that is owned and used in connection with the exercise of the constitutional right to religious freedom and the rights of religious communities, is hereby exempted from the applicability of section 12(3).”

ADV N.L. BADENHORST

Legal Counsel

Freedom of Religion South Africa (FOR SA)

E-mail: legal@forsa.org.za

&

MS DANIELA ELLERBECK

Legal Advisor

Freedom of Religion South Africa (FOR SA)

E-mail: daniela.ellerbeck@forsa.org.za