SAKELIGA
SELFSTANDIGE SAKEGEMEENSKAP

28 February 2020

To: THE AD HOC COMMITTEE ON THE AMENDMENT OF SECTION 25 OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996
For attention: Mr V Ramaano
By email: section25@parliament.gov.za

RE: OBJECTION TO THE AMENDMENT OF SECTION 25 OF THE CONSTITUTION AS ENVISIONED IN THE DRAFT CONSTITUTION EIGHTEENTH AMENDMENT BILL

The following comment has been prepared following a request for comment by the Ad Hoc Committee to Initiate and Introduce Legislation Amending Section 25 of the Constitution (the Committee hereafter).

Outline of Contents

Executive Statement and Recommendation

In this submission, Sakeliga objects to the Draft Constitutional Amendment Bill. The objection is based on a rejection of the premise of the Bill and therefor to the Bill in its entirety. As such no alternations to the proposed wording is suggested.

Sakeliga comments on the Bill by way of five points. These points are substantiated in annexures A through D, which include expert contributions on constitutionalism, international law, economics and the relation between economics and constitutionalism.

1. **Constitutions are always subject to constitutionalism itself**: The Constitution of South Africa was enacted by Parliament as the country's foundational legislation. Proper procedure, while important, is only one requirement for amendments to the Constitution's text to be valid. Another essential requirement is that amendments must be in accordance with the deeper principles of constitutionalism itself, such as respect for private property as a cornerstone of civil society. Put differently, Constitutions cannot be amended arbitrarily, as if anything is possible as long as proper procedure is followed and a majority in Parliament votes for it – such a situation would imply tyranny. Constitutions that are amended such that they violate the principles of constitutionalism loses to this extent their legitimacy and regains legitimacy only after constitutionalism is restored.
2. **Expropriation without compensation is confiscation**: For a taking of property to constitute expropriation, it is essential that an owner have access to the remedy of compensation. Absent the remedy of compensation takings of property are not expropriations, but rather penalties or forfeitures, and therefore in fact really confiscations.
3. **The Bill adds a new provision to the Constitution and does not simply make explicit that which is implicit**: Contrary to the premise from which Parliament and the Committee operates, the Constitution does not implicitly sanction expropriation without compensation, or confiscation in the proposed way. The current effort to alter the Constitution is therefore an attempt to insert into the Constitution a new provision precisely because that which is said to be there implicitly is in fact not there.
4. **International consultation and international law**: Consultation with international property owners, as required by the South African Constitution, have been insufficient. Government has a duty to consult meaningfully with local and, also importantly, international property owners. Failure to have done so casts doubt on the validity of the process followed by the Committee. Moreover, since

government is duty bound by international law to provide adequate protection to international investors, confiscation as a state policy will put South Africa in violation of its international obligations.

5. **The constitutionality and legitimacy of the Constitution of South Africa**: The current Bill is an attempt to insert into the Constitution a provision that is at odds with the principles of constitutionalism itself. Should confiscational powers for the state, as contemplated, be inserted into the Constitution it will render the document unconstitutional and illegitimate in so far as and so long as that amendment taints it. It will then be incumbent upon citizens and civil society in all its manifestations to refuse to abide by such an amendment and to endeavour themselves to the restoration of a sound constitutional order.

RECOMMENDATION

Sakeliga proposes that the Committee reports to Parliament that

1. It is unable to decide the matter referred to it for report, in terms of Rule 166(1)(c) of the National Assembly, since it is not possible to formulate an amendment to the Constitution, for expropriation without compensation, such that constitutional integrity is maintained;
2. The Committee's mandate rests on a mistaken premise, in that the amendment in fact seeks to add something new to the Constitution and not simply make explicit that which is already implicit;
3. An amendment to the Constitution as contemplated would bring the Constitution in conflict with the concept of constitutionalism itself;
4. The amendment would jeopardise initially the legitimacy of the Constitution in so far as it is amended as proposed, and over time detract extensively from the legitimacy of the Constitution as a whole, as generally perceived by civil society and business;
5. An amendment to allow confiscation of assets as proposed would bring South Africa in conflict with international law and lead to great economic harm; and
6. Given the unprecedented wave of opposition from civil society and business it would be unwise to proceed with the amendment, since civil society and business are unlikely to ever accept the amendment to the Constitution.

Piet le Roux
Chief Executive Officer
Sakeliga

Background on Sakeliga's Position

1. With more than 12 000 members, 3000 associates, and several affiliated chambers of commerce, Sakeliga is perhaps the largest business organisation in South Africa.
2. Sakeliga supports private property rights and free markets as matters of justice and in the interest of the well-being of everyone in South Africa.
3. Sakeliga 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 to
    a. the text of the Constitution
    b. the interpretation of the Constitution
4. Sakeliga 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)
5. Sakeliga 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 and become its 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)
6. Sakeliga 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.
7. Sakeliga 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.
8. Sakeliga 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 Sakeliga, both individuals and companies, will enjoy this protection.

Annexure A: The Implications of Expropriation Without Compensation for Constitutionalism (Prof. K. Malan)

by Prof. Koos Malan

Professor of Public Law University of Pretoria
for Sakeliga

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 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. 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 handouts 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 independence, 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 fullfledged 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.

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.

Annexure B: Expropriation without Compensation and the International Law Standard of Treatment (Prof. H. Strydom)

by Prof. Hennie Strydom
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for Sakeliga

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 2 nd 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 nondiscriminatory 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 2 nd 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.

Annexure C: The Dangerous Economics of Expropriation (R Lamberti)

by Russell Lamberti - Strategist, ETM Macro Advisors *for* Sakeliga

1. Introduction

The parliamentary motion on land expropriation without compensation (EWC) in 2018 and subsequent heated national debate over the land issue came at a time when South Africa could least afford to play fast and loose with investor confidence.

Parliament has since proposed the 18th Constitutional Amendment Bill. The outcome of the amendment, should it go through, would be to weaken property rights, give more control and discretion over land and real estate to the state, and make selective state expropriation possible. The amendment risks sliding South Africa into further economic deterioration.

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 decisions of control of property would still be centralised and based on political favouritism and cronyism, complex bureaucracy, and subject to the whims of the political leaders of the day, extreme state control would retard purposeful economic activity and reduce incentives to invest and 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. Such a 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 people's land ownership – that is, effective control - were uncertain and subject to unpredictable political whim, 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 conceding to the state the power to unilaterally deprive people of land and the improvements thereon – 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 economic deterioration 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 in 2018, factions within the ANC and EFF began advocating for nationalisation of the central bank.

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.

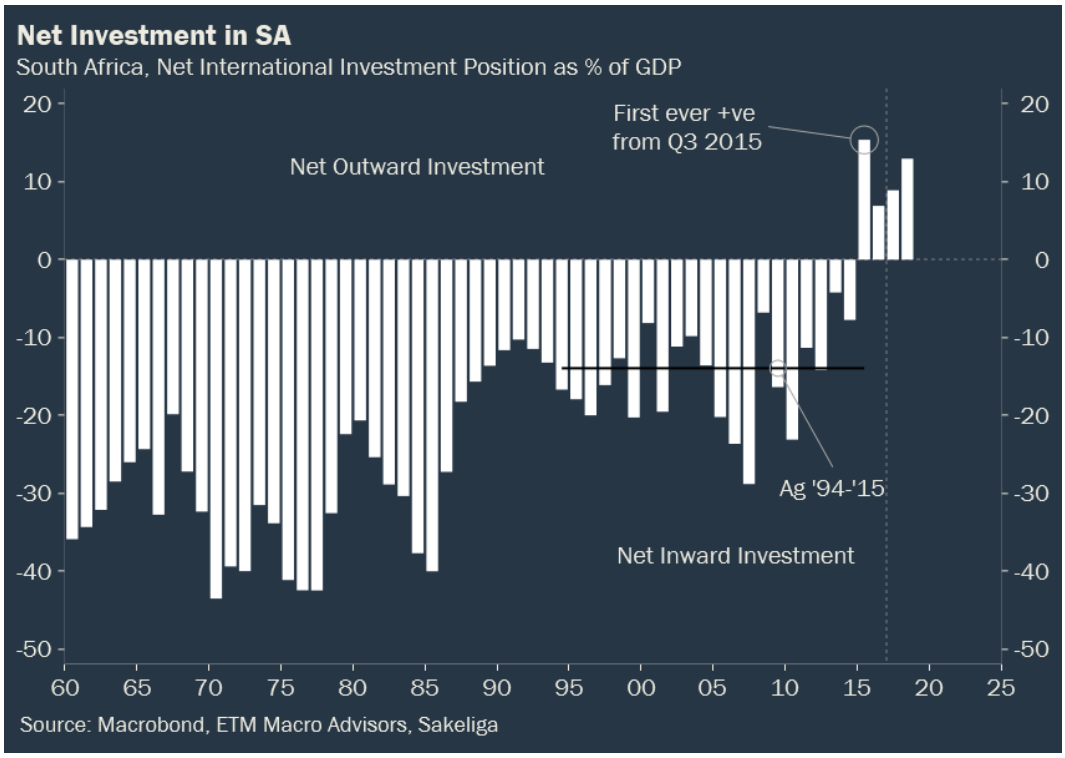
Consider how these developments affect the expectations and plans of investors. These are shades of precisely what happened in Zimbabwe, and while South Africa remains some way off Zimbabwe's total institutional political decay, it is troubling that the governing elites see moving closer to the Zimbabwe 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.

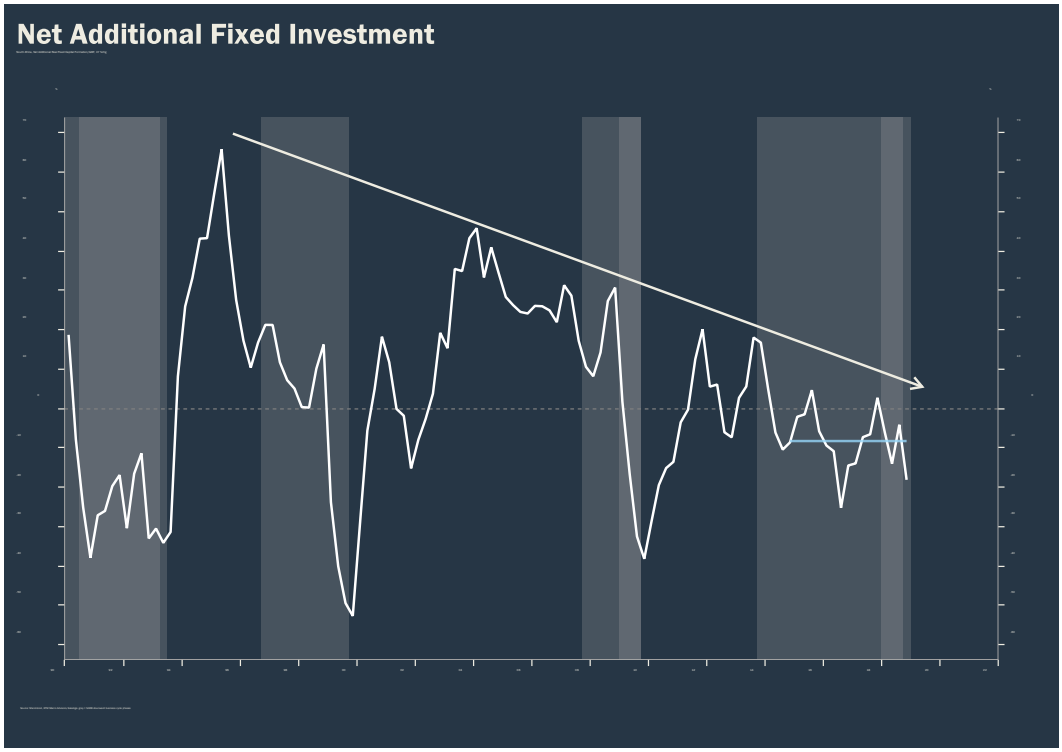
Already, for the first time on record, South Africans invest more abroad than foreigners invest in South Africa, a sure sign of the loss of investor confidence during the Zuma era (chart below). The near-25% of GDP swing in the net international investment position from

the 1994-2015 average to levels today represents about 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.

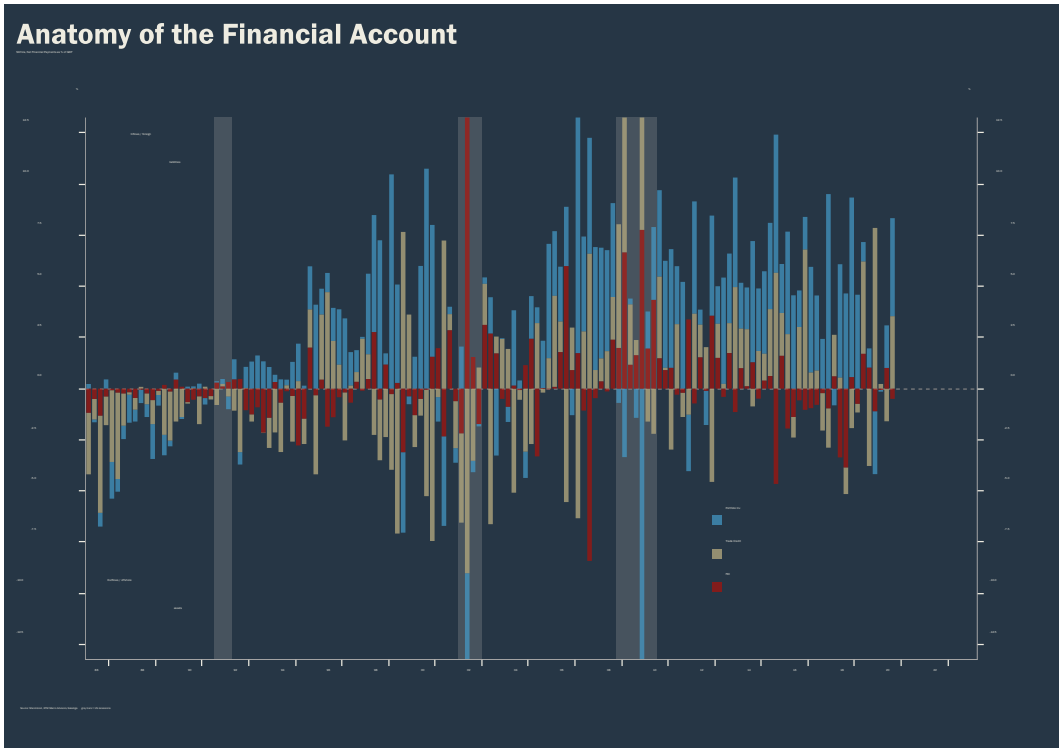


Meanwhile, the level of new fixed capital formation, adjusted for inflation and net of capital depreciation, has more than halved as a percentage of GDP since 2008, according to Stats SA and SA Reserve Bank (SARB) data and ETM Macro Advisor estimates. This doesn't mean that the stock of capital has stagnated, but its growth has decelerated considerably. 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 and remained weak over the past ten years. This again shows less inward investment by foreigners and more outward investment by locals.



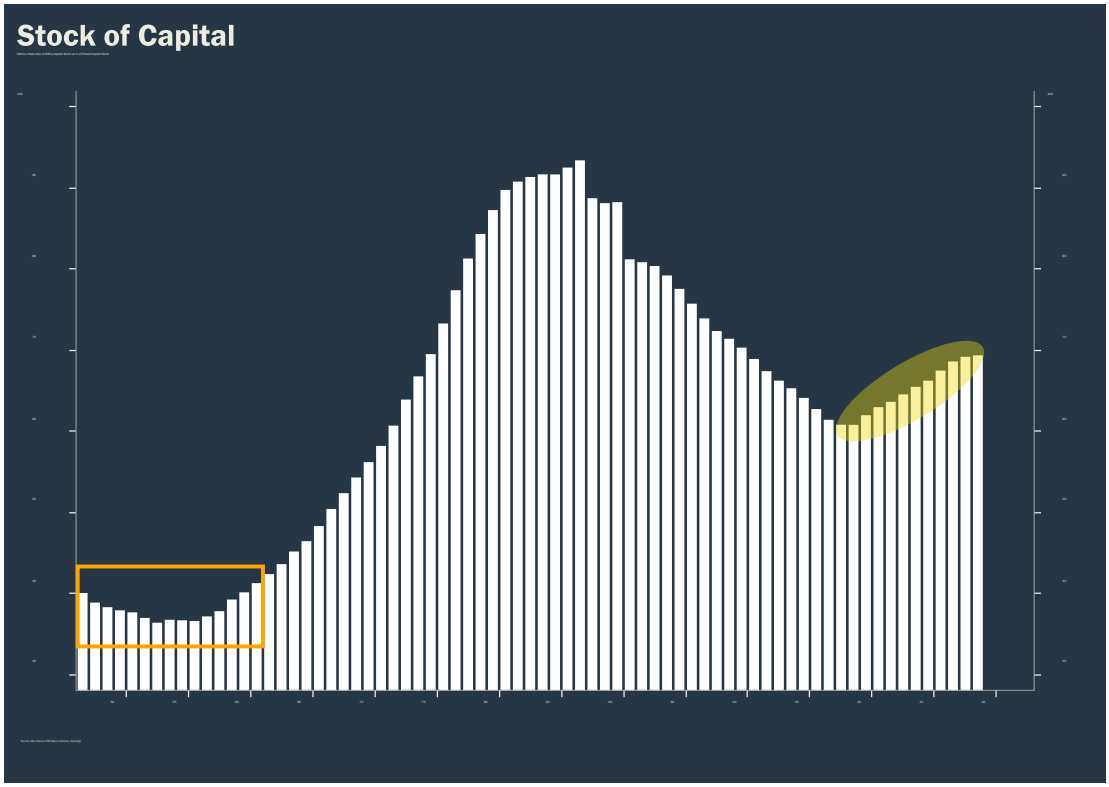
5. Investment Quality as Important as Quantity

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.

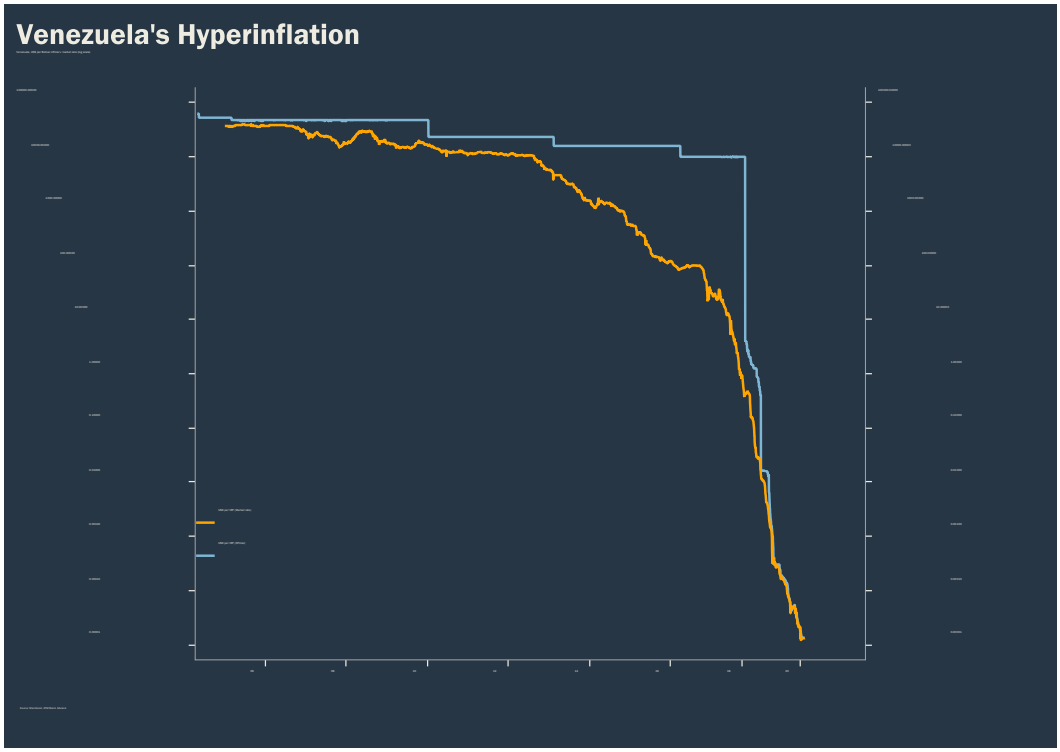
It would also require Herculean efforts on the part of the government to reduce state corruption and the wanton plunder of public funds.

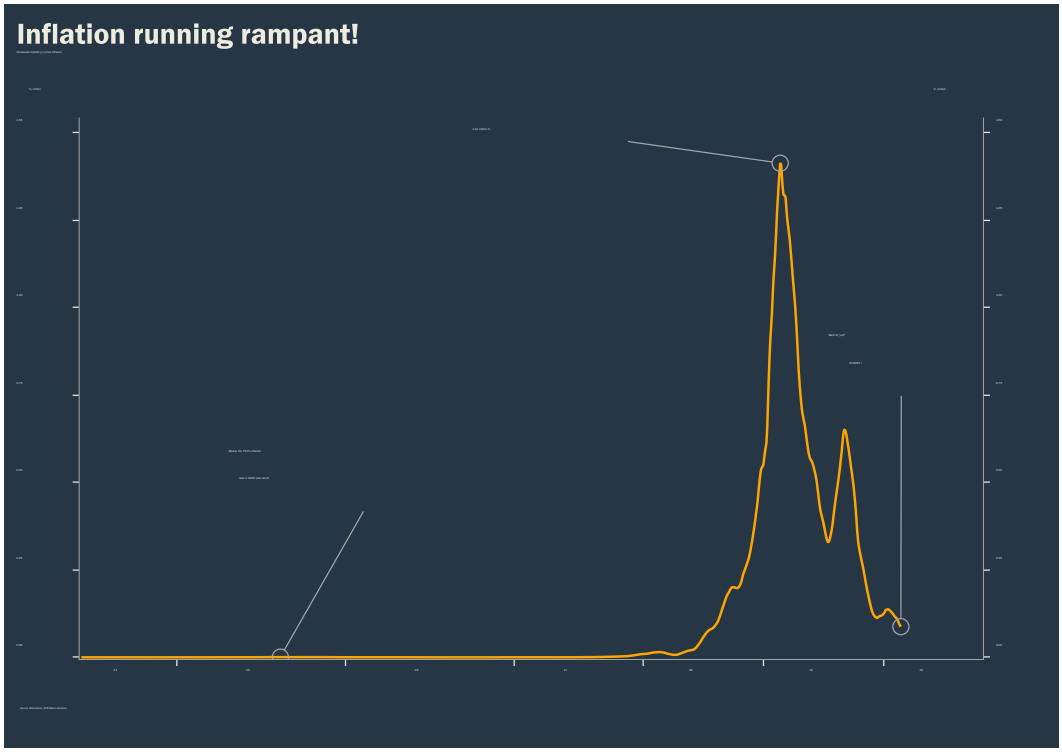
Without reforms of this nature, investors and businesses will have to either continue seeking opportunities to deploy their capital abroad or find ways to 'state-proof' as much as reasonably possible their investments and businesses domestically. If the ruling elites continue to press toward undermining 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 purchase *practically zero* US dollar, or 0.00001¢, due to rampant monetary corruption and printing which is causing hyperinflation and impoverishment.

Venezuela's annual inflation rate peaked at a staggering 1,410,000%. - effectively meaning that the currency was rendered worthless.





South African 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 has assembled teams of business and political leaders to conduct roadshows 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 these roadshows 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 promised 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.

Annexure D: On the relationship between economics and constitutionalism (P le Roux)

by 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.