SAKELIGA

SELFSTANDIGE SAKEGEMEENSKAP

13 August 2021

TO:	Ad Hoc Committee to Initiate and Introduce Legislation Amending Section 25 of Constitution
ATTENTION:	V Ramaano
DELIVERED:	By email: section25@parliament.gov.za; vramaano@parliamanet.gov.za

To whom it may concern,

SUBMISSIONS: REVISED CONSTITUTION EIGHTEENTH AMENDMENT BILL, 2021

Overview

Sakeliga NPC takes this opportunity to comment on the revised (July 2021) version of the Constitution Eighteenth Amendment Bill, 2021.

This document consists of Sakeliga's submission, an economic submission, an expert submission focusing on constitutional issues, and various addenda, including Sakeliga's previous submission to the Constitutional Review Committee. The addenda provide supporting arguments for these submissions.

Sakeliga seeks to offer oral commentary on this comment if such an opportunity arises.

About Sakeliga

Sakeliga (Business League) is a business group and public benefit organisation with more than 12,000 members in various enterprises from small to big across South Africa. Sakeliga promotes a favourable business environment in the public interest, by means of its support for a market system and a sound constitutional order. Sakeliga believes the revised Constitution Eighteenth Amendment Bill represents significant, perhaps existential, threats to the market economy and to constitutionalism in South Africa.

www.sakeliga.co.za

Expert submission

Sakeliga has commissioned Martin van Staden, an independent Legal Fellow at Sakeliga and constitutional law expert, to prepare the expert submission found in this document.

CONTENTS

1 SAKELIGA'S SUBMISSION

Issued by

Piet le Roux

Chief Executive Officer, Sakeliga

Sakeliga does not support and will never accept the revised Constitution Eighteenth Amendment Bill. Confiscation by any other name, as is the intent of the Amendment Bill, is irreconcilable with the principles of constitutionalism itself.

It is our view that the Amendment Bill is harmful and detrimental to economic progress, resource allocation, but most fundamentally will injure the constitutional order. Moreover, so-called “expropriation without compensation” is not reconcilable with South African property law. It is a new phenomenon that does not exist in law as it stands – it is a political invention aimed at expanding State power.

Expropriation necessarily and per definition always involves compensation. Appeals to "compensation" being "nil rand" are nothing more than a fraudulent misrepresentation (*fraus legis*) of the reality: no compensation whatsoever. Expropriation without compensation is not expropriation but, simply put, “confiscation”. Confiscation of justly obtained property is not reconcilable with any valid constitutional order. Internationally, the payment of compensation in cases of expropriation is best practice, with only countries with poor human rights records and economic performance being the exception.

Confiscation is irreconcilable with constitutionalism. It will disempower civil society and citizens by undermining the security of their property rights, thereby endangering their ability to provide for their own livelihoods and sustenance, and as a result, undermining their ability to engage in matters of governance on an independent footing. Citizens cannot participate in public affairs if they fear loss of property at any moment by a state with vast power to infringe on private property.

In the final analysis confiscation turns citizens into dependents. This has the effect of centralising power. Citizenship and the dispersal of public power are closely related constitutional safeguards.

The Amendment Bill also seeks to install government custodianship of “land” (meaning all fixed property). Such a scheme is unworkable, economically detrimental, and out of step even with developments among prominent BRICS partners that have decided to bolster individual property rights rather than undermine them. Custodianship is sure to reduce private incentives for value-creation and to increase the potential for state mismanagement of important economic assets – especially land.

While the Amendment Bill does not outright nationalise property, it makes the power to do so at any time and for any reason available to government.

The idea of "custodianship" is about protection. A custodian of something protects that thing. Experience around the world and practice in South Africa however shows that the state does not act as a "custodian" of economic goods but rather as a controller thereof. The Amendment Bill is clearly intended to put the state in a position of power and control over all fixed property, not to protect it. In this sense, the constitutional principle of limited government, that serves to protect its society, is infringed.

The principle of state custodianship of land is as irreconcilable with constitutionalism as confiscation is. History has shown that the private ownership of property by individuals, businesses, and communities has

served welfare and prosperity more than nationalisation or state ownership (which is what custodianship in practice is).

There is also a risk that even if the Amendment Bill is not enacted, a possibility widely reported in the press media, certain political parties will keep confiscation on Parliament's agenda for years to come. This is hugely destructive for investment and economic certainty and occurs at a time when investment trends are already concerning.

Should these amendments of section 25 of the Constitution be adopted -- confiscation and/or state custodianship of fixed property -- section 25 will be rendered toothless in the protection of property rights and interests in South Africa.

It is for these reasons that Sakeliga regards the Amendment Bill as completely unacceptable. Even if adopted according to the prescripts of section 74 of the Constitution, Sakeliga will not regard confiscation and state custodianship as sound constitutional law and will work tirelessly with the enterprising community and constitutionalists around South Africa to either reverse this perversion of the Constitution or to enable businesses and communities to escape it and state-proof themselves against it.

In view of this submission and the economic and constitutional submissions below, we insist that the Amendment Bill be withdrawn, and that Parliament put an end to attempts to amend section 25 of the Constitution to allow for state custodianship of property and confiscation in whatever guise.

We shall never accept confiscation.

Piet le Roux
Chief Executive Officer, Sakeliga

2 ECONOMIC SUBMISSION

Author

Gerhard van Onselen

Senior Analyst, Sakeliga

2.1 Introduction

Sakeliga has provided input to Parliament of economic concerns related to expropriation without compensation on several occasions. In this submission we provide a brief overview of those concerns. We also add a summary of a comparative legal analysis with insights drawn from the examples of China and Russia.

In this submission we again briefly outline our concerns on the likely economic impact of a regime of expropriation without compensation/nil compensation (it is our view that there is no difference between the two, see the expert submission below) and state custodianship of property.

Our concerns centre around the vital social function of stable private property rights. We maintain that the current proposal to amend the Constitution to allow for nil compensation continues a proposal likely to undermine the economy. We note that jurisdictions such as China and Russia, BRICS peers, have taken steps to strengthen property rights. In China's case, a regime of bolstered property rights was pivotal to economic progress.

We note the following concerns on the regime the Amendment Bill will usher in. In the first instance, expropriation without/for nil compensation is likely to harm investment, capital formation, and economic efficiency. Losses of efficiency, in turn, is likely to harm living standards and government's own capacity for social programmes. In the second instance, custodianship over property (nationalisation in effect) is likely to over-bureaucratise resources allocation, which is likely to severely harm economic efficiency.

We are especially concerned about the effects of a regime of no compensation on investment quantity and quality, the likely harm of deterioration of capital investment with spill-overs of deteriorating living standards (especially for the poor), and the depressing effect on beneficial economic action. Lastly, we provide comparisons to BRICS peers, which also suggest to us that the Amendment Bill is out of touch with important developments among BRICS peers.

Next, we recap and add to previous comments made in prior submissions.

2.2 The social function of property

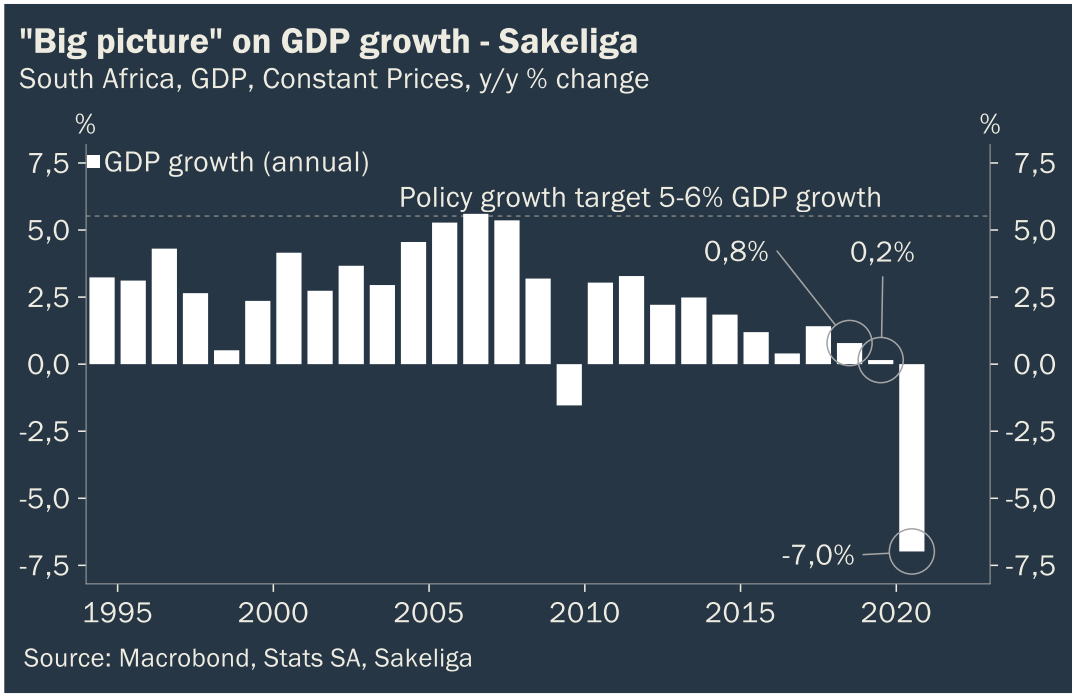
- Private property fulfils a vital role for societies and communities. Firstly, private property provides incentives for wealth creation, secondly, private property facilitates purposeful and efficient economic action and trade, and thirdly, private property diminishes conflict over resources.
- Policies that harm the certainty of private property – as a regime of nil compensation or expropriation without compensation will inadvertently do – raise the risk to productive economic activity.
- Without securely demarcated private property rights, no one will be able to optimally use land and property effectively in important value creating endeavours. To ensure progress, South Africa must maximise the output of the economy to improve living standards of all people and communities in South Africa.

- In essence, private property rights allow a multivariate set of (entrepreneurial) plans of different people and entrepreneurs to compete in the process of value-creation. Supplanting these competing plans with an overly bureaucratic state plan (of nationalisation), i.e., custodianship, will harm productivity, market-led allocative economic resource error-correction, and efficient economic coordination.
- Moreover, if the state becomes the custodian, and a prescriptive arbiter over the uses of property, it will reduce the competing uses for property in private endeavours, which will reduce the potential for economic progress.
- In essence, we are likely to see a state plan, bureaucracy, and corruption crowding out more efficient market planning and allocation.
- We submit again: "*Subjecting a huge number of economic assets to undue political arbiters, to forces outside of consumer efficient markets, will most likely open the door for large-scale corruption and rent-seeking. In highly bureaucratised markets, political corruption, rent seeking and patronage should not come as a surprise, it should be expected*."

The current proposed amendment continues the effort for a regime of nil compensation at expropriation and seeks to set up the state as custodian of property. This reduces private incentives for value-creation and increases the potential for state mismanagement of important economic assets.

2.3 Economic growth

- The following chart illustrates that South Africa's GDP growth has been deteriorating over several years. The wisdom of an amendment likely to dissuade and hamper private economic activity and investment should be questioned. In our estimation, even the timing of the amendment, from a perspective of economic growth, is highly problematic.



2.4 Investment

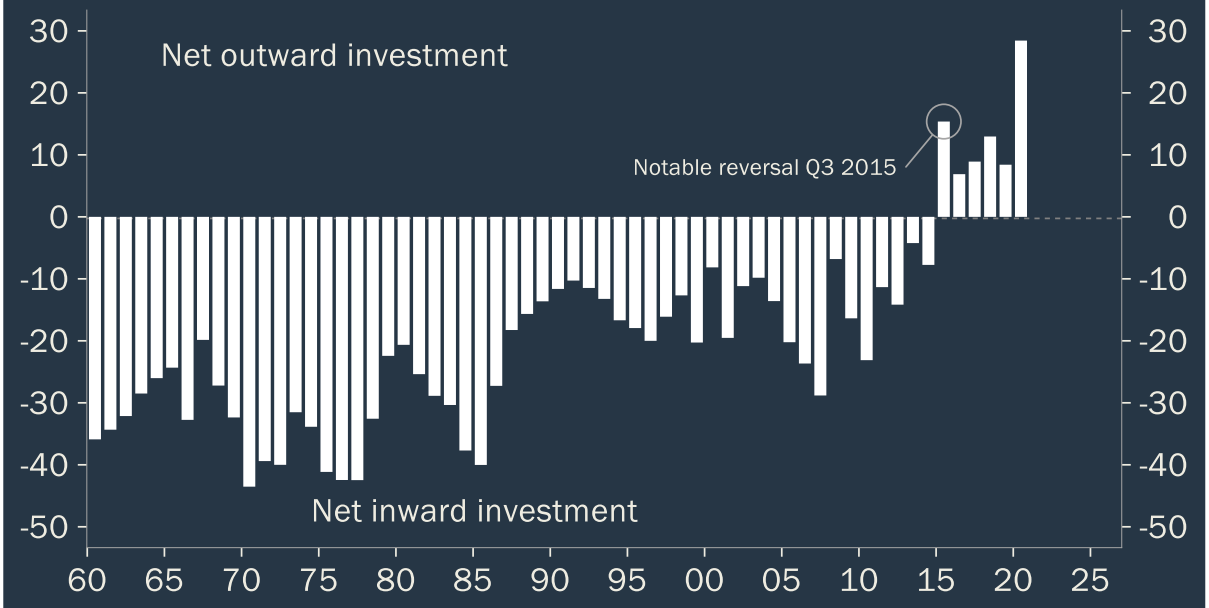
- On the margin, entrepreneurs and investors will likely be rendered more cautious to invest in South African property (which is broader than land) if the Amendment Bill is adopted.
- South Africa's economy is highly reliant on investment. Measures that harm investment will reduce the country's economic potential. It will do so because of a likely reduction in incentives to capitalise the economy (invest in land and machinery for example).
- Reduced capitalisation will mean less output from productive activity, which means a poorer society across the board. The effect on the poor is likely going to be profound and we may see many more dropping below poverty lines.
- Capitalisation does not refer only to large industry, it also refers to decisions all businesspersons, even the owner of a Spaza shop, make daily.
- By investment, we do not only refer to investment from outside of South Africa. In effect, all businesspersons must make continual investments (if even just in inventory).
- Investment decisions are sensitive to the regime of property rights. When certainty of property rights come into question, the farmer for instance may reconsider investing in a new tractor and the landowner may decide not to build a new building. These effects, compounded over many industries and businesses, have depressing effects on economic potential.
- In extreme cases, such as the recent protests of June 2021, have cogently illustrated, investors may stop investing completely or change investment plans dramatically. Investment plans, in part, are sensitive to and influenced by the regime of property rights.
- Sakeliga has observed in surveys among its members a current tendency of international diversification of investment and operations in businesses. This outward looking trajectory should continue as long as the state threatens assets (including land) and activity through detrimental public policies.
- An amendment that raises the risk on investing in certain classes of property, such land, are likely to reduce investment in those classes of property – the size of the effect depends on the perception of risk the policy creates.
- In effect, if all land and property can be expropriated for nil compensation, it will undoubtedly raise the risk to investors. When risk is increased investment is likely to decrease.
- Economic metrics we track suggest a deterioration in the quantity and quality of investment is already underway. We see little reason to expect a reversal given the trajectory of a weakening of property rights.

2.4.1 Important investment trends

- The first graph that follows below illustrates that outward investment in South Africa has continued to exceed inward investment since around 2015. The second graph reveals a dramatic weakening in net fixed capital investment, which became especially acute in 2020. The third graph below suggests a deterioration in SA's private capital stock.
- The state and SOEs are taking on a larger and larger share of the capital stock. This is detrimental to efficiency, resource allocation and living standards.

Net outward investment exceeds inward investment

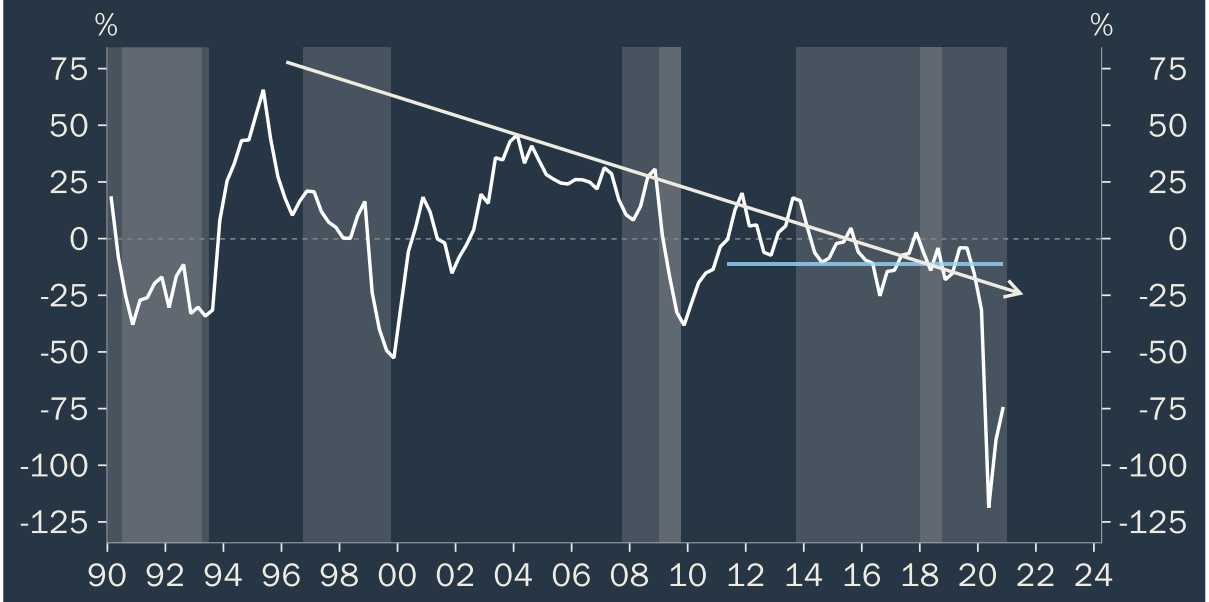
Net international investment position as a % of GDP



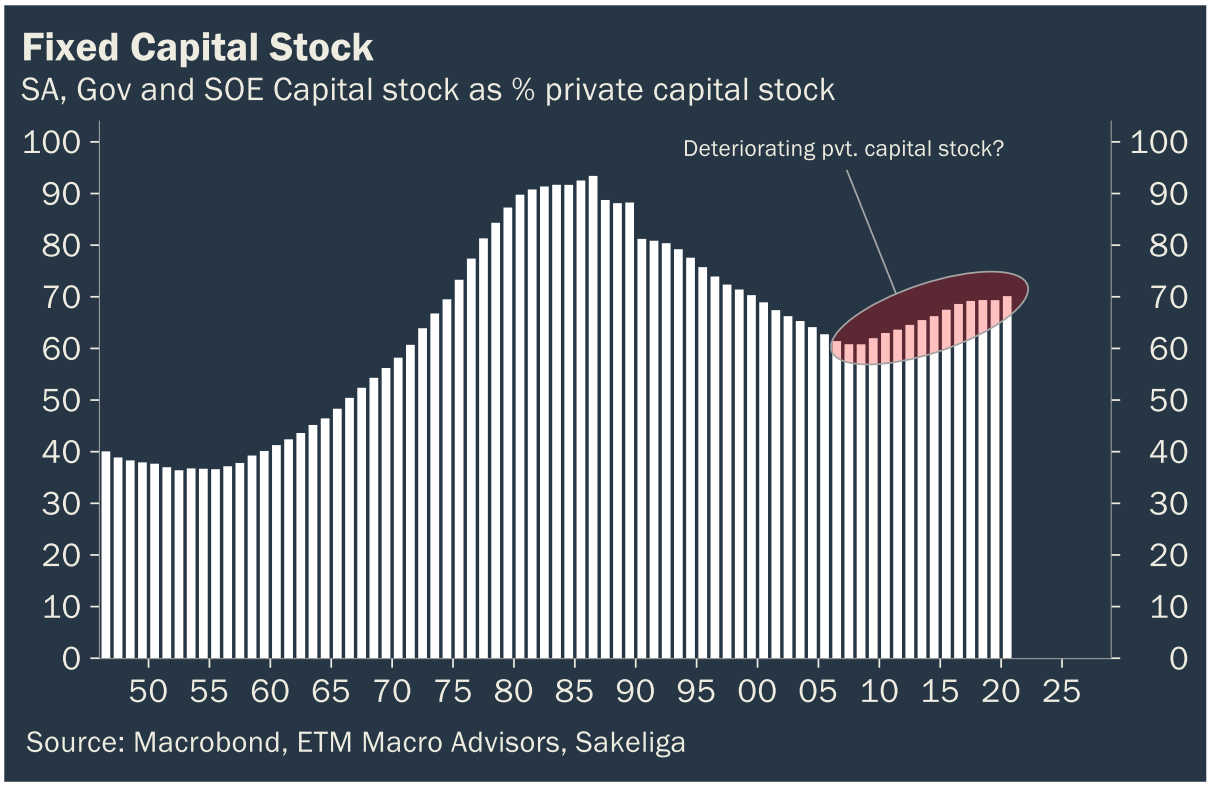
Source: Macrobond, SARB, ETM, Sakeliga

Net Fixed Investment

South Africa, Net Real Fixed Capital Formation, 2Y %chg



Source: Macrobond, ETM Macro Advisors, Sakeliga grey = SARB downward business cycl



- We submit again, that *"it is through increases in the economic production of valued goods and services that people, and communities acquire purchasing power."* The impact of the Amendment Bill must be carefully evaluated for its likely impact on the living standards of all people in South Africa.

2.5 Summary of comparative legal analysis

- Sakeliga's legal analysts also considered pertinent examples of approaches to property rights. Focus was placed on the BRICS grouping of countries, specifically on the cases of China and Russia, which reveal trends toward a strengthening of individual property rights.
- China and Russia are particularly relevant, having, over the course of the 20th century, carried out some of the largest and most far-reaching land reform schemes in history. Radicalised land-reform schemes were disastrous not only in terms of lives lost, but also on economic progress.

2.5.1 China

- China undertook a policy of land reform since the 1930s, the initial phases of which sought to implement land reform with "minimal social disruption." The programme, unfortunately, became politicalised and radicalised by the Communist Party and culminated in land seizures in the late stages of the Chinese Civil War (circa 1947 to 1950) and the Great Leap Forward (1958-1962).
- It is noteworthy that, from the mass-killings of landlords during the initial land grabs in 1947 and the later Great Leap Forward in 1958, private property – and, more particularly, ownership of land – has slowly been making inroads in Chinese law.

- Starting in 1978 with Deng Xiaopeng's market-orientated reforms, the Chinese economy has gradually cemented its position as one of the world's fastest growing economies, regularly exceeding 10% GDP-growth annually.
- The current Chinese constitution has been amended five times, in 1988, 1993, 1999, 2004, and 2018. In its latest iteration, it provides explicitly for the right of citizens to own private property, which is enshrined as being "inviolable".
- Starting in 1980, several semi-permanent use rights were issued for domestic, industrial, agricultural and domestic purposes. Such rights increase the certainty of property rights and arguably supported China's tremendous rise as and economic superpower.
- Article 13 of the current Chinese constitution states that, *"The State may, in the public interest and in accordance with law, expropriate or requisition private property for its use and* **make compensation** *for the private property expropriated or requisitioned."*
- Expropriation in China is carried out subject to "fair compensation", which is generally taken to refer to the market value of said property. This, again, is in contrast to the provisions of the present amendment, which, generally may result in compensation below market or no compensation at all.
- In China's many special economic zones (SEZs) these principles are even more readily apparent, with even stricter protection for private property and safeguards against interference by the central government.
- In considering Chinese SEZs, several authors have commented that, not only do they have a demonstrable and statistically significant beneficial effect on economic development, but this effect is also directly correlated with the pace at which liberalisation of the market had taken place.
- Despite the central government's (of China) calls from the 2000 onwards for local officials to be responsible with their use of expropriatory authority, these provisions have gained a great deal of international notoriety. In China, perverse incentives, such as benefits ensuing from redistribution of land to special interest groups set the stage for abuse by officials and rent-seeking.
- Similar notoriety could be devastating for a small open economy such as South Africa's, which relies on investment. South Africa, certainly, is also not immune to political drives to radicalise land reform. Such radicalisation is likely to result in similar detrimental and depressing effects to those seen in China. It is important that constitutional safeguards remain secure.
- China's example illustrates that economic progress requires safeguards for private property. The Amendment Bill will remove important safeguards for property from the Constitution.

2.5.2 Russia

- The Russian legal tradition, in contrast to the Roman-Dutch and the Anglo-American legal traditions, has, for the most part, lacked effective systems to protect private ownership. From approximately the end of the 15th century to the end of the 18th, the Russian tsarist state had free reign in confiscating subjects' property at will – and largely for own benefit.
- Following the Bolshevik Revolution of 1917, modest developments in private property rights were overturned. Key in this process was the 1922 Land Code of the Russian SFSR, the key provisions of which were only abrogated by the 2001 Land Code of the Russian Republic.

- It is important note that, in the extant Russian Constitution, property rights are guaranteed as a key component of economic activity and, ultimately, development.
- Importantly, the Russian Federation has taken several steps to strengthen property and economic rights, especially since 2012.[1] These include the establishment of new types of and rights in property that will accrue to private persons.
- It is clear from the policy direction that the present Russian central government has taken that it considers the uncertainty and bureaucracy associated with uncertain property rights to be a serious impediment to its economic aspirations.
- Amendments to section II of the Russian Civil Code now offers expanded protection even in the absence of a clearly demonstrated property rights, offering, as South African law does currently, a great deal of protection to bona fide possessors of property. See section 13 of the current code.
- In contrast, to the mere anaemic position that held before now, real rights which are hallmarks of South African property law, such as personal servitudes and "use rights" in property has been instituted in Russian law.[2]

2.5.3 Conclusion

- It is apparent that both China and Russia are taking active steps to further entrench legal and policy protection for private, individually held property.
- Considering the prominence of both jurisdictions as members of the BRICS grouping – of which South Africa is also a member – it is likely worthwhile to consider the policy-initiatives they have been undertaking in recent years.
- Considering that China, especially, far outperforms South Africa economically, it is worthwhile further improvement in South Africa with regards to the status of real rights and policy-certainty.

3 EXPERT SUBMISSION

Author

Martin van Staden

Martin van Staden has an LL.B. and LL.M. (*cum laude*) from the University of Pretoria, where he is pursuing an LL.D. in constitutional law. He is a Sakeliga legal fellow, additionally serves on the Rule of Law Board of Advisors of the Free Market Foundation, and serves as the Chief Advisor for Legal Policy on the Board of Advisors of BridgeAfrica. Martin is author of the 2019 book, *The Constitution and the Rule of Law: An Introduction*, and has had his work published *inter alia* in the *Pretoria Student Law Review*, the *African Human Rights Law Journal*, and the *Journal of Contemporary Roman-Dutch Law*.

For more information, visit www.martinvanstaden.com.

3.1 Introduction

On 16 July 2021, the Ad Hoc Committee to Initiate and Introduce Legislation Amending Section 25 of Constitution published the revised Constitution Eighteenth Amendment Bill ("Amendment Bill") for public comment. This submission was commissioned by business group Sakeliga.

The proposed revisions to the Constitution Eighteenth Amendment Bill are disturbing. Sakeliga has provided submissions at every stage of public engagement pointing to the economically disastrous and anti-constitutional nature of the Amendment Bill, and much of that is repeated in this submission and the addenda.

Up to now, the Amendment Bill has dealt exclusively with so-called "expropriation without compensation". The July 2021 revision of the Amendment Bill has intensified these abhorrent features of the proposed constitutional change considerably, by introducing the interrelated notions of land being the "common heritage" of all South Africans and allowing for so-called "state custodianship" of land.

3.2 Amendment Bill undermines property law

Friedrich Hayek writes that constitutional law – including the Constitution – is not the source of all other law but merely a superstructure that was erected around the law to ensure that the (existing) law is protected and enforced. It organises the enforcement of the law as it exists, rather than necessarily creating new law.[1]

This approach to constitutional law, which it is submitted is correct, is important, because the Amendment Bill proposes fundamental changes to South African property law by way of the Constitution.

South African property law, for the most part, are the principles of law that have spontaneously developed over centuries and crystalised into what is today English common law of property, Roman-Dutch civil law of property, and African customary law of property (all together may be regarded as the "South African common law of property"). All three of these sources of South African common law of property place great emphasis on security of and protection for property rights and property tenure. It is, indeed, a myth that the kind of deprivations of property rights contemplated by the *ad hoc* committee is in any way representative or related to precolonial African approaches to property.[2]

The South African common law of property is not something to be changed as a matter of statutory amendment. The Constitution is not meant to be the source of property law. The Amendment Bill

[1] Hayek FA. *Law, Legislation, and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy.* (1982). Routledge. 134.
[2] https://www.news24.com/citypress/voices/african-norms-are-not-compatible-with-expropriation-without-compensation-20201214

represents precisely a substantive addition to (or rather subtraction from) this common law of property, not only in a way that undermines the spontaneous and organic nature of law, but in a way that undermines constitutionalism itself. The novelties the Amendment Bill will introduce into the Constitution will oblige government to violate the law – in its broadest sense – rather than respect and enforce it.

3.3 Constitutional certainty

3.3.1 Myths and improprieties

For four years commerce and civil society have grappled with and suffered under the threat of the previous version of the Amendment Bill published in December 2019, only now to be disrespected with a revision that falls completely outside of the parameters set by the original parliamentary resolution from February 2018. Any revisions made to the Amendment Bill as a result of the public participation phase had properly to be narrowly tailored to be consistent with the Amendment Bill's existing structure.

At this point in time, the *ad hoc* committee, with Parliament's blessing, is playing fast and loose with the Constitution, a statute that is supposed to be respected and preserved as South Africa's highest law. A written constitution's two defining features is that it is supreme and that it is rigid. This rigidity is in large part meant to establish and safeguard legal certainty at the highest level of law.

For four years there has been no certainty, as the President has assured investors that no harm will come to the economy or investment, yet this is exactly what has happened as a result of the mere threat of the constitutional amendment under consideration. Certainty was further undermined by myths being peddled in the public discourse by government – such as so-called "land hunger", a demonstrably false narrative, and the idea that government simply wants to "make explicit what is already implicit" in the Constitution, something that is not reflected in either the previous or certainly not the present version of the Amendment Bill.

Research by the Institute of Race Relations shows without any doubt that there is no "land hunger" issue in South Africa requiring the coercive redistribution of private property.[3] There are in any event many alternatives available to government to satiate any supposed hunger for land that do not involve the kind of property deprivation presently contemplated, such as the distribution of State land.[4]

Furthermore, "expropriation without compensation" has never been an implicit feature of the Constitution. Section 25(2) and (3) up to now have unequivocally required the payment of an amount of compensation for all expropriations. The absence of compensation (or "nil compensation") can

[3] https://www.biznews.com/thought-leaders/2021/04/08/land-reform-priority-jeffery
[4] Van Staden M. "Private Property, Public Interest: Alternatives to Confiscation and Nationalisation." (2021). Free Market Foundation. https://www.freemarketfoundation.com/dynamicdata/documents/research-private-property-public-interest-martin-van-staden.pdf. 9-19. ("Alternatives").

never qualify as "an amount", nor could such a lack of an amount ever be "paid". The word "compensation" means "to recompense". In turn, this means "to make amends for a loss or damage". To argue in any context that not paying compensation, or "paying" R0 in "compensation", amounts to making amends for the loss to a property owner upon the confiscation of their property and as such qualifies as compensation, is impermissible sophistry and arguably fraudulent engagement with the constitutional text (*fraus legis*).[5] The Amendment Bill does not make explicit what is already implicit in the Constitution, but adds novel, unacceptable features to it.

3.3.2 The never-ending story?

South Africa runs the additional risk that if Parliament fails to adopt the Amendment Bill (i.e., insufficient numbers of National Assembly members vote in its favour), certain political formations will in all likelihood keep the constitutional amendment on Parliament's agenda. This risk is especially pressing with the largest and third-largest parties represented in the National Assembly.

Elsewhere, and according to common sense, if the Amendment Bill fails, that will be the end of the matter, and life will go on with the Constitution unamended and supreme. However, it appears that in our case there might be further discourse and talks between political parties that might lead to a second and perhaps further attempts to amend section 25 of the Constitution in the not-too-distant future. This is akin to losing a referendum but continuously calling further referendums in the hopes that one might succeed eventually.

In civil law a remedy exists for this problem: The decree of perpetual silence in Roman-Dutch law allows a person who has been threatened with legal action to force the person making the threat to institute that action or remain silent. It is a shame that one cannot, in constitutional law, apply the same principle and compel Parliament to attempt its amendment of section 25, and should it fail to do so, to remain forevermore silent on the matter. This is unfortunate, because for as long as Parliament or some of its largest political parties continue to keep a constitutional amendment, particularly to section 25, on its agenda for years to come, domestic and foreign investment will diminish and stall, as it has already begun to do.

This is the risk of the continued lack of legal certainty around property rights. And if the Constitution is amended in the contemplated manner (either the first or the present version of the Amendment Bill), it will in any event be a death-knell for South Africa's economy. The only reasonable thing that government can do is abandon its intention to amend the Constitution entirely and to reassure the South African public and international investors that section 25 is safe from political threat.

[5] See generally Van Staden M. "*Fraus Legis* in Constitutional Law: The Case of Expropriation 'Without' or for 'Nil' Compensation". (2021). 24 *Potchefstroom Electronic Law Journal*.

3.4 Confiscation (so-called "expropriation without compensation")

Sakeliga has already made its views on the unacceptability of property confiscation clear in its submission above and in Addendum 4.

It must additionally and clearly be noted that so-called "expropriation without compensation" as a contradiction in terms, and it is incompatible with the requirements of constitutionalism. Sakeliga, according to CEO Piet le Roux in his oral evidence to Parliament on the first version of the Amendment Bill, will never accept such a concept as part of the constitutional law of South Africa, even if the Constitution is amended validly according to the procedure set out in section 74. This is the correct position to take.

Expropriation, as a long-recognised legal institution, necessarily and always involves the payment of an amount of compensation – this excludes so-called "nil compensation". Expropriation without compensation or expropriation for an amount of nil compensation are therefore not instances of expropriation at all – they represent nothing more than arbitrary confiscation of property without any criminal conviction or proven delictual liability as its basis.[6]

Most importantly, property confiscation of the kind envisaged is wholly incompatible with constitutionalism.

Constitutionalism is about the definition and limitation of State power to the benefit of the public. Part of this paradigm of limitation is respect for and deference to civil society: The constitutional state (the so-called "*rechtsstaat*") does not regard the government as superior to or sovereign over civil society, but regards civil society and government as partners in governance. Civil society by all accounts requires the effective and sincere protection of private property rights not only to function properly, but to exist *per se*. Without secure property rights, no such thing as civil society can come about. Property rights are what empower civil society and empower citizens to be equal participants in governance alongside the government – it provides them with sustenance, with infrastructure for their work, and with independence from always needing to rely on political favour.

Without property rights that are secure, the citizenry and civil society must necessarily always be dependent on government's good graces to succeed commercially or even to simply survive. The Amendment Bill is a classic embodiment of a measure designed to do nothing more than deprive civil society of its secure property rights in favour of a government that seeks more power over private and commercial affairs. As we have already indicated, this is not a power government has – expropriation involves the necessary safeguard of (market-based) compensation, which Parliament now proposes to strip away.

[6] https://sakeliga.co.za/en/expropriation-as-punishment/

3.5 The principles of "common heritage"/"custodianship"

The new content of the Amendment Bill is deeply concerning and problematic.

To treat land as the "common heritage" of all South Africans ignores the reality that privately-owned land, throughout history, has served the public interest far better than any form of socialised or State ownership of land. Relatively undisturbed private property rights in land is crucial to a well-functioning economy and prosperous society.

By implication, any talk of State "custodianship" of fixed property must be out of the question. Even though the revision under consideration does not outright nationalise land, the provision related to custodianship in effect bestows on government the power to do this at any time and for any reason. In other words, this provision can never be regarded as a constitutional safeguard – it is nothing more than a negation of constitutionalism by giving government an unrestrained discretion to at any time surprise South Africa and the world with a wholesale nationalisation of fixed property. No economy can be built on such a foundation.

That the revised Amendment Bill refers to "certain land" is cold comfort. No court, within the confines of present South African jurisprudence, is qualified to second-guess Parliament or even the executive about which types of land may fall under "certain land". In other words, if Parliament adopts an Act nationalising "all land", that would still, very likely, to a court qualify as "certain land".

It is uncontroversial that it is the role of the State is to protect property. Section 205(3) of the Constitution makes this much clear, providing that the police service must *inter alia* "protect and secure the inhabitants of the Republic and their property". In this sense, the State is a "custodian" of property and must "safeguard [land] for future generations". But this is certainly not the intention with the proposed revisions to the Amendment Bill.

The intention, and effect, of the Amendment Bill is clearly to place the State in a position of power over property that is properly private. The State will not protect or "safeguard" fixed property – it will control it. As regards property, this amendment will turn South Africa into a police state; bearing in mind that "police" here does not refer to "the police" but to an older meaning of the word which relates to the power to regulate and control. A police state is not necessarily one where the law enforcement agency plays a substantial governmental role, but simply one, contrasted with a constitutional state, where the power of government to arbitrarily exercise power over society is relatively unconstrained.

Should the proposed amendment to the Constitution be adopted, section 25 of the Constitution will be rendered largely toothless and as a result, government power will be significantly and unacceptably expanded over property matters. This is a slippery slope, because the (secure) right to property underlies many of the other rights recognised and protected by the Constitution.

The effective nationalisation of fixed property is similarly incompatible with constitutionalism for the same reasons discussed above under the heading of expropriation without compensation, and this novel addition to the Amendment Bill renders it more starkly unconstitutional and anti-constitutional than the first version of the Amendment Bill had been.

3.6 Conclusion

Section 25 is a comprehensive provision that places substantive land-reform obligations on government. The pace of land reform therefore has nothing to do with constitutional safeguards contained in section 25 but everything to do with government's own determination of the speed of land reform.

The Constitution requires that government restitute ill-gotten property (in line with South African common law of property), that it secure and safeguard tenure and property rights that are insecure, and that it expands access to land on an equitable basis. This final requirement has often been interpreted as the Constitution bestowing a power on government to "redistribute" private property, which in turn is being used as an additional motivating force in favour of the Amendment Bill. But this is not the case – from the text it is quite clear that the Constitution contemplates government instead making it easier for South Africans to access land, not government seizing property and dishing it out.[7] Justice minister Ronald Lamola has indicated that an original-meaning approach to interpreting the Constitution must be adopted,[8] and it cannot be argued that section 25(5) at any point during the constitutional negotiations and drafting had a "hidden" meaning of redistribution embedded in it. Its text might not be unequivocal about what it might encompass (i.e., how does one secure equitable access to land?), but it is unequivocal about what it does *not* encompass – confiscation and deprivation of property – because these phenomena are incompatible with the remainder of section 25.

In light of this submission, it is recommended that the Amendment Bill be withdrawn in its entirety.

[7] Van Staden. "Alternatives" (above). 12.
[8] https://www.gov.za/speeches/minister-ronald-lamola-deepening-constitutionalism-25-years-30-jul-2021-0000

4 ADDENDA

4.1 Addendum 1: Common law constitutionalism[9]

Introduction

Constitutionalism refers not only to the written Constitution, but to the constitutional order in which the Constitution finds itself. The constitutional order includes various principles and customs that the Constitution itself does not explicitly express.

One may consider, for example, the principle that the legal rules expressed in legislation must be clear and unambiguous. The Constitution itself contains no such requirement, but it is commonly recognised that no unclear legal rule may be enforced upon legal subjects and that such a rule is *ab initio* void for vagueness. This rule is absolute and supreme, as no proper court of law will enforce that which either the court itself or the legal subject concerned cannot understand.

These rules and principles are usually borne out of a society's *jus commune* -- its common law. In South Africa, therefore, English and Roman-Dutch constitutional principles, and perhaps in the future some principles of African customary law, make up the constitutional order, alongside the written Constitution.

This addendum considers some of these important principles of the constitutional order that do not necessarily find explicit recognition in the Constitution.

Constitutionalism

Written constitutionalism

A constitution, properly understood, is a special type of law that, unlike other laws, addresses itself to the government of a society, and lays out what that government may, and crucially, what it may not do. The core idea of constitutionalism is that *everything which government is not explicitly allowed to do, is forbidden*. Constitutions are one of those things a society cannot afford to get wrong, because they are not transient. All future governments – not always of the same political party – will interpret them differently and according to their own ideological frameworks.

The Constitution of South Africa is not meant to be completely inflexible or completely flexible. Section 74 provides that section 1 of the Constitution may be amended with a 75% majority vote of the National Assembly and the support of six provinces in the National Council of Provinces, and the remainder of the Constitution may be amended with a two-thirds majority of the National Assembly and the support of six provinces in the National Council. The remainder of the section sets out various other procedures and considerations.

[9] This addendum has been adapted, albeit not exclusively, in large part from Sakeliga's submission on the policy of expropriation without compensation, prepared by Prof Koos Malan.

But if the Constitution is to be amended, the process must not simply amount to Parliament going through the constitutional procedure and adopting the amendment. There must be a drawn-out, years-long public consultation process to determine whether a national consensus exists. The Constitution sets out how an amendment must be processed, but a government cannot act without a mandate.

One must also bear in mind the nature of the Bill of Rights. Chapter 2 of the Constitution does not 'create' rights, but merely protects pre-existing rights. Indeed, section 7(1) states that the Bill of Rights "enshrines" the rights, not creates them. Sir Thomas More once aptly noted:

> "Some men think the Earth is round, others think it flat. But if it is flat, will the King's command, or an Act of Parliament, make it round? And if it is round, will the King's command, or an Act of Parliament, flatten it?"

Enshrining something, in the constitutional sense, means to place that thing somewhere where it is protected, in this case, in a constitution.[10] But legislation cannot change reality, in this case being the reality of rights: South Africans have rights outside of the Constitution, and if a provision in the Bill of Rights is repealed, that does not mean South Africans 'lose' that right. If this were the case, there would be little use in referring to rights as 'human' rights, as section 1 and the Preamble of the Constitution do. We are rights-bearing entities because we are humans with dignity and individuality, not because government has 'given' us those rights.

If the Bill of Rights is thus amended, the basic essence of the right in question must remain. If protection for human rights is removed from the Constitution, South Africa's constitutional project will be severely undermined in that the highest law will continue to recognise the rights in question, but will not protect them. This is not a situation South Africans would want to find themselves in. By implying that government can 'extinguish' a right by simply removing it from the Constitution, the impression is created that rights are an idea owned by the State, and not the people. This would be faulty both according to human rights theory, but also according to the logic of the Constitution itself.

Any constitution is meant for the ages. As respected constitutional scholars Herman Schwartz and Richard A Epstein have noted, "Constitutions are written to supply a long term institutional framework, which by design imposes some limitations on the power of any given [parliamentary] majority to implement its will".[11] The Constitution of the United States — a standard-setter for constitutionalism — has endured for 230 years and been amended only 27 times. South Africa's Constitution has been amended 17 times in 23 years, with most amendments being technical or procedural.

---

[10] See https://dictionary.cambridge.org/dictionary/english/enshrine.

[11] Epstein RA. "Drafting a constitution: A friendly warning to South Africa". (1993). 8 *American University Journal of International Law and Policy*. 567.

Constitutionalism and the Rule of Law require long-term thinking, which recognises that the government of today is not the government of tomorrow, and that the outrage currently dominating public opinion will not always be around.

If our Constitution should lose its basic character as a shield for the South African people against undue government overreach within the period of only one political party's rule, there can be no doubt that tyranny is the rule and freedom has again slipped through our grasp.

Unwritten constitutionalism

Constitutionalism presupposes the pursuit of justice on a grand scale, that is, for the whole of the polity, and more specifically for all individuals and communities within the polity. In this way, constitutionalism is inextricably associated with the pursuit of justice, but this normative commitment – the commitment to justice – is only one side of the constitutional idea. The second element of constitutionalism relates to power: power that has to serve as a rampart that supports the normative – the justice element. Hence the normative element has to be complemented by a real element, which consists in the structures for the suitable allocation and checks on political power, thus to ensure that power is not abused; to ensure that it is exercised for the benefit of the whole instead of degenerating into privateering for the sake of only a segment – either a minority or a majority. The structural element is essential to constitutionalism. Precisely for that reason questions around governmental power – its allocation, exercise, limitation and control – are and have always been essential for constitutionalism.

In the present context the following two prerequisites, both relating to the real element of constitutionalism, are crucial. The first is citizenship and the second is the notion of the dispersal of power and (mutual) checks and balances.

- Citizenship in the real sense of the word is not viable without the protection of personal property rights, that is, the property rights of individuals and juristic persons; and
- Constitutionalism is founded on the basis of the dispersal of power among the largest possible number of centres of power, more specifically not only the three centres of state power, but the widest range of loci of private, civil and economic power (here in after referred to as institutions of civil society). These loci of power must be strong enough to counterbalance governmental power and strong enough to counterbalance each other, thus to ensure that no locus of power grows so strong that it gains absolute power that would allow it to abuse its power to the detriment of any segment of the populace. Once any locus of power, and specifically the state, is so strong that it can act in an unconstrained fashion, it becomes absolutist. That rings the death knell of constitutionalism. Institutions of civil society constitute loci of power capable of discharging their check and balance function only when they have their own property, which allows to them act autonomously.

Citizenship

It is important to clarify the meaning of citizenship. That requires, amongst other things, that citizenship be distinguished from the concepts of subject and consumer. The latter two should not be confused with that of citizenship; in reality they stand in opposition to the idea of citizenship.

From the point of view of constitutionalism, it would be most inappropriate to view the populace – also the South African populace – as a collection of subjects. Subjects denote a relationship of subordination, inequality and dependence of the populace vis-à-vis government. It is an inappropriate, essentially monarchical concept, which is incompatible with the very notion of republicanism which is the idea on which the South African constitution claims to be premised.

Viewed through the prism of constitutionalism it would be equally inapt to conceive of the South African populace as collection of consumers. A consumer is by definition in a commercial relationship in which the identity of buyer, tenant, borrower, or whatever other commercial identity stands at the centre.

In contrast to the above, in pursuance of the very notion of constitutionalism, the appropriate public identity of members of the populace should be that of citizens.

Citizenship, unlike the identities of consumer and subject, primarily denotes the ability to participate independently and on an equal footing with all other citizens in the joint endeavour to govern the polity in the public good and to the benefit of the citizenship body as a whole, through a process of even-handed rational public discourse and compromising decision-making.

Independent participation of all citizens in the continuous enterprise of government for the public good, is impossible, however, if the people are economically reliant, especially solely reliant on another person or entity, more specifically if people are reliant on the state. When the populace is dependent on the state for their livelihood, they are not citizens anymore. Then they are but subordinate subjects and state-dependent consumers.

Dispersal of power and civil society

The notion of the dispersal of power and attendant checks and balances lies at the very core of the constitutional idea. This is particularly also true for South Africa priding itself of a constitutional dispensation that purports to subscribe to the idea of constitutionalism. It is important to emphasise that the dispersal of power is not limited to the traditional idea of the trias politica – the threefold separation of power between the legislature, executive and the judiciary. Trias politica, though important, provide but the basic rudiments for a full-fledged system of power dispersal. Dispersal of power goes much broader than trias politica. It includes a rich plethora of power centres of civil society, commercial enterprises and other economic endeavours, cultural and religious endeavours, educational institutions, religious institutions, charity organisations and many more non-governmental

organisations and many more institutions of civil society. The need for the dispersal of power among all these centres is a generally accepted prerequisite of sound modern-day constitutional law. In their absence the spectre of absolutism, more specifically of unrestrained governmental power which is by definition an outrage against the very foundation of constitutionalism, looms dangerously large.

The mentioned plethora of institutions of civil society fulfils two important roles.

In the first place they provide the best rampart against absolutism. They act as a counterbalance against absolutism of an excessively powerful, centralised government. Bills of Rights, that seek to protect the rights of individuals against actual and threatened governmental violations of rights, is more often than not of no practical value. Individuals lack the required muscle to take on a powerful rights-infringing government. Moreover, even if an individual does have the power to sue for the remedying of rights, the courts may rule in favour of government because they share the same ideological convictions. Even if a court does rule in favour of (an) individual/s, orders are not complied with and turn out to be judicial wishes rather than true binding orders. The South African experience of the past decades are swamped of such cases, where the executive and the state administration have proven to be unwilling and / or able to heed to words of the judiciary. Institutions of civil society are the only instruments with sufficient muscle to provide the required check on an infringing state and that can, at the same time, enlist the resources to fill the void left by a faltering state. Institutions of civil society in this way is the only genuine guarantee for the rights and interests of people and for sustaining constitutionalism.

Secondly, institutions of civil society also act as a mutual power balance and check on each other, thus avoiding and / or countering the abuses accompanied by economic monopoly practices in a way similar to how they keep a rights-infringing centralised government in check and/ or fill the gap left by a faltering state.

Conclusion

Citizenship and autonomous institutions of civil society also mutually imply one another:

- Citizenship – the capacity to participate in the governance of the polity – is reinforced and strengthened when people assemble and act through institutions of civil society, instead of acting individually on their own with much greater difficulty; and

- Institutions of civil society on the other hand cannot be viable without citizens joining these institutions and without them materially contributing towards such institutions, thus enabling these institutions to discharge their check and balance function.

Conduct by government, whether executive, legislative, or judicial, must respect and promote citizenship and civil society, not undermine or attack them.

4.2 Addendum 2: Section 1 of the Constitution[12]

Introduction

Section 1 of the Constitution, along with section 74 (the constitutional amendment provision), is the most entrenched provision in the Constitution. It may only be changed with an affirmative vote of 75% of the National Assembly, a generally elusive parliamentary majority for any single political party. This is for good reason. Section 1, said to be "the Constitution of the Constitution", provides not only the fundamental values upon which South African society is thought to be based, but on which the Constitution, itself a value-laden law, is also based. All constitutional interpretation, construction, and practice must happen with the values enshrined in section 1 foremost in mind.

It is our view that government has not paid enough, if any, mind to section 1. When government does contemplate constitutional values, it usually references the Preamble, a part of the Constitution that is without enforceable effect, or various rights in the Bill of Rights. Rarely, if ever, is section 1, the most important part of the Constitution, considered.

This is problematic, because section 1's values are actionable and substantive: They must be adhered and given effect to, otherwise the offending entity is trafficking in unconstitutional territory. We have regrettably seen this play out since the Constitution's enactment.

Section 1(a): Human rights and freedoms

Section 1(a) provides that South Africa is based *inter alia* on the "advancement of human rights and freedoms". Regrettably, government has treated section 1(a) as if this clause is absent.

A recent example of this, among many, is the National Sport and Recreation Amendment Bill, 2020, which effectively proposes to nationalise the civilian sporting industry and regulate various aspects of that industry. How can it be that South Africa is truly based on the advancement of human rights and freedoms if government is reducing the scope of freedom in such personal and intimate affairs like sporting and recreation?

The same is particularly true of interventions like the Constitution Eighteenth Amendment Bill. This intervention will deprive South Africans of their hard-won (and incredibly necessary) property rights, which are a prerequisite for the exercise of freedom and the attainment of prosperity.

Finally, it is worth noting that had this provision been given the due respect and recognition it demands, South Africa's unemployment rate would not be nearly as high as it is today. The Bill of Rights, particularly sections 9 and 23, have been interpreted in such a way that government has been empowered to disregard the human rights and freedoms of the jobless in favour of those with trade

[12] This addendum was adapted in large part, albeit not exclusively, from the submission of the Free Market Foundation on the 2020 annual review of the Constitution. The sole author of that submission is one of the co-authors of this submission.

union membership. Section 1(a) read with section 22 of the Constitution as a matter of course must have the consequence that jobseekers are not disallowed from seeking employment on such terms that they deem beneficial to themselves.

But legislation such as the National Minimum Wage Act[13] stands in evident conflict with these provisions, by regimenting labour relations in accordance with academic and politically convenient narratives rather than the best interests of the poorest among us. We submit that section 1(a), and also section 1(c) discussed below, must permeate any legislation and regulations promulgated by government, and in this respect, it is evident that this has not happened. Had if happened, legislation like the National Minimum Wage Act would never have been enacted.

Section 1(b): Non-racialism

It is well-known by now that government has engaged in racialist rhetoric and public policy since the dawn of constitutional democracy in South Africa. It has found ways in the Constitution of justifying this conduct but has paid no mind to the fact that those justifications are borne out of provisions in the Constitution that must be read as compliant with section 1, and particularly section 1(b), which prohibits racialism. Thus, even if one can, upon a very strained reading, regard section 9 as allowing, or even obligating, government to engage in racial policymaking, the presence of section 1(b) makes such an enterprise constitutionally impossible.

In other words, those provisions in the Constitution which seem to justify racialist policy measures, legally cannot do so, because section 1(b) of the Constitution proscribes it entirely. Government appears to be ignorant of this fact.

Section 1(c): The Rule of Law

The Rule of Law is often touted by government and opposition officials without any regard being paid to its substance. It is used as filler-text in political speeches and press statements. When it comes to the actual content of the Rule of Law, government has in many ways not complied with any such requirements.

Section 1(c) of the Constitution provides that South Africa is founded upon the supremacy of the Constitution and the Rule of Law. Section 2 provides that any law or conduct that does not accord with this reality is invalid. This co-equal supremacy between the text of the Constitution and the doctrine of the Rule of Law remains underemphasised in South African jurisprudence, but it is important to note.

One of the Constitutional Court's most comprehensive descriptions of what the Rule of Law means was in the case of *Van der Walt v Metcash Trading Ltd*. In that case, Madala J said the following:

[13] National Minimum Wage Act (9 of 2018).

"[65] The doctrine of the rule of law is a fundamental postulate of our constitutional structure. This is not only explicitly stated in section 1 of the Constitution but it permeates the entire Constitution. The rule of law has as some of its basic tenets:

1. the absence of arbitrary power – which encompasses the view that no person in authority enjoys wide unlimited discretionary or arbitrary powers;

2. equality before the law – which means that every person, whatever his/her station in life is subject to the ordinary law and jurisdiction of the ordinary courts.

3. the legal protection of certain basic human rights.

[66] The concept of the rule of law has no fixed connotation but its broad sweep and emphasis is on the absence of arbitrary power. In the Indian context Justice Bhagwati stated that:

'the rule of law excludes arbitrariness and unreasonableness.'

I would also add that it excludes unpredictability. In the present case that unpredictability shows clearly in the fact that different outcomes resulted from an equal application of the law".[14]

The Rule of Law thus:

- Permeates the entire Constitution;
- Prohibits unlimited arbitrary or discretionary powers;
- Requires equality before the law;
- Excludes arbitrariness and unreasonableness; and
- Excludes unpredictability.

The Good Law Project's Principles of Good Law report largely echoed this, saying:

"The rule of law requires that laws should be certain, ascertainable in advance, predictable, unambiguous, not retrospective, not subject to constant change, and applied equally without unjustified differentiation".[15]

The report also identifies four threats to the Rule of Law,[16] the most relevant of which, for purposes of this submission, is the following:

[14] *Van der Walt v Metcash Trading Ltd* 2002 (4) SA 317 (CC) at paras 65-66. Citations omitted.
[15] Good Law Project. *Principles of Good Law*. (2015). Johannesburg: Law Review Project. 14.
[16] Good Law Project 29.

> "[The Rule of Law is threatened] when laws are such that it is impossible to comply with them, and so are applied by **arbitrary discretion** […]"

Friedrich August von Hayek wrote:

> "The ultimate legislator can never limit his own powers by law, because he can always abrogate any law he has made. The rule of law is therefore not a rule of the law, but a rule concerning what the law ought to be, a meta-legal doctrine or a political ideal".[17]

What is profound in Von Hayek's quote is that he points out that the Rule of Law is not the same as a rule of the law. Indeed, any new Act of Parliament or municipal by-law creates and repeals multiple 'rules of law' on a regular basis – expropriation without compensation would be an example of 'a' rule of 'the' law. The Rule of Law is a doctrine, which, as the Constitutional Court implied in Van der Walt, permeates all law, including the Constitution itself.

Albert Venn Dicey, known for his *Introduction to the Study of the Law of the Constitution*, and considered an intellectual pioneer of the concept of the Rule of Law, wrote that the Rule of Law is "the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even wide discretionary authority on the part of the government".[18]

Dicey writes "the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint".[19] He continues, saying the Rule of Law means "the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government".[20]

The opposition to arbitrary power should not be construed as opposition to discretion in and of itself. Officials use discretion to determine which rules to apply to which situation, and thus some discretionary power is a natural consequence of any system of legal rules. However, the discretion must be exercised per criteria which accord with the principles of the Rule of Law, and the decision itself must also accord with those principles.

A common example of arbitrary discretion is when a statute or regulation empowers an official to decide "in the public interest". What is and what is not "in the public interest" is a topic of much debate, and empowering officials to apply the force of law in such a manner bestows upon them near-absolute room for arbitrariness. The "public interest", however, can be one criterion among other, more specific and unambiguous criteria.

---

[17] Von Hayek FA. *The Constitution of Liberty*. (1960). Chicago: University of Chicago Press. 206. Our emphasis.
[18] Dicey AV. *Introduction to the Study of the Law of the Constitution*. (1959, 10th edition). London: Macmillan. 202-203.
[19] Dicey 184.
[20] Dicey 198.

The fact that some discretion should be allowed is a truism; however, the principle that officials may not make decisions of a substantive nature still applies. Any decision by an official must be of an enforcement nature, i.e., they must do what the legislation substantively requires. For instance, an official cannot impose a sectoral minimum wage. The determination of a minimum wage is properly a legislative responsibility because it is of a substantive nature rather than mere enforcement.

4.3 Addendum 3: The right to enterprise

The Constitution must be read as a whole

Chaskalson J wrote for the majority of the Constitutional Court in *S v Makwanyane* that a provision of the Constitution "must not be construed in isolation, but in its context, which includes the history and background to the adoption of the Constitution, other provisions of the Constitution itself and, in particular" other provisions in the chapter of which it is a part.[21]

This means that no part of the Constitution is left unaffected by other parts of the Constitution, especially the provisions of section 1 of the Constitution, which provide for the broad constitutional basis of South Africa. These provisions are said to permeate the whole Constitution. Per Chaskalson J in *Minister of Home Affairs v NICRO*:

"The values enunciated in section 1 of the Constitution are of fundamental importance. They inform and give substance to all the provisions of the Constitution".[22]

Section 1 of the Constitution provides:

> "Republic of South Africa
>
> 1. The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (a) Human dignity, the achievement of equality **and the advancement of human rights and freedoms**.
>
> (b) **Non-racialism** and non-sexism.
>
> (c) **Supremacy of the constitution and the rule of law**.
>
> (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness." (our emphasis)

The emphasised portions of section 1 above proscribe racial discrimination absolutely, and makes freedom – the idea that individuals and groups of individuals must have the ability to make decisions for themselves without interference – an imperative in South African public policy.

---

[21] *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at para 10.
[22] *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others* 2005 (3) SA 280 (CC) at para 21.

Section 1(a) provides that the "advancement of … freedoms" is a value upon which South Africa is founded. This foundational value has the effect of strengthening every right in the Bill of Rights, as discussed below, which culminates into a right to enterprise. Whether or not South Africans should be free to make their own choices is not a question government gets to ask – it is a founding value and an imperative.

Non-racialism is, similarly, a Founding Provision and not a right in the Bill of Rights. Its absence from the Bill of Rights means that it is not available to limitation under section 36 of the Constitution, which enables the section 9 right to equal protection of the law to be limited. Thus, while equality between South Africans can be limited, **racial** equality is a constitutional imperative insofar as public policy relates.

This point is further reinforced by section 1(c), which provides for the co-equal supremacy of the Constitution and the Rule of Law.

The Rule of Law as a "meta-legal doctrine"[23] means in part that everyone subject to the law shall be governed by the same law, and not separate laws for separate people. If the latter occurs, the 'rule of man' reigns at the order of the day, whereby politicians and bureaucrats arbitrarily assign legal advantages to themselves and their constituencies at the expense of other citizens. The Rule of Law does not exist in such a state of affairs. Thus, there are two founding values which prohibit racial and sexist discrimination, *in addition* to section 9 of the Constitution, which theoretically allows for discrimination on *other* grounds.

The cumulative 'right to enterprise' in terms of the Constitution

There exists a cumulative right to enterprise in the Constitution that becomes clear once the principle enunciated by Chaskalson J is truly appreciated – that the Constitution must be read as a whole. The right to enterprise means that South Africans may, free from the interference of government and other actors, voluntarily go about their own business. This right to enterprise consists of various rights in the Bill of Rights (informed by the section 1(a) commitment to the advancement of freedoms):

Section 10 – the right to human dignity. In *Ferreira v Levin*, Ackermann J opined:

> "Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible. **Without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked.** To deny people their freedom is to deny them their dignity".[24] (our emphasis)

Section 12 – freedom and security of the person – especially sections 12(1)(a) and (c). These provisions provide that nobody may be deprived of freedom without just cause and that everyone has

[23] Von Hayek FA. *The Constitution of Liberty*. (1960). Chicago: University of Chicago Press. 311.
[24] *Ferreira v Levin* 1996 (1) SA 984 (CC) at para 49

the right to be free from violence from both public and private sources. Violence must be understood as including the threat of violence, which underlies any new law or regulation such as the provisions of the present intervention.

Section 13 – freedom from slavery, servitude and forced labour. If South Africans are guaranteed the right to be free from slavery – forced employment – the converse is also logically true: South Africans are to be free from forced *un*employment as well, which is often the result of well-intended government policy.

Section 14 – the right to privacy. The right to privacy implies that persons or groups of persons may go about their businesses without the interference or surveillance of others – including and especially government – if they do so without violating others' rights. Such interference could include obliging the divulging of intimate personal or commercial details that a government ordinarily has no interest in knowing.

Section 18 – freedom of association. This right entitles everyone to associate (or disassociate) with whoever or whatever they wish on whatever basis. The provision was formulated without any provisos or qualifications and is therefore absolute insofar as it is not limited by section 36. South Africans may freely associate or disassociate as long as they do not violate the same right of others or any of the other rights in the Bill of Rights. Economic policy has a tendency to violate the freedom of association of enterprises, in South Africa often providing for forced racial association and disassociation.

Section 21(1) – freedom of movement. The freedom to move – leave, return, roam – is a vital element of enterprise.

Section 22 – freedom of trade, occupation and profession. The freedom to choose one's trade, occupation, and profession is, along with the property rights provision, the core of the right to enterprise. Section 22 provides that government may *regulate* (not *prohibit*) the practice (not the choice) of a profession. The regulation of practicing a particular profession cannot be so severe as to prohibit it.

Section 23 – labour relations. The Constitution guarantees the right of employees and employers to associate with trade unions and employers' organisations.

Section 25 – the right to property. There can be no right to enterprise, and no enterprise *per se*, without private property rights. Section 25, along with the freedom of trade, occupation and profession, forms the core of the right to enterprise and is a *conditio sine qua non* for South Africa's prosperity. A right to property supposes that the owners of the property in question may do with that property as they see fit, insofar as they do not violate the rights of others.

4.4 Addendum 4: Sakeliga (then known as AfriBusiness) submission on expropriation without compensation

Submission made by AfriBusiness to the Constitutional Review Committee

June 2018

Contents

Submission compiled by
Piet le Roux, CEO of AfriBusiness

With special contributions by
Prof. Koos Malan, Professor of Public Law, University of Pretoria
Prof. Hennie Strydom, South African Research Chair in International Law, University of Johannesburg
Russell Lamberti, Strategist, ETM Macro Advisers

And an earlier analysis of factual problems in the relevant parliamentary motion by
Johann Bornman of AgriDevelopment Solutions

Executive summary

AfriBusiness opposes the amendment of the Constitution to facilitate expropriation without compensation. We argue that:

1. Expropriation of property without compensation is an act of confiscation.
2. A constitutional dispensation that allows for the confiscation of property or a constitution which in its text allows for the confiscation of property ceases to be a real constitution because it reneges on the very notion of constitutionalism. This implies that both an amendment to the text of the Constitution and an amended interpretation of the current text of the Constitution to the effect of legitimising confiscation would be equally unacceptable.
3. The denial of compensation for expropriated property amounts to a denial of a remedy, which constitutes a violation of the South African constitution as well as of international law.
4. An amendment to the constitution to facilitate expropriation without compensation, read together with other interventions such as BEE, the Mining Charter and central bank nationalisation, would signal to investors that South Africa is on a Zimbabwe trajectory.
5. The motion by the EFF and ANC for expropriation without compensation rests on statistical fiction about land ownership patterns in South Africa, and neglects to acknowledge the extensive and extending spread in land ownership across race groups in South Africa.
6. AfriBusiness will provide free legal aid to the first of its members who becomes a victim of expropriation without compensation due to an amendment of the property rights clause in the Constitution. All members of AfriBusiness, both individuals and companies, will enjoy this protection.

About AfriBusiness

AfriBusiness is an independent business community with more than 12 000 members countrywide. Its mission is to promote and create – in the interest of its members and in the common interest wherever its members do business – a constitutional order, free markets, property rights, prosperity and a favourable business environment. The organisation was founded in 2011.

PART 1

Executive statement

In this submission, AfriBusiness expresses its opposition to an amendment of the Constitution to facilitate expropriation without compensation. It does so on four levels:

1. Constitutionally
    a. The right to private property is fundamental to constitutionalism itself. The corollary to this right is compensation in the event of an expropriation by the state.
    b. Any constitution purporting to allow for expropriation without compensation would seize to observe constitutionalism, and in that respect fail to be a legitimate constitution.
    c. Whether a constitutional amendment for expropriation without compensation is effected by way of a change to the text of the Constitution or by way of a reinterpretation of existing text is irrelevant.
    d. Two crucial foundations of constitutionalism – citizenship and the discharge of the check and balance function by institutions of civil society – require vigilant protection of the right to private property.
    e. Private property provides the oxygen for free, active and politically participating citizens and renders the basis for the autonomous institutions of civil society acting as a check and balance against bad government and on one another, securing (individual) freedom.
    f. A constitution that allowed for expropriation without compensation would revive as an actual constitution only once it regains core constitutional content by safeguarding private property, protecting citizenship and bolstering power dispersal and checks and balances.
2. The International Law Standard of Treatment
    a. The prevailing international law position on the expropriation of property owned by foreign nationals is that the expropriating state is under an obligation to pay compensation.
    b. Expropriation of property without compensation is an act of confiscation. It takes the form of a forfeiture or a penalty, which by nature, cannot attract compensation. Expropriation, on the other hand, is a concept that is always linked to a remedy in the form of the payment of what the property is worth at a certain point in time.
    c. The denial of compensation for expropriated property amounts to a denial of a remedy which constitutes a violation of the South African constitution as well as of international law.
    d. The current political debates in South Africa on expropriation and the payment of compensation seem to oscillate between Soviet-style confiscation and one or other still to be determined sanitized version of confiscation.
    e. Treaties have become the fundamental source of international law in the field of foreign investments.

f. Since some guarantees contained in treaties are based on general state practice they have become part of the general principles of investment law and as such have relevance beyond the life of any individual treaty.
g. Apart from treaties themselves, guarantees may derive from general international law on treaties and on the treatment of foreign nationals under international law.
h. Since the enactment of the 2015 Protection of Investment Act appears to be intended as a step towards the phasing out of bilateral investment treaties in favour of a legislative mechanism, the protective regime of the Act must be scrutinized to assess its comparability with what investors can rely on in terms of an investment treaty or general international law principles. Such an assessment ought to be an integral part of the current constitutional review and public comment process on the issue of expropriation without compensation.
i. Nowhere in the 2015 Protection of Investment Act is there any explicit reference to the payment of compensation. If this was a deliberate omission to provide government with an option to expropriate without compensation, it may constitute a violation of the international minimum standard. Since South Africa has not explicitly denounced this standard, it may face claims based on a legitimate expectation that compensation must be provided for.
j. A reconsideration of the 2015 Protection of Investment Act is inevitable should expropriation without compensation become a reality.

3. Economically
    a. For the first time on record, South Africans invest more abroad than foreigners invest in South Africa, a sure sign of the loss of investor confidence. Other trends, such as in fixed capital formation and balance of payments data, point to similar concerns.
    b. Nationalisation would strengthen current trends of relative increases in state capital formation compared to private sector capital formation, which decreases overall capital quality, and is typically a leading indicator of low growth and stagnation.
    c. Diminishing property rights and making constitutional provisions for greater state control of land will open the door to the same “state-capture” risks of the Zuma administration but on an even grander scale. This would further diminish investment quality in South Africa, causing severe misallocation of capital to serve narrow special interests, perpetuating economic decline.
    d. Economically speaking, the purposes of private property are to incentivise wealth creation, facilitate purposeful economic action and trade, and diminish conflict over resources.
    e. An amendment to the constitution to facilitate expropriation without compensation, read together with other interventions such as BEE, the Mining Charter and central bank nationalisation, would signal to investors that South Africa is on a Zimbabwe trajectory.
    f. To amend the Constitution in such a way as to weaken property rights, give more control and discretion over land and real estate to the state, and make arbitrary state expropriation possible, is to risk sliding South Africa into an economic abyss.

g. Without extensive free market reforms, investors and businesses will have to either continue seeking opportunities to deploy their capital abroad or find ways to 'state-proof' as much as reasonably possible their investments and businesses domestically.

4. Factually
    a. The motion by the EFF and ANC for expropriation without compensation rests on statistical fiction about land ownership patterns in South Africa.
    b. The motion provides three land ownership statistics to justify expropriation without compensation. However, all three statistics are erroneous, which leaves the motion without factual basis.
    c. Under paragraph 3, the motion reads: "The African majority was only confined to 13% of the land in South Africa while whites owned 87% at the end of the apartheid regime in 1994". However, while it is true that land ownership by black, coloured and Indian people were restricted before 1994, and most notably since the 1913 Land Act, the numbers cited are in error. State-owned land, land in the former homelands, self-governing states and development trust land alone in 1994 amounted to 28% of total usable land in South Africa. Furthermore, it should always be borne in mind that the inclusion of the semi-desert, sparsely populated Northern Cape, accounting for some 30% of land area in South Africa, in nationally aggregated statistics completely distorts the picture. It cannot be reasonably said that white people owned 87% of land by 1994.
    d. Under paragraphs 4 and 5, the motion reads: "Only 8% of the land transferred to black people since 1994," (par. 4), and "black people own less than 2% of rural land, and less than 7% of urban land," (par. 5). However, these numbers are far off. According to the best available statistics, black, coloured and Indian people in South Africa currently own approximately 38% of useable land in South Africa, and 27% of agricultural land. Moreover, even according to the Department of Agricultural Development and Land Affairs, black, coloured and Indian people own 46% of yard surface area in towns and cities.
    e. It should be noted that the significant spread in ownership of land across races in recent decades occurred despite government's self-admitted land reform failures. In large part, successful land reform has been the result of restitution (either of land or by compensation), goodwill between persons from different race groups in South Africa, and regular free market purchases and sales.
    f. A constitutional amendment for expropriation without compensation threatens the three sources of successful land reform in the country – restitution, goodwill and the free market. And to add insult to injury, indications are that such constitutional provisions would be used to make the state the owner of land, leading to less black, coloured and Indian land ownership than currently exist.
    g. Any undermining of the property rights of white land owners will come at the expense of the property rights of all other race groups in South Africa as well.

PART 2

The implications of expropriation without compensation for constitutionalism

by Prof. Koos Malan

Professor of Public Law

University of Pretoria

for AfriBusiness

1. Summary

Expropriation without compensation, more correctly, the confiscation of property, is a patent invasion into the basic right to private property. More importantly, it is also an offence against the very foundation of constitutionalism. Even though Parliament may amend the written text of the South African Constitution to allow for expropriation without compensation, such amendment would be constitutionally illegitimate for its offending the very foundation of constitutionalism as such. The same applies for a pro–confiscation interpretation of the present text of the Constitution. Should the present text be interpreted to permit expropriation without compensation, such interpretation, though in conformity with the Constitution, would be an affront to the idea of constitutionalism.

2. The foundation of constitutionalism

Constitutionalism presupposes the pursuit of justice on a grand scale, that is, for the whole of the polity, and more specifically for all individuals and communities within the polity. In this way, constitutionalism is inextricably associated with the pursuit of justice, but this normative commitment – the commitment to justice – is only one side of the constitutional idea. The second element of constitutionalism relates to power: power that has to serve as a rampart that supports the normative – the justice element. Hence the normative element has to be complemented by a real element, which consists in the structures for the suitable allocation and checks on political power, thus to ensure that power is not abused; to ensure that it is exercised for the benefit of the whole instead of degenerating into privateering for the sake of only a segment – either a minority or a majority. The structural element is essential to constitutionalism. Precisely for that reason questions around governmental power – its allocation, exercise, limitation and control – are and have always been essential for constitutionalism.

In the present context the following two prerequisites, both relating to the real element of constitutionalism, are crucial. The first is *citizenship* and the second is the notion of *the dispersal of power and (mutual) checks and balances*.

- Citizenship in the real sense of the word is not viable without the protection of personal property rights, that is, the property rights of individuals and juristic persons; and
- Constitutionalism is founded on the basis of the dispersal of power among the largest possible number of centres of power, more specifically not only the three centres of state power, but the widest range of loci of private, civil and economic power (here in after referred to as institutions of civil society). These loci of power must be strong enough to counter-balance governmental power and strong enough to counter-balance each other, thus to ensure that no locus of power grows so strong that it gains absolute power that would allow it to abuse its power to the detriment of any segment of the populace. Once any locus of power, and specifically the state, is so strong that it can act in an unconstrained fashion, it becomes absolutist. That rings the death knell of constitutionalism. Institutions of civil society constitute loci of power capable of discharging their check and balance function only when they have their own property, which allows to them act autonomously.

Both these crucial foundations of constitutionalism – citizenship and the discharge of the check and balance function by institutions of civil society – require vigilant protection of the right to property.

3. Citizenship

It is important to clarify the meaning of *citizenship*. That requires, amongst other things, that citizenship be distinguished from the concepts of *subject* and *consumer*. The latter two should not be confused with that of citizenship; in reality they stand in opposition to the idea of citizenship.

From the point of view of constitutionalism, it would be most inappropriate to view the populace – also the South African populace – as a collection of subjects. *Subjects* denote a relationship of subordination, inequality and dependence of the populace vis-à-vis government. It is an inappropriate, essentially monarchical concept, which is incompatible with the very notion of republicanism which is the idea on which the South African constitution claims to be premised.

Viewed through the prism of constitutionalism it would be equally inapt to conceive of the South African populace as collection of *consumers*. A consumer is by definition in a commercial relationship in which the identity of buyer, tenant, borrower, or whatever other commercial identity stands at the centre.

In contrast to the above, in pursuance of the very notion of constitutionalism, the appropriate public identity of members of the populace should be that of citizens. Citizenship, unlike the identities of consumer and subject, primarily denotes the ability to participate *independently and on an equal footing* with all other citizens in the joint endeavour to govern the polity in the public good and to the benefit of the citizenship body as a whole, through a process of even-handed rational public discourse and compromising decision-making.

Independent participation of all citizens in the continuous enterprise of government for the public good, is impossible, however, if the people are economically reliant, especially solely reliant on another person or entity, more specifically if people are reliant on the state. When the populace is dependent on the state for their livelihood they are not citizens anymore. Then they are but subordinate subjects and state-dependent

consumers. This is precisely what is occurring when the state (or any other entity) becomes the sole or primary property holder. Precisely that is the effect of schemes such as the confiscation of property. It nullifies the status of citizenship and the ability of active participation in the governance of the polity that goes along with it. Once private property rights are invaded and property is taken away from private property holders people are relegated to dependent consumers of state hand-outs and the status of subordinate subjects, forced to look up to someone or something else – the state – for their livelihoods.

The right to private property is therefore not limited to the realm of private law. It is as significant if not more for constitutional law. It serves as the guarantee for the autonomy of people. A(n) (individual) man of straw without property – without the ability of affording a living – and who has to look someone else in the eye to survive, also does not have the freedom of his / her own views, or, at least, does not have the freedom to openly express their own views. Such person is for all practical purposes devoid of her / his citizenship and degraded to the status of a reliant subject and dependent consumer of state hand-outs. Such powerless, reliant subject and needy consumer can only hope that the state would be willing and able to meet his / her basic needs through the allocation of state sponsored charities in the form of social grants.

True citizenship can be achieved only when the reliant subject status is relieved and if people are in a position to earn the means to become the proprietor of assets. In this way the crucially important *in*dependence, which is a prerequisite for genuine citizenship and accompanying citizen participation in the enterprise of government, can be achieved.

4. Dispersal of power and checks and balances

The notion of the dispersal of power and attendant checks and balances lies at the very core of the constitutional idea. This is particularly also true for South Africa priding itself of a constitutional dispensation that purports to subscribe to the idea of constitutionalism. It is important to emphasise that the dispersal of power is not limited to the traditional idea of the *trias politica* – the threefold separation of power between the legislature, executive and the judiciary. Trias politica, though important, provide but the basic rudiments for a full-fledged system of power dispersal. Dispersal of power goes much broader than trias politica. It includes a rich plethora of power centres of civil society, commercial enterprises and other economic endeavours, cultural and religious endeavours, educational institutions, religious institutions, charity organisations and many more non-governmental organisations and many more institutions of civil society. The need for the dispersal of power among all these centres is a generally accepted prerequisite of sound modern-day constitutional law. In their absence the spectre of absolutism, more specifically of unrestrained governmental power which is by definition an outrage against the very foundation of constitutionalism, looms dangerously large.

The mentioned plethora of institutions of civil society fulfils two important roles.

In the first place they provide the best rampart against absolutism. They act as a counter-balance against absolutism of an excessively powerful, centralised government. Bills of Rights, that seek to protect the rights of individuals against actual and threatened governmental violations of rights, is more often than not of no practical value. Individuals lack the required muscle to take on a powerful rights-infringing government.

Moreover, even if an individual does have the power to sue for the remedying of rights, the courts may rule in favour of government because they share the same ideological convictions. Even if a court does rule in favour of (an) individual/s, orders are not complied with and turn out to be judicial wishes rather than true binding orders. The South African experience of the past decades are swamped of such cases, where the executive and the state administration have proven to be unwilling and / or able to heed to words of the judiciary. Institutions of civil society are the only instruments with sufficient muscle to provide the required check on an infringing state and that can, at the same time, enlist the resources to fill the void left by a faltering state. Institutions of civil society in this way is the only genuine guarantee for the rights and interests of people and for sustaining constitutionalism.

Secondly, institutions of civil society also act as a mutual power balance and check on each other, thus avoiding and / or countering the abuses accompanied by economic monopoly practices in a way similar to how they keep a rights-infringing centralised government in check and/ or fill the gap left by a faltering state.

The private property rights of individuals and of institutions of civil society are an absolute *conditio sine qua non* for fulfilling these check and balance and rights-guaranteeing functions. Institutions of civil society can perform these functions only if they have the material means – the independent proprietary basis – to that end. The institutions of civil society as well as their individual members that constitute their support base must therefore be in a position to accumulate material assets in the form of protected property. The privately owned property of institutions of civil society and their members enable these institutions (and their members) to act autonomously and in that way place them in the position to discharge their responsibility to act as a check and balance against a rights-infringing absolutist government and also to stand in for a faltering state.

Citizenship and autonomous institutions of civil society also mutually imply one another:

- Citizenship – the capacity to participate in the governance of the polity – is reinforced and strengthened when people assemble and act through institutions of civil society, instead of acting individually on their own with much greater difficulty; and
- Institutions of civil society on the other hand cannot be viable without citizens joining these institutions and without them materially contributing towards such institutions, thus enabling these institutions to discharge their check and balance function.

5. Conclusion

Constitutionalism is to a considerable extent premised on the protection of private property rights. Private property provides the oxygen for free, active and politically participating citizens and renders the basis for the autonomous institutions of civil society acting as a check and balance against bad government and on one another, securing (individual) freedom.

Thus viewed preference should be given to promote and expand property rights in order to enable the largest number of people – inhabitants of South Africa in the present case – to become property holders, thus affording them the opportunity to cultivate meaningful citizenship. The plea for property rights does not amount to arguing for the rigid maintenance of existing patterns of asset ownership in South Africa; on the

contrary, it is a plea for the exact opposite, namely to make it possible that the existing patterns can be changed, and more specifically that it can be expanded so that many more people can become property owners. This calls for the exact opposite of expropriation without compensation. It calls for policies that could enable more people to become property owners, and in doing so to become true citizens and active participants in governance and in fending off absolutism through meaningful participation in strong institutions of civil society.

On close analysis the undoing of private property through schemes of confiscation masquerading as expropriation without compensation or other schemes with a similar effect is therefore undermining the very idea of constitutionalism itself. A constitutional dispensation that allows for the confiscation of property or a constitution which in its text allows for the confiscation of property (for expropriation without compensation) ceases to be a real constitution because it reneges on the very notion of constitutionalism. Such constitution continues to be a constitution only in name, but in substance it is a constitution no more. In substance it descends into an instrument of state absolutism and violation of the idea of citizenship and violation of the notion of dispersal of power and checks and balances. It descends into a wicked instrument of rights violation that cannot command respect and which warrants rejection instead of compliance. Being devoid of the genuine core content of constitutionalism and having ceased to be a true constitution, such false constitution forfeits legitimacy and loses the legal (constitutional) basis for the voluntary obedience by the citizenry. It revives as an actual constitution only once it regains core constitutional content by safeguarding private property, protecting citizenship and bolstering power dispersal and checks and balances.

PART 3

Expropriation without compensation and the international law standard of treatment

by Prof. Hennie Strydom
South African Research Chair in International Law
University of Johannesburg
for AfriBusiness

1. Introduction

The views and comments expressed in this part are based on the premise that the prevailing international law position on the expropriation of property owned by foreign nationals is that the expropriating state is under an obligation to pay compensation. This has been confirmed in various arbitral awards and commentaries on the principles of international investment law (see for instance Salacuse *The Law of Investment Treaties* (2010); ditto *The Three Laws of International Investment* (2013). What is also not in dispute is that states may differ as to the method and standard of compensation and different formulations are used in treaties, arbitral awards and national laws. For instance in the *De Sabla* case it was found that the claimant was entitled to the "full value" of the property (1934, 28 *American Journal of International Law* 602, 611 – 602) and in the *Norwegian Claims* case the Permanent Court of Arbitration held that the claimants were entitled to "just compensation … under the municipal law of the United States, as well as under international law" (*The Hague Reports*, 1932, vol 2, at 69). In several bilateral investment treaties the phrase "prompt, adequate and effective compensation is used (see example below).

As far as the protection of national and foreign investments are concerned, South Africa has confirmed the relevance of international law standards (see The Protection of Investment Act below) and has committed itself in bilateral treaties to the payment of compensation in the case of expropriation (see treaty with Finland below as an example). Since these commitments may now be under threat in view of the current plans to provide in law for expropriation without compensation (i.e. confiscation), three counter-movements of the 20th century on expropriation and compensation may be helpful, firstly for investors (national and foreign) to consider the nature and scope of the investment risks they may face in future, and secondly, for government to realize the importance of bringing legal certainty to an area of governance that has become increasingly chaotic and divisive with potentially serious economic and political consequences.

The first, and most notorious, were the large-scale confiscations of property without compensation practiced by the Soviet government after the October Revolution of 1917 under the delusion of the Dictatorship of the Proletariat. In the 1920's with an economy in ruins and desperately seeking international recognition and economic assistance a so-called New Economic Policy was launched which included concessions by the Soviet

government to entertain foreign claims arising out of the confiscation policy following the 1917 revolution (see Salacuse *The Law of Investment Treaties* (2010) at 62, 63). What followed was an intricate web of horse trading between Western countries and the Soviet Union in settling claims and counter-claims for damages caused by either the reckless and ruthless experimenting with communism or the opportunistic intervention by some Western powers in the socio-political crisis following the October revolution.

A second development originated in the Latin American countries through efforts to implement the so-called Calvo doctrine which purported to subject all property-related claims to domestic law only and to exclude the use of diplomatic protection by foreign nationals whose property rights were affected by action taken by the territorial state. This 'national treatment' rule had the effect that foreign nationals who entered into contracts under the Calvo clause with the territorial state could not claim treatment under an international law standard and had to accept treatment equal to the treatment nationals of the territorial state could lawfully claim, no matter how low that level of treatment was. In several arbitral awards handed down between the 1920's and the 1950's the rule was applied that a Calvo-clause contract precluded a foreign national from presenting a claim to his/her government for interpretation or fulfilment of the contract concluded with the territorial state (Salacuse *op cit* 65 -67). In 2002, the International Law Commission, in its Third Report on Diplomatic Protection made it clear that the Calvo clause only applied to contracts between a foreign national and the territorial state containing the clause and not to breaches of international law, especially breaches that constitute a denial of justice (own emphasis). Since compensation is a recognized remedy that must follow an expropriation, the denial of compensation may constitute a denial of justice and even an arbitrary taking of property.

The third, and perhaps most relevant development for current purposes is the post-colonial challenge to customary international law principles on the protection of investments. This took the form of UN General Assembly resolutions in the 1960's and 1970's when developing states sought to use their numerical strength in the Assembly to shape international law of state responsibility to foreign investors in accordance with their own interests. The underlying political agenda was informed by the concept of permanent sovereignty over natural resources by means of which developing states sought recognition of their right to nationalize and re-establish sovereignty over natural resources in their territories without the necessity or adequacy of compensation. Developed states, on the other hand were prepared to accept such a right provided that developing countries remain in compliance with established rules of international law on the payment of compensation. From the 1960's to the mid 1970's 62 developing countries engaged in 875 nationalizations or takeovers of foreign enterprizes which led to a dramatic increase in disputes about the existence and nature of compensation for expropriated property under international law. Soon, the economic and political consequences of the expropriation frenzy had a sobering influence on the aspirations of developing countries under what became known as the New International Economic Order (NIEO). In 1962, the General Assembly adopted resolution 1803 on the issue of permanent sovereignty over natural resources. In para 3 the resolution states in clear terms that foreign capital investments and the earnings on that "shall be governed by the terms thereof, by the national legislation in force and by international law" (own emphasis). In para 4, the resolution states that in the case of nationalization, expropriation or requisitioning "the owner shall be paid appropriate compensation, in accordance with the rules in force in the State… and in accordance with

international law" (own emphasis). Of further significance is para 8, which determines that "[f]oreign investment agreements freely entered into by or between sovereign states shall be observed in good faith" (own emphasis).

Even in the more radical General Assembly resolution 3171 of 1973, developing states did not get rid of the compensation principle, but merely made the amount of compensation and the mode of payment, matters to be determined under national law. The payment of compensation in the case of expropriation became further entrenched in General Assembly resolution 3281 of 1974, known as the Charter of Economic Rights and Duties of States adopted by a vote of 120 in favour, 6 against and 10 abstentions. In article 2(2)(c) the Charter included the payment of "appropriate compensation" in the case of nationalization, expropriation or transfer of ownership of foreign property, albeit prefaced with the precatory 'should'.

The Charter never developed into a binding instrument because its terms, like leaving the payment of compensation entirely to the subjective discretion of the expropriating state coupled with its failure to include other terms and conditions firmly established under customary international law created insurmountable obstacles in finding common ground between developing and developed states. Whatever sentiments have remained, in reality the political and economic counter-movements of the 20th century on these issues have lost steam and are unhelpful in the 21st century given the far greater and increasing economic inter-dependence of states.

The current political debates in South Africa on expropriation and the payment of compensation seem to oscillate between Soviet-style confiscation and one or other still to be determined sanitized version of confiscation. The term 'confiscation' is deliberately used here in view of the fact that expropriation of property without compensation is an act of confiscation, pure and simple. It takes the form of a forfeiture or a penalty, which by nature, cannot attract compensation. Expropriation, on the other hand, is a concept that is always linked to a remedy in the form of the payment of what the property is worth at a certain point in time. Hence, the denial of compensation for expropriated property amounts to a denial of a remedy which constitutes a violation of the South African constitution as well as of international law. In the latter instance, it is worth taking note of the following: "The right to a remedy when rights are violated is itself a right expressly guaranteed by global and regional human rights instruments. Most texts guarantee both the procedural right of effective access to a fair hearing and the substantive right to a remedy" (Shelton *Remedies in International Human Rights Law* 2nd ed (2005) at 114. This explains why the European Court of Human Rights has held that the payment of compensation is a necessary condition for the taking of property by a contracting state (*James v United Kingdom* 98 Eur. Ct. H.R. Series A, 1986).

Since a range of other legal considerations are applicable it is in the interest of legal certainty, which is a corollary of the rule of law, entrenched in section 1 of the South Africa constitution, that any government decision on the legal dispensation that will in future govern expropriation without compensation (sic) is capable of rationally explaining and justifying where government stands with regard to the developments and principles above. Moreover, of specific relevance will be to get clarity on whether the protective principles in the examples below will still apply in the new expropriation dispensation, and if so, to what extent.

2. The Protection of Investment Act 22 of 2015

This Act, which applies to South African as well as foreign nationals, was passed by Parliament and assented to by the President but its promulgation in the Government Gazette is yet to take place, which event will bring it into operation in accordance with section 16 of the Act. The Act also provides that existing investments that were made under bilateral investment treaties will continue to be protected for the period and terms stipulated in the treaties. Moreover, an investment made after the termination of a bilateral investment treaty but before promulgation of the Act, will be governed by general South African law (section 15).

The nature and scope of the protection of investments envisaged by the Act appear from the following:

In the preamble to the Act, which is a tool of legislative interpretation in South African law, Parliament has endorsed the following principles, rights, obligations and objectives:

- The obligation to protect and promote the rights enshrined in the Constitution;
- The importance that investment plays in job creation and economic development;
- That the state is committed to maintaining an open and transparent environment for investment;
- The responsibility of government to provide a sound legislative framework for the protection of all investments, including foreign investments, pursuant to constitutional obligations;
- Securing the balance of rights and obligations of investors to increase investment in the Republic;
- Rights related to access to just administrative action, access to justice, access to information and all other rights set out in the Bill of Rights;
- The obligation to take measures to protect or advance persons, or categories of persons, historically disadvantaged due to discrimination;
- The protection of investments in accordance with the law, administrative justice and access to information;
- The government's right to regulate investments in the public interest in accordance with the law; and
- To ensure, in accordance with international law, that human rights, fundamental freedoms and protection of peoples' resources are adequately protected.

In its substantive part, the Act contains a wide definition of investment and of the assets that will enjoy protection under the Act (section 2). Included are shares, debentures, securities, loans, movable or immovable property, performance under a contract having a financial value, copyrights, intellectual property rights, goodwill, patents, trademarks, profits, dividends, royalties, income yielded by an investment, and rights or concessions to cultivate, extract, or exploit natural resources.

According to section 3, the interpretation and application of the Act will be subject to:

a) The Constitution;

b) The Bill of Rights, according to the interpretation provided for in section 39 of the Constitution, meaning that a court, tribunal or forum must (i) promote the values that underlie and open and

democratic society based on human dignity, equality and freedom; (ii) must consider international law and (iii) may consider foreign law;

c) Customary international law, which is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament (see section 232 of the Constitution);

d) The constitutional duty to prefer any reasonable interpretation of any legislation that is consistent with international law over any other alternative interpretation that is inconsistent with international law (see section 233 of the Constitution); and

e) Any relevant convention or international agreement to which the Republic is or becomes a party.

Section 3 of the Act further invokes the purposes of the Act in section 4 as interpretation aids. These purposes are to:

a) protect investment in accordance with and subject to the Constitution in a manner which balances the public interest and the rights and obligations of investors;

b) affirm the Republic's sovereign right to regulate investments in the public interest; and

c) confirm the Bill of Rights in the Constitution and the laws that apply to all investors and their investments in the Republic.

Other protective measures provided for in the Act are as follows (sections 6, 9 and 10 of the Act):

a) Ensuring that administrative, legislative and judicial processes do not operate in an arbitrary way or denies justice to investors;

b) The availability of administrative review of decisions consistent with section 33 of the Constitution;

c) Right of access to information;

d) The provision of physical security of property owned by foreign investors in accordance with the minimum standards of customary international law and subject to available resources and capacity; and

e) The right to property in terms of section 25 of the Constitution.

The Protection of Investment Act adopts the 'national treatment' standard for the protection of foreign investments. Section 8 reads in this regard as follows:

"Foreign investors and their investments must not be treated less favourably than South African investors in like circumstances".

What is the position if the future national investment protection standard falls below the international minimum standard of protection? Will foreign investors then be entitled to invoke diplomatic protection or is it the position of the South African government that in such instances a Calvo-type doctrine will apply?

'Like circumstances' means the requirements for an overall examination of the merits of the case by taking into account all the terms of a foreign investment. This will include the effect of the investment on the Republic; the sector in which the investments are; the aim of the measure relating to the investment; the effect on third persons and the local community; the effect on employment; and the direct and indirect effect on the environment.

3. Guarantees against expropriation of property without compensation in terms of Bilateral Investment Treaties

By way of example the 1998 Bilateral Investment Treaty between South Africa and Finland is used. This treaty is still in force and according to the Dept of International Relations and Cooperation the South African government has notified the Finnish government of its attention to terminate the treaty in 2019. If the Protection of Investment Act (above) is then in force, the investments of Finnish nationals will then, presumably, fall under the Act. The termination of the treaty seems to be part of a policy decision by the Dept of Trade and Industry to phase out bilateral investment treaties and to replace their guarantees with the guarantees under the 2015 Act. Since the guarantees contained in the treaty are based on general state practice they have become part of the general principles of investment law and as such have relevance beyond the life of any individual treaty.

3.1 General

In this part the term 'property' instead of 'land' is used. The reasons are two-fold. Firstly, because the treaty itself uses a brought definition of "investment" in article 1 which includes a range of assets and property classes; and secondly, it is not clear at this point in time whether land and other kinds of immovable property will be the only asset class that will be subject to expropriation without compensation. The BLF and the EFF have made it clear that all property will be subject to this form of expropriation while other voices have called for the clear circumscription of the kinds of property that may be expropriated without compensation. Currently the position remains fluid which calls for government clarification in the interest of legal certainty.

Apart from the bilateral treaty itself, guarantees may derive from general international law on treaties and on the treatment of foreign nationals under international law. As regards the former, the Vienna Convention on the Law of Treaties is of immediate relevance. As a written agreement between states governed by international law it qualifies as a treaty arrangement under article 2(1)(a) of the Vienna Convention with the concomitant rights and duties provided for under the Convention. Of specific relevance are articles 26 and 27. Article 26 imposes an obligation on the parties to a treaty to give effect to the treaty in good faith while article 27 interdicts a party to a treaty to invoke the provisions of its domestic law as justification for its failure to perform a treaty. Although South Africa is not a party to the Vienna Convention, it has unequivocally accepted that the country considers itself bound by the provisions of the Convention and has made a statement to this effect on the webpage of the Department of International Relations and Cooperation. By giving public notice to the international community of states about its acceptance of the provisions in the Vienna Convention, it has laid the foundation for parties to agreements with South Africa to have a legitimate expectation that South Africa will perform in good faith the terms and conditions of such agreements.

While, in terms of article 62 of the Vienna Convention on the Law of Treaties, a party to a treaty may invoke a fundamental change of circumstances as a ground for lawfully terminating or withdrawing from a treaty, South Africa cannot avail itself of this provision if the fundamental change is the result of a breach by South Africa of an obligation under the treaty. Moreover, in the context of article 62, South Africa will have to prove that the government was an innocent bystander vis-à-vis the fundamental change of circumstances and that such circumstances were not known at the time of the conclusion of the treaty.

Against this general background certain provisions of the bilateral Finland – South Africa agreement needs to be highlighted. Under article 2(2) investors and their investments are entitled to "fair and equitable treatment" and "shall enjoy full protection and security in the territory of the host party". The provision further states that the "host Party shall in no way … by unreasonable and discriminatory measures, impair the management, maintenance, use, enjoyment or disposal of investments by investors of the other Contracting party".

Article 3 contains the well-known 'national treatment' principle. Its effect is that the host party is under an obligation to subject investors of the other party to "treatment no less favourable than that which it accords to investments of its own investors or to investments of investors of any third state". However, if the national treatment standard is lowered (i.e. by legalizing expropriation without compensation) this lowered standard may then equally apply to foreign investors. In such cases, the South African government will be under an obligation to inform the Finnish government in advance about the potential impact of a lowered national standard, or of other factors, on the treatment of Finnish investors under the bilateral agreement. This obligation to inform is a corollary of the good faith obligation in treaty law mentioned above. Another potential remedy in this regard is section 32 of the Constitution which entitles 'any person' to a right of access to information held by the state or a private person "that is required for the exercise or protection of any rights". Read with section 6(3) of the Protection of Investment Act (if an investor can still rely on it) it means that investors, both national and foreign, will be entitled to have access to government-held information in respect of their investments in a timely fashion.

Acutely relevant in the above context is article 5 of the bilateral agreement. This provision states unequivocally that in the case of expropriation or nationalization, or another measure having the same effect, and provided that it is done in the public interest, on a non-discriminatory basis and under due process of law, prompt, adequate and effective compensation shall be paid (own emphasis). The amount of compensation shall be the "fair market value of the investment expropriated at the time immediately before the expropriation or impending expropriation became public knowledge in such a way as to affect the value of the investment". This raises a crucial question about the appropriate time of determining the 'market value' of the property that may become subject to expropriation. Depending on the type of property, current debates may already have a depressing influence on the inherent value of property and in view of the fluidity of the situation a carefully considered property valuation strategy may arise as of right, especially if current debates on the need for the identification and circumscription of property that will be subject to expropriation are taken into account.

3.2 The requirements of 'fair and equitable treatment' and 'full protection and security'

Both these requirements, which often overlap, reflect standard formulations in bilateral investment treaties and need further clarification in view of the general observations above on the essentials of the bilateral investment treaty between Finland and South Africa which may also occur in other bilateral investment treaties entered into by South Africa.

It is now an accepted principle that the 'fair and equitable treatment' of foreign nationals in the territorial state contains entitlements that must be given effect to in accordance with the international human rights obligations of the territorial state. This understanding already became part of the International Law Commission's 1957 report on state responsibility for injuries done to foreign nationals on their territories (UN Doc A/CN.4/106 (1957) 113). At the time the principle of equal treatment was already enshrined in articles 1 and 2 of the 1948 Universal Declaration of Human Rights and which were strengthened by the catalogue of rights in the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966), both of which have been ratified by South Africa. These developments, coupled with UN General Assembly resolution 40/144 (1985) on the human rights of individuals who are not nationals of the country in which they find themselves, has caused the enjoyment by foreign nationals of rights in accordance with domestic law to become subject to the international law obligations of the territorial state.

There is no doubt that the developing standards of treatment derived from international human rights law are increasingly likely to determine the content of the 'fair and equitable treatment' principle referred to above. Further support for this statement is to be found in the judgment of the International Court of Justice in the *Diallo* case where the following was said: "Owing to the substantive development of international law over recent decades in respect of the rights it accords to individuals, the scope *ratione materiae* of diplomatic protection, originally limited to alleged violations of the minimum standard of treatment of aliens, has subsequently widened to include, inter alia, internationally guaranteed human rights" (*Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo*)(Preliminary Objections) ICJ Reports, 2007, 582 para 39).

The 'full protection and security' principle puts an obligation on a state to take measures to protect foreign investors and their investments against any negative effects in the host state (Dolzer & Schreuer *Principles of International Investment Law* 2nd ed (2012) 57. This standard now includes both legal and physical forms of security (Forster "Recovering 'protection and security': the treaty standard's obscure origins, forgotten meaning, and key current significance" in 45(4) *Vanderbilt Journal of Transnational Law* (2012) 1095 at 1107) and it involves a due diligence standard which applies to questions of state responsibility and liability.

An analysis of arbitral jurisprudence shows that the main elements of the 'fair and equitable standard' of treatment are focused on the following duties of the territorial state (Kläger "Fair and equitable treatment" in *International Investment Law* (2011) 116 – 119; Schefer *International Investment Law: Text, Cases and Materials* (2013) 188 – 189, ch 5):

- Promises and undertakings made by the territorial state, and upon which the investor has relied, must be honoured since they create legitimate expectations on the part of the investor;
- Treatment of a foreign investor must be non-discriminatory and non-arbitrary;
- Judicial and administrative procedures must follow due process and allow for access to a remedy;
- The legal framework and procedures of the territorial state must be transparent and clear as to what is expected of the investor;
- State measures affecting the investment must be reasonable and rationally linked to their objective and not disproportionately burdensome to the investor; and
- Where compensation is due, it must be paid promptly, adequately and effectively.

With regard to the compensation issue it must be pointed out that the payment of compensation is one of the conditions of an expropriation which must be in conformity with a state's international obligations (Marboe "Restitution, damages and compensation" in Bungenberg, Griebel, Hobe & Reinisch (eds) *International Investment Law* (2015) 1033). This legal position was also confirmed by the SADC Tribunal in the *Campbell* case which dealt with the expropriation of land belonging to mainly white farmers by the Zimbabwean government without the payment of compensation. In this matter the Tribunal held that in international law, the expropriating state has the duty to compensate and that the exclusion of compensation in the Zimbabwean constitution by means of a 2005 amendment, was contrary to the clear legal position in international law (*Mike Campbell and Others v Republic of Zimbabwe*, SADC (T) Case no 2/2207, 48 (3) ILM (2009) 534 at 547.

4. Conclusion

Investment risk associated with a lack of legal assurances and effective protection of investments in certain host countries, is the main reason for the enhanced treatification of international investment law since the second half of the previous century. This has taken the form of bilateral as well as multilateral investment arrangements between states providing protection for individual investors. The consequence of this shift is that treaties have become the fundamental source of international law in the field of foreign investments. These treaties have brought discipline to host country treatment of foreign investors by obligating them to grant investors full protection and security, fair and equitable treatment and protection against arbitrary treatment and expropriation without adequate compensation (Salacuse *op cit* 2010, 79).

Thus, if the enactment of the 2015 Protection of Investment Act is indeed intended as a step towards the phasing out of bilateral investment treaties in favour of a legislative mechanism, the protective regime of the Act must be scrutinized to assess its comparability with what investors can rely on in terms of an investment treaty or general international law principles. Such an assessment ought to be an integral part of the current constitutional review and public comment process on the issue of expropriation without compensation. With that in mind the following aspects need government's attention and clarification:

- Nowhere in the Act is there any explicit reference to the payment of compensation. If this was a deliberate omission to provide government with an option to expropriate without compensation, it may constitute a violation of the international minimum standard. Since South Africa has not

explicitly denounced this standard, it may face claims based on a legitimate expectation that compensation must be provided for (see also section 6 of the Act);

- In the preamble to the Act, government has committed itself to respect international law and to ensure that human rights, fundamental freedoms and protection of peoples' resources are adequately protected. This commitment is strengthened by section 4(c) which states that the purpose of the Act is to "confirm the Bill of Rights in the Constitution and the laws that apply to all investors and their investments in the Republic". Apart from providing a basis for potential claims under the Bill of Rights, there is also the question whether the reference to "laws that apply to all investors…" includes international investment law on the payment of compensation? Furthermore, by committing itself to provide "adequate protection", government needs to explain, should it decide to expropriate without expropriation, why the taking of property without compensation is not a violation of the "adequate protection" standard.
- Finally, the above issues, among others, illustrate that a reconsideration of the Act is inevitable should expropriation without compensation become a reality. Regardless of how government is going to revise investors' legal rights the potential for investor – state conflicts over the interpretation and implementation of the applicable legal regime is significant, especially given the potentially ruinous consequences for an investor of an expropriation without compensation. The resolution of such disputes by means of litigation or other national or international means of dispute resolution usually ends in settlements or awards that have their own political, economic, cost, service delivery and governance implications, which may, at some point or another, eclipse the benefits of the expropriation.

PART 4

The economics of expropriation

by Russell Lamberti

Strategist, ETM Macro Advisers

for AfriBusiness

1. Introduction

The recent land expropriation without compensation (EWC) motion in parliament and subsequent heated national debate over the land issue comes at a time when South Africa can least afford to play fast and loose with investor confidence.

If parliament amends the Constitution in such a way as to weaken property rights, give more control and discretion over land and real estate to the state, and make arbitrary state expropriation possible, then South Africa risks sliding into an economic abyss.

2. The Purpose & Benefit of Private Property

The following points summarise the reason why threatening property rights and the security of property tenure is so dangerous:

- Private property incentivises wealth creation
- Private property facilitates purposeful economic action and trade
- Private property diminishes conflict over resources

These three elements are absolutely crucial to economic development, economic progress, and poverty alleviation.

Private property gives us the security that what we work for will be to our benefit and will not be taken away from us. This incentivises us to invest our time, talent and resources into creating valuable products and services that we can trade with others in return for their valuable things. This allows people to build wealth.

Having a domain of exclusive control over something is precisely what private property recognises. Without clearly delineated private property, no one is certain who may justly use, control and trade with resources. Economic action is confused, retarded and fraught with conflict. Conflict arises over scarce resources when ownership is not delineated and respected. The incentive to produce and trade diminishes, and the result is that productivity plummets and people create less wealth than they would otherwise.

Poverty becomes inescapable.

The state may try to claim ownership of all property and promise to mitigate conflict as a sort of “final arbiter”. But since the allocation of control of property would still be arbitrary and based on political favours

and cronyism, bureaucratically complex, and be subject to the whims of the political leaders of the day, it would retard purposeful economic activity and reduce incentives to produce value.

And even if the state did not try to tell everyone what to do with every piece of property, if it still retained effective legal ownership of all property then it could arbitrarily deprive people of their possessions whenever it liked or dictate how others may use property. This lack of security of and control over property would deter productive private investment and reduce wealth creation.

Private property in land allows people to have exclusive control over parcels of space to facilitate valuable economic production, consumption, dwelling and trade in land. If land tenure is uncertain, people would be less willing to invest their time, talents and resources in using it to produce value, to improve living conditions, or trade for other economic goods and services.

Placing land under state ownership or allowing the state to arbitrarily deprive people of land – like in the case with property in general – would destroy productivity on land and decimate wealth creation.

3. Dying Investment

The first mechanism through which this would happen is a curtailing of capital investment. Capital investment is the transformation of savings into productive, useful capital that is ultimately used to produce consumer goods.

Consider that investors channel voluntary savings into productive capital. Greater capital accumulation leads to more employment and higher productivity, which leads to higher pay and more and cheaper products, raising average real living standards. The path of nations who become rich is paved with savings, investment, more productivity, more savings, more investment, and so on.

As impoverished people gain employment, raise their incomes, and manage to grow their savings, so they too become investors. Indeed, anyone with savings in a pension or provident fund or invested in a family member's business or even money in a fixed bank deposit is an investor and can begin to benefit from this wealth creation process. Even consumers with no savings benefit from this wealth, since more productivity means lower prices, rising wages, and rising real living standards (think of how even impoverished people today can still own and use a cell phone to communicate!).

This process rests fundamentally on secure, demarcated, non-arbitrary, just property rights.

It is quite another matter when state policies undermine and discourage investment attractiveness for investors whose capital is a source of business and product creation, jobs, and prosperity.

In the same week that the land expropriation motion sailed through parliament, factions within the ANC and EFF began advocating for nationalisation of the central bank. Shortly after that, the new mining minister, Gwede Mantashe, backed away from expectations that he would take a more sensible stance on the draconian Mining Charter and sector BEE rules.

All these proposed measures could threaten the security of private property. Land expropriation endangers the security of land tenure. Central bank nationalisation could be used by the state to print money and

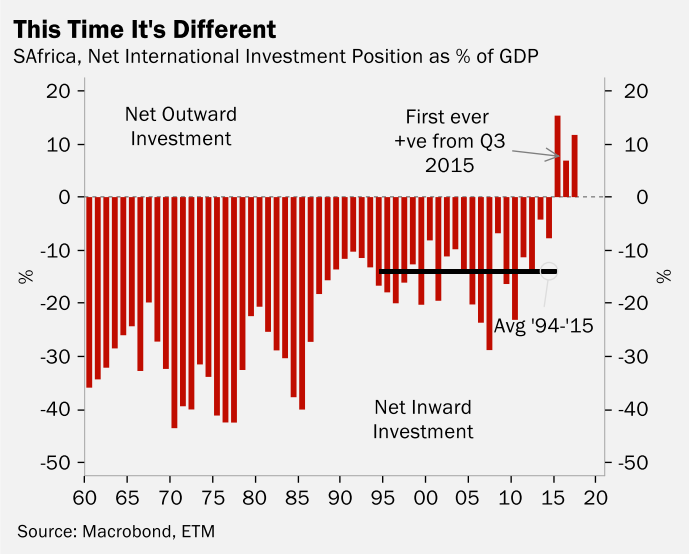
produce more inflation, robbing people of the value of their money savings. The mining charter and BEE codes strip asset owners of control of their assets, diminishing their effective ownership.

Consider how these developments affect the expectations and plans of investors. These are shades of precisely what happened in Zimbabwe, and while South Africa remains some way off Zimbabwe's total institutional political decay, it is troubling that the governing elites see moving closer to the Zimbabwe model, not further away from it, as a viable policy trajectory. It is also no surprise that investors, local and foreign, would remain sceptical and extremely cautious about investing in South Africa given the portents of what have historically proven to be very detrimental policies in other countries.

4. Investment Trends

It is not just that South Africa is risking scaring off investment capital. It is doing so after a decade already of discouraging investment, and two decades of slowly rendering the SA economy profoundly unproductive – like playing with matches on a pile of dry sticks.

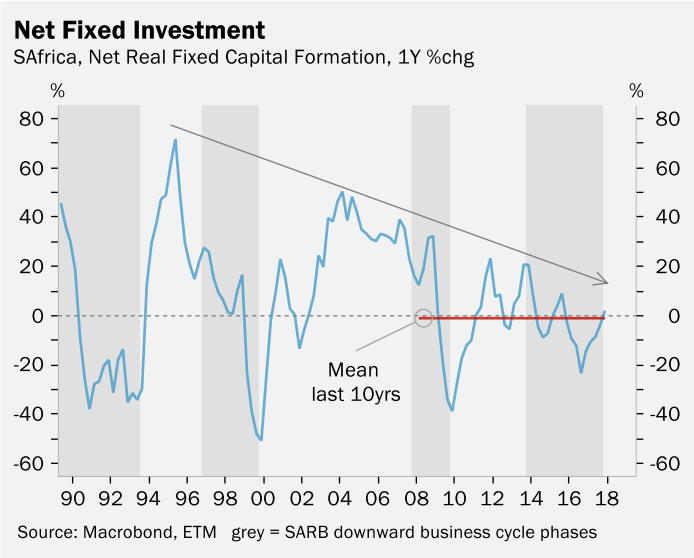
Already, for the first time on record, South Africans invest more abroad than foreigners invest in South Africa, a sure sign of the loss of investor confidence during the Zuma era (chart below). The near-25% of GDP swing in the net international investment position from the 1994-2015 average to levels today represents a R1.2 trillion swing in net assets held. Although this can partly represent a change in existing asset ownership, it also represents a significant decline in inward capital investment and a substantial rise in outward capital investment as locals choose to allocate their savings where it will be better protected. This represents a loss of confidence in the management of the country.



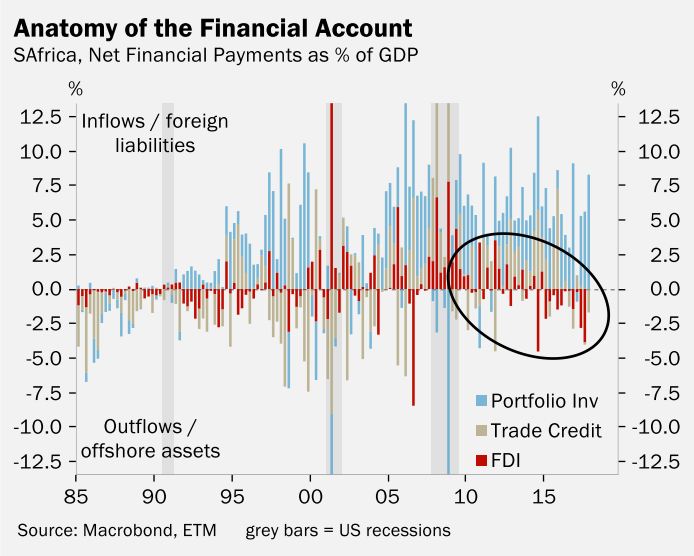
Meanwhile, the level of new fixed capital formation, adjusted for inflation and net of capital depreciation, has stagnated for the past decade, according to Stats SA and SA Reserve Bank (SARB) estimates. This doesn't mean that the stock of capital has stagnated, but that the additional amount of net new capital formation in the domestic economy has, indicating the *net growth in the overall stock of capital is decelerating*. Although

this is undoubtedly better than the stock of capital *decreasing*, it nonetheless means that productivity, wage, and overall economic growth potential is steadily falling.

With high unemployment levels and persistent poverty, these investment trends represent a chronic and severe crisis.



We can also see the lack of investor confidence in the balance of payments data for flows on the financial account. In the chart below, notice how net foreign direct investment (FDI, red bars) moved steadily negative over the past ten years. This again shows less inward investment by foreigners and more outward investment by locals.



5. Investment Quality as Important as Quantity

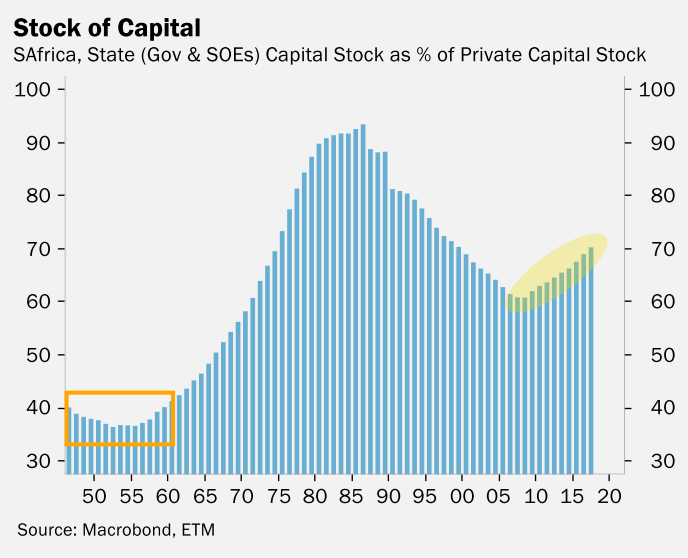
But it's not just the *quantity* of investment that has suffered under a regime of policy uncertainty and rising state economic control.

South Africa is also suffering from a lack of capital *quality*.

Financial account net flows have in recent years been almost exclusively portfolio inflows (blue bars in the chart above), which overwhelmingly corresponds to the buying of domestic government bonds by locals and foreigners to fund extremely unproductive government debt.

Also, since around 2006, a rising proportion of the capital stock and gross new real investment comes from the less efficient, poorly incentivised, and generally corrupt public sector, including the poorly managed state-owned enterprises.

In the chart below, periods of high economic growth followed falling, or low state-owned capital stock relative to privately-owned capital stock. Periods of high and rising state capital stock relative to private capital stock preceded low growth and stagnation. Present levels of state capital stock relative to private capital stock are roughly double today what they were at the start of the 1960s and have been rising for over a decade.



Furthermore, one can make a case that undue and heavy-handed influence by the state has increasingly impaired the private capital stock. As the size of the state has grown in the past 10-15 years and its regulatory tentacles have spread, so more and more private capital is being allocated according to political or non-market rather than market ends.

These trends clearly show a decline in the quality of investment, which is another way of saying that savings are not being efficiently allocated and sufficiently transformed into wealth creation.

The overall picture we see is undoubtedly one of a chronic loss of investor confidence, and a lack of new private sector capital investment specifically, whether by foreign investors or local.

It is rather astonishing then that the South African government should be thinking about weakening private property rights through EWC and deepening socialist policies. These policies have already proven for the past decade or more to be wholly unconducive to investment and therefore productivity, employment and all the

downstream developmental benefits. Weakening property rights has also proven disastrous wherever it states have attempted it, such as in the Soviet Union, present-day Venezuela, late-90s/early-2000s Zimbabwe, and indeed in post-colonial India, much of Asia in the 20th Century, and much of Africa even to this day.

Investment quality also declines through corruption and cronyism, which creates opportunities for unproductive 'investors'.

The appeal to placate "investor confidence" is often met with frustration by those who believe sovereign nation-states should not be beholden to the wielders of savings capital. Indeed, when investors are placed at the front of the queue unduly through unfair legal privilege and to the detriment of ordinary citizens, a society does well to question the useful role of such investors. In such cases, people should demand domestic reforms that may jeopardise the plans of vested special interests to the benefit of society as a whole.

The "state capture" debacle under the Zuma administration has arguably demonstrated this issue well in recent years. The state granted privileged investors access to abuse public funds. The SAA and Eskom travails also reveal the damage of investor privilege. In the case of state-owned enterprises, the privileged investor is the state which gets to force unwilling taxpayers to keep throwing money down financial black holes. There was even, under the Zuma administration, the threat of committing vast amounts of public finances to Russian-led nuclear plant development, which threatened to tie taxpayers into endless obligations to another set of privileged investors for uncertain benefits. Even the new Ramaphosa administration has moved to give privileges to renewable energy investors, again with possible future implications for taxpayers and uncertain benefits. BEE beneficiaries too are a privileged class of investor that obtain preferential access to corporate shareholding and state projects with questionable economic rationale.

These are precisely the kind of investors to be wary of, and it is right that their benefit should not come at the expense of taxpayers, private property rights, citizens' rights, and other fundamental freedoms and requirements of justice.

Diminishing property rights and making Constitutional provisions for greater state control of land will open the door to the same "state-capture" risks of the Zuma administration but on an even grander scale. Favoured investors could be granted favoured land to perpetuate and deepen lines of political patronage. The potential scope for corruption, nepotism, and the creation of a narrow, land-owning and controlling political elite would be vast.

This would further diminish investment quality in South Africa, causing severe misallocation of capital to serve narrow special interests, perpetuating economic decline.

6. What Lies Ahead?

Changing the Constitution to weaken property rights, give the state more discretion to decide what to do with private property, and allowing for land expropriation without compensation, would very likely be an economic disaster.

South Africa's relative investment stagnation is not irreversible. However, an improvement in the environment for investors would require policies that lead to smaller, less intrusive, less indebted government, less onerous regulations, land restitution with stronger property rights, monetary policy soundness, and integrity of state institutions.

It would also require Herculean efforts on the part of the government to reduce state corruption and the wanton plunder of public funds.

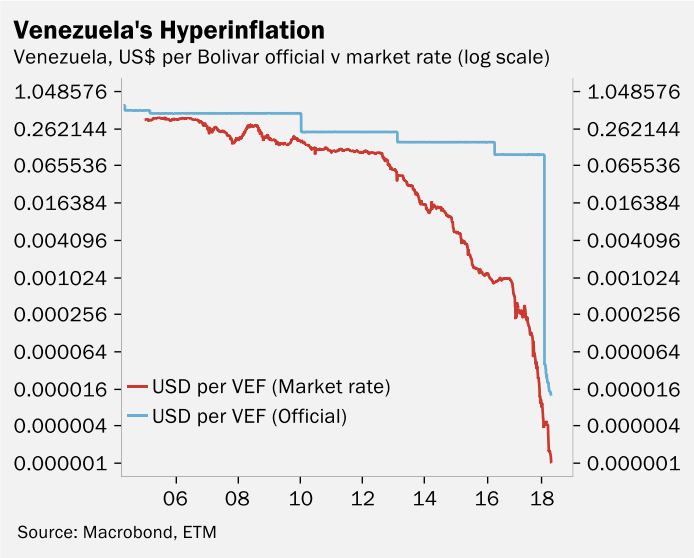
Without reforms of this nature, investors and businesses will have to either continue seeking opportunities to deploy their capital abroad or find ways to 'state-proof' as much as reasonably possible their investments and businesses domestically.

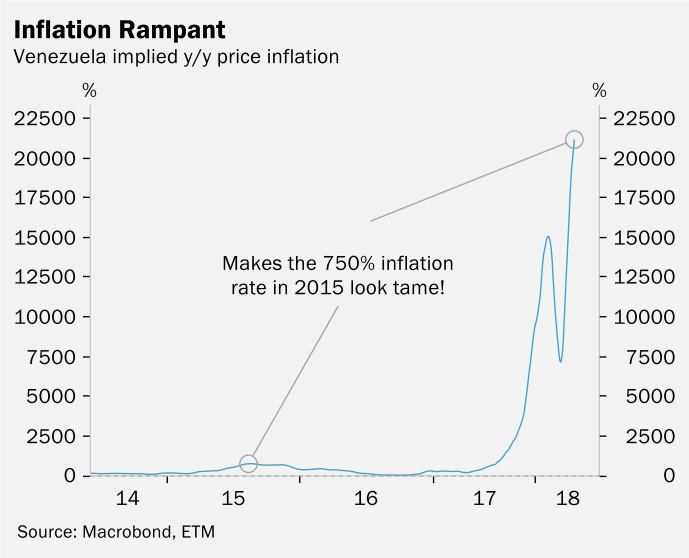
If the ruling elites continue to press toward undermining property rights and replicating policies tried in dozens of hopelessly and tragically failed states, the results shall be predictably dire, not only for investors and businesses but especially for poor, uneducated South Africans.

In the latest such experiment in disregarding property rights, nationalising mining, and corrupting the central bank, we have seen the almost total economic and social collapse of Venezuela.

Venezuela's currency, the bolivar, could acquire a quarter of a US dollar - 25¢ - a decade ago. Today it can only purchase *1-millionth* of a US dollar, or 0.0001¢, due to rampant monetary corruption and printing which is causing hyperinflation and impoverishment.

Venezuela's annual inflation rate is currently running along at a staggering 21,000%.





New SA president, Cyril Ramaphosa, seems to possess a degree of understanding of the need to court back foreign investors to SA shores. This is why he assembled a team of business and political leaders to conduct a roadshow to promote South Africa as an investment destination. Since astute foreign investors are not unaware of South Africa and its hostile policy environment, this roadshow was presumably about providing inside information about specific projects and political assurances to investors. But if this process were genuinely open and transparent and about creating a conducive environment for investment generally, could this information not have been shared at far less expense in op-ed pieces or adverts placed in popular newspaper publications? Could the president not have held a single press conference in which he announced to the world the change in policy direction to reaffirm and even strengthen property rights?

It is therefore hard to see this roadshow as anything other than an attempt to court a new class of privileged investor to reap unfair rewards at the expense of ordinary South Africans and deliver narrow economic benefits or none at all.

Perhaps this assessment is too cynical. Maybe the Ramaphosa administration indeed wants to make South Africa “open for business” as president Zuma so often liked to pretend on his overseas trips. If this is the case, then it is going to have to show its strong commitment to keeping the central bank out of the hands of the political populists and money-grubbers, actively reduce BEE and labour regulations, and fight for a process of just land restitution that does not weaken but strengthens property rights. If Ramaphosa and his appointees can do these things and at the same time decentralise bureaucratic authority and political decision-making, then his administration will achieve what many sceptics think nearly impossible.

Whether the South African government can turn away from endemic corruption, socialist-style policies, and undermining property rights toward encouraging lots of high-quality capital investment, remains to be seen. But it is a most paramount and urgent undertaking.

PART 5

Amendment of article 25 of the Constitution: Motion of Mr J.S. Malema in Parliament – 27 February 2018

by Johann Bornman

AgriDevelopment Solutions

for AfriBusiness (18/02/2018)

The content of the motion, as presented to Parliament by Mr. Julius Malema in terms of the amendment of Article 25 of the Constitution regarding land expropriation, deserves commentary regarding the information as per points 3, 4 and 5. Because the sources of the information are unclear, just the following:

i) Under point 3, the statement is made: "the African majority was only confined to 13% of the land in South Africa, while whites owned 87% at the end of the apartheid regime in 1994". The Department of Agriculture's 1993 Agricultural Census indicates Developing Agriculture in former Homelands covers 17,1 million ha or 13,9% of the total South African surface. Should unusable land such as mountains and rivers be left out of the equation, the area amounts to 15%.

In 1994 the following land surfaces were transferred to people of colour, as well as the government:

"State land"	13,8 million ha
"TBVC-state, self-governing and development trust land"	18,0 million ha
Total	31,8 million ha

(Source: ADS, Agri SA and Farmer's Weekly *land audit, 2017.)*

This land area makes out 28% of the total usable surface in South Africa.

ii) Under point 4: "... only 8% of the land transferred to black people since 1994..." and 5: "... black people own less than 2% of rural land, and less than 7% of urban land..." the following:

The information can simply not be accepted as correct. Even the orders of magnitude in the motion under points 3 and 4 indicate bigger surfaces.

Based on the information as contained in the **ADS, Agri SA and *Farmer's Weekly*** land audit of November 2017, the surface in possession of people of colour amounts to 38% of usable surface in South Africa. In terms of agricultural land: 26,7%.

According to the land audit report by the Department of Agricultural Development and Land Affairs of November 2017, people of colour own 46% of the yard surface in towns and cities.

(Table 10: Individuals' erven land ownership by race in hectares. Page 12 of the report.)

This is a substantial difference from the information as presented by Mr. Malema.

It is unfortunate that the information to Parliament is being skewly presented.

PART 6

AfriBusiness's position on private property and expropriation without compensation

1. AfriBusiness supports private property rights and free markets as matters of justice and in the interest of the well-being of everyone in South Africa.
2. AfriBusiness is opposed to an amendment of the constitution to allow for expropriation without compensation, regardless of whether such amendment is achieved by way of an alteration
    a. to the text of the constitution; or
    b. to the interpretation of the constitution.
3. AfriBusiness generally supports transfers of land that occur as part of
    a. Land restitution (the return of rights in land to persons from whom such rights had been unjustly deprived since the 1913 Land Act, or proper compensation in the alternative)
    b. The free market (buying, selling, donating, bequeathing and other transfers between mutually agreed partners)
    c. Voluntary empowerment projects (in which owners of land encourage employee and community participation in the management and ownership on mutually acceptable terms)
4. AfriBusiness generally opposes transfers of land that occur as part of
    a. Redistribution (the confiscation, expropriation or purchase of land previously held by rightful owners in order to transfer such land to preferred recipients of the state on a discretionary basis)
    b. Nationalisation (when the state expropriates land to become its new owner)
    c. Custodianship (when the state takes control of property away from an owner, but, under a convenient legal construction, does not become the official owner, but rather its custodian)
5. AfriBusiness warns that expropriation without compensation, regardless of whether it is performed under an altered constitutional text or alternative interpretation of the current text, would lead to great personal, economic and public harm.
6. AfriBusiness objects to the statistical errors on which the motion for a constitutional amendment to facilitate expropriation without compensation rests.

7. AfriBusiness considers it important to oppose expropriation without compensation firmly and will not be soothed by assurances from politicians in the absence of deep policy reform.
8. AfriBusiness undertakes to support private property rights and free markets in the interest of its members, the economy in general and a vibrant civil society and constitutional order.
9. AfriBusiness will provide free legal aid to the first of its members who becomes a victim of expropriation without compensation due to an amendment of the property rights clause in the Constitution. All members of AfriBusiness, both individuals and companies, will enjoy this protection.

4.5 Addendum 5: On the relationship between economics and constitutionalism

Piet le Roux, CEO, Sakeliga

The problem with South Africa's debate about expropriation without compensation is that its Parliament got the question wrong.

At first glance, what is debated is whether the Constitution should be amended to facilitate expropriation without compensation. However, this superficial question obscures a much more fundamental issue.

Sakeliga submits that what is really in question is the constitutionality of the South African Constitution. Understanding this is essential for two reasons: First, for resolving the debate in an acceptable way. Second, for developing the ethical and moral foundation upon which, should the proposed amendment take place, civil society's unremitting refusal to accept that state of affairs, and its efforts to restore a constitutional order, can rest.

Constitutions and the market

Sakeliga is a business organisation, with more than 12 000 members concentrated in small and medium size enterprises. We advance our members' interests and the common interest wherever our members do business. This means that we promote free markets. In market transactions both parties gain something, so that the sum of co-operation is greater than its parts. This is the much neglected nature of economic growth.

However, markets, as the respected post-war Austrian economist, Wilhelm Röpke, reminded us, do not exist in a vacuum: "the market economy is a form of economic order that is correlated to a concept of life and a socio-moral pattern [and it] can thrive only as part of and surrounded by a [constitutionally-oriented] social order."

Röpke's setting of the market – which in this context we shall call a constitutional order – is the subject of our presentation.

Understanding the question

In order to answer the question, whether the Constitution should be amended to facilitate expropriation without compensation, we should seek first to understand it. The question has two constituent parts: a) what is a constitution, and b) what is expropriation without compensation?

a) What is a constitution?

On the face of it and in our present context, a constitution is the foundational legal text of a state, in this case South Africa, as adopted and amended from time to time according to applicable procedure. But scratch under the surface, and the issue becomes murkier. Almost at once it should be asked whether it is sufficient for the legitimacy of a constitution simply that it passes formal requirements such as consultation, deliberation, and referendum, or are carried by a stipulated majority in a legislative body such as a parliament. And not far in its stead is the question whether public opinion alone can ever be justification enough for a constitutional amendment. To answer yes to questions such as these would be essentially to assert that constitutions can have arbitrary content; that their legitimacy is simply a question of administrative criteria. The evidently tyrannical implications of such a formalistic conception of constitutions should be enough to dissuade quickly reasonable people of its merits.

Contrary to the arbitrary conception of constitutions Sakeliga submits that there are fundamental requirements of content to which any constitution must adhere, for it to be a true constitution.

While constitutions the world over vary considerably, they are not arbitrary documents. As legal scholar Professor Koos Malan argues for Sakeliga in our submission, a constitution is only a legitimate foundational legal text if it complies with the fundamental requirements of something called *constitutionalism*: the proper structuring of political power in the pursuit of justice for the whole of a polity.

Constitutionalism rests, writes Malan, in the present context upon two crucial foundations.

The first is citizenship: a legal text, for it to be a constitution, must allow people the "ability to participate *independently and on an equal footing* with all other citizens in the joint endeavour to govern the polity ..."

The second is dispersal of power: If it wants to be more than mere decree, a constitution must further a dispersal of power. Writes Malan: "Dispersal of power goes much broader than *trias politica*. It includes a rich plethora of power centres of civil society […] . The need for the dispersal of power among all these centres is a generally accepted prerequisite of sound modern-day constitutional law. In their absence the spectre of absolutism, more specifically of unrestrained governmental power which is by definition an outrage against the very foundation of constitutionalism, looms dangerously large."

Importantly, as Malan also stresses, the requirements of constitutionalism are applicable not only to amendments of a constitutional text, but equally to constitutional changes effected through interpretation by the courts.

b) What is expropriation without compensation?

Expropriation, legally speaking, is a concept that is always linked to a remedy in the form of payment for what a property is worth at a certain point in time. Since the question before this Committee is decidedly about takings not accompanied by compensation, the question is raised whether what is considered should carry the name of expropriation at all.

In fact, the term expropriation is mistaken. The correct term, when a taking constitutes an act with zero compensation, is confiscation, as argued by Professors Koos Malan and Hennie Strydom in Sakeliga's written submission.

It follows, and is important to point out, that in so far as any act of expropriation is with compensation, but below market value, that shortfall also constitutes a confiscation, albeit a partial one.

The real question

Which brings me to the real question: we are really dealing with a different question here than the one ostensibly before us. In practice, the question asked of this Committee is not whether the constitution should be amended to facilitate expropriation without compensation. The fundamental question is: *Can* the Constitution be amended to allow for *confiscation*?

Put differently, is it possible for the Constitution to be amended to allow for confiscation *and* remain a legitimate constitution, or will it lose legitimacy despite maintaining constitutional form, because the document is in violation of constitutionalism itself? In order to recommend the amendment in question, the Committee would have to answer this question in the affirmative.

Sakeliga submits that the correct answer must be in the negative. The reason is that confiscation in the sense contemplated by Parliament is an affront to the very idea of constitutionalism. Amending the Constitution to facilitate confiscation would jeopardise the material basis on which citizenship and the dispersal of power – two essential attributes

of constitutionalism – rests. For elaboration on these points, I refer you to Malan's chapter in our submission.

Regrettable consequences either way

The Constitutional Review Committee finds itself in a quagmire. The correct recommendation to Parliament is that the text of the Constitution not only should not, but in fact cannot, be amended to facilitate confiscation (or what is called expropriation without compensation). Not if you want to maintain constitutionality itself.

Still, let us contrast some of the consequences to recommendations either way.

Consequences if the committee recommends against confiscation

It is a stark fact of recent months that unreasonable, radical expectations about land redistribution have been generated in public debate. Not least through the 34 public hearings held by this Committee across the country. And not least through the actions of President Cyril Ramaphosa himself, when he repeatedly assured the public that expropriation without compensation (confiscation) will be implemented.

Recommending that the Constitution should not be amended because it will be fundamentally unconstitutional to legitimise confiscations would disappoint these radical expectations and lead to a backlash. Yet, there is no way around it, and it is a backlash that should be faced the sooner the better, for it will only grow more difficult with time.

This is not to say that there are not more or less desirable patterns of ownership, and that matters of justice (rather than the ideological idea of equality) do not necessitate reform. The answer here is to persist with the long and hard way, if though with more urgency and competency.

Examples of justified land reform include:

- The existing land restitution programme, which is about restoring land or offering compensation to those previous owners of land who were unjustly, with or without compensation, deprived of their land;
- Mutual goodwill between members of the public, exemplified in the testimonies of farmers of different race groups at the agricultural conference at Bela-Bela in August this year, about how they were working together and helping each other of own accord;
- Free market land reform, which simply means the buying and selling of land across race groups and communities, and which has been happening extensively with both urban and agricultural land;
- Formalising and providing title deeds for property owned in all but name, mostly by black people in townships and informal settlements; and
- The privatisation of state land.

Consequences if the Committee recommends in favour of confiscation

There is an emerging consensus among local and international commentators that the similarities between South Africa and Zimbabwe are steadily becoming more than the differences.

Thankfully, there still are many dissimilarities, but should this Committee recommend a change to the constitutional text to allow for confiscation, it will facilitate this consolidation of local and international consensus among commentators, business people and concerned citizens: South Africa is on the road to Zimbabwe. Not there yet but committed to repeating the same mistakes.

In this case it will be incumbent upon all constitutionally-minded people to put their full effort, as never before, behind the restoration of constitutionalism and in opposition to those who undermine constitutionalism. While ethically and morally necessary, it will lead to great tension between the various communities in South Africa, because the actions in defence of constitutionalism will be made suspect and attacked in racial terms. As a business organisation, Sakeliga will act to play the greatest role it possibly can to restore the foundations to order and prosperity in the country, as well as harmonious relationships between different communities.

Conclusion

Sakeliga submits that the Constitution cannot be amended to facilitate confiscation as contemplated and remain a true constitution. It will lose its legitimacy in so far as it is so amended and will regain that only after such an amendment is undone.

I should point out that there are those who argue that the current constitutional text needs no amendment and can simply be interpreted to allow for confiscation. Our argument still holds: such a *de facto* amendment, even if it were eventually to be endorsed by the South African Constitutional Court, would jeopardise the constitutionality of the South African state just as much as a *de jure* introduction of confiscation. I hesitate to say, but should this Committee insist on recommending an amendment to the constitution, then perhaps it

should take this form: that any current ambiguity in section 25 of the Constitution about property rights be rectified to make it explicit that confiscations are unacceptable.

Sakeliga realises the difficult position this Committee is in: fundamentally, it must make a recommendation on whether the Constitution should maintain its constitutional character, or whether it should lose it. Whether South Africa should have a constitutional order, or not.

Without a constitutional order the market economy cannot exist, and without a market economy there is no prospect for South Africa as place where people can thrive. As Röpke elaborated: “The real role of property cannot be understood unless we see it as one of the most important examples of something of much wider significance.”

That much wider significance – the constitutionality of our social order itself – is what is at stake in this matter.