



SAKELIGA

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24 February 2021

TO: Portfolio Committee on Public Works and Infrastructure

ATTENTION: Nola Matinise
Committee Secretary

DELIVERED: **By email:**
expropriationbill@parliament.gov.za

To whom it may concern,

COMMENT: EXPROPRIATION BILL, 2020

Sakeliga welcomes the opportunity to comment on the proposed Expropriation Bill, 2020. Sakeliga represents almost 12 000 members, from different sectors and enterprises. As such, we are well-placed to comment on the merits and potential repercussions of a law that will have such wide-ranging effect on the economy of South Africa and the constitutional rights of South Africans as the Expropriation Bill.

While we are aware of the importance of having a constitutionally-aligned legal regime that regulates and limits the expropriation power of government. We are concerned that the bill attempts to achieve that necessity by flawed means. The comments and recommendations contained in this submission therefore serve to identify those problems and assist the committee in solving them.

We also provide various addenda that provide supporting arguments for the main comment below and urge you to consider both the comment and the addenda together.

Should the opportunity arise, Sakeliga wishes to make an oral submission on the bill.

1. Introduction

On 10 December 2020, the Portfolio Committee on Public Works and Infrastructure published the Expropriation Bill, 2020, for comment. Sakeliga welcomes the opportunity to comment, and does so in this submission.

Sakeliga is an independent business community that promotes a healthy business environment that is only attainable through a free-market economy and a public order based on constitutionalism. The vast majority of Sakeliga's nearly 12 000 members are from various enterprises across South Africa. It is within this context that we regard ourselves as well-placed to provide insights into a bill that will have wide-ranging economic consequences if adopted. Such consequences would be detrimental if the bill is adopted in its current form. Sakeliga regards the protection of private property rights to be strongly in the public interest.

While there can be no doubt that South Africa's expropriation law had to be brought in line with the Constitution,¹ it is our considered view that the proposed bill not only falls far short of this ideal but in fact entrenches various unconstitutional and even anti-constitutional rules of law. Additionally, the bill, including and particularly the notion of expropriation without compensation included therein, will only yield detrimental economic consequences if enacted.

Sakeliga does not deny that South Africa requires a lawful expropriation regime, not because Sakeliga favours expropriation,² but because no country in the world lacks such a regime, and the present Expropriation Act, 1975, contains many of the very same faults and problems evident in the Expropriation Bill under consideration. As such, Sakeliga has undertaken a comprehensive analysis of the bill, and in addition to general comments on the expropriation power, has outlined the problems evident in each clause in the bill and proposed a way to fix that problem. Should Sakeliga's recommendations be incorporated into the bill, the South African expropriation regime will be consistent with constitutional standards. If not, it is likely that the bill, once an Act of Parliament, will be set aside by the superior courts.

2. Economic considerations of expropriation

Sakeliga has noted to Parliament before of several economic concerns that arise because of worrying expropriation policies. Suggestions of expropriation for nil compensation increase our concerns in this regard even more.

The following summary raises those concerns again in connection the present bill. In essence, from an economic perspective, expropriation without compensation will affect a) incentives for progress, d) the quantum of capital investment, c) the quality of investment, and d) even the currency. We again highlight concerns from a previous submission:

Private property serves to incentivise wealth creation, facilitates purposeful economic activity, and diminishes conflict over resources. Laws that affect private property rights also affect broader economic activity. Industrious people need the certainty that what they work for will not be taken away by the State. Investors need the same certainty in order to apportion resources to maintain or

¹ Constitution of the Republic of South Africa, 1996.

² On the contrary. It is our view that the power to expropriate lawfully acquired and -held private property ought *never* be invoked.

expand productive activities. Expropriation without compensation, and many of the other clauses of the bill discussed below, goes directly against such certainty.

Without clearly delineated private property and protected property rights, no one is certain who may justly use, control, and trade with resources. Without such certainty of ownership, economic activity becomes confused, conflict-ridden, and “dead” and unproductive capital may ensue.

Even if the State assumes itself to be the final arbiter of property, its allocation decisions on final economic control of property (or assets) would still be centralised. Such decisions may easily fall to political favouritism, cronyism, complex cumbersome bureaucracy, and the whims of current and future political leaders. Extreme State control, therefore, will most likely retard purposeful economic activity and reduce incentives to invest and produce value, which will harm the general living standards of all citizens.

Certainty of private ownership of land in particular 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 land to produce value. Such investment improves living conditions.

Capital investment is the transformation of savings into productive, useful capital that is ultimately used to produce desired consumer goods. Expropriation without compensation is a direct threat to productive capital investment. In hampering productive capital investment, economic deterioration is ensured.

Over the past number of years, the growth of new fixed capital investment has weakened considerably. Moreover, a lack of investor confidence is also evident given the trends of less inward investment by foreigners and more outward investment by locals of the last decade. It is not just that the prospect of nil-compensation expropriations risks scaring off investment capital, but It is doing so after many years of already of discouraging investment trends.

The past two decades, moreover, have slowly rendered the South African economy profoundly less productive than was necessary. The COVID-19 lockdowns have greatly exacerbated this difficult position. Expropriation without compensation will undoubtedly compound economic difficulties. A hampered economy produces less value, which also affects governments broader aims of improving living standards

Investment quality, in our estimation, has also declined because of corruption and cronyism, which creates opportunities for the unproductive allocations of capital.

Moreover, concerning trends suggest a weakening of the private capital stock in relation the public capital stock. The 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. This suggests government is taking control of increasing proportions of the capital stock. As the size of the State has grown in the past 10-15 years and its regulatory reach has spread, so more and more private capital (and resources) is being allocated according to political or non-market rather than market ends.

Weakening investment and declining productivity also reduces government's revenue. This increases pressure to fund the State by other often destructive means. One such experiment with a weakening of property rights played out in Venezuela. Venezuela disregarded property rights, nationalised mining, and corrupted the local central bank. Since then, 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¢ more or less a decade ago. Today it can purchase practically zero US dollars due to rampant monetary corruption and printing, which has caused hyperinflation and wide social impoverishment.

Expropriation without compensation in itself damages the social system of cooperation and incentives needed to create value in the first place. It cannot yield aggregate positive economic consequences. But this is only one component of the proposed expropriation regime that is problematic. A discussion of expropriation without compensation and the other problems evident in the bill follows.

3. Expropriation Bill, 2020

3.1 General comments

3.1.1 Expropriation as a concept

Expropriation is a highly questionable public policy with wide potential for government abuse and harm. The power of expropriation is one of the most invasive, rights-infringing, and awesome powers that any government possesses. Whether it is a *necessary* or an *unnecessary* evil is subject to widespread debate, but expropriation's evil nature cannot be doubted, particularly not in a rights-based constitutional democracy like South Africa.

The evil and powerful nature of expropriation thus necessitates subjecting any expropriation regime to substantive and powerful legal constraints, requirements, and safeguards.

Under no circumstances ought the power to expropriate be “streamlined” or “simplified”, nor should the process of expropriation be “accelerated”. We are dealing here with the constitutional rights and livelihoods of law-abiding South African citizens, not criminals. The already-existing fine line separating expropriation from the compulsory forfeiture of criminal assets must not be allowed to be eliminated. These two regimes must be kept conceptually and practically separate, with no possibility of a merger. As such, the rights and interests of private property owners must be respected and prioritised.

3.1.2 Racial discrimination

It is, furthermore, beyond contention that the present bill, as well as related efforts to amend section 25 of the South African Constitution, have been discussed extensively in public by politicians from all parties – often in racially-charged terms. Considering this fact, it is in the interest of justice and equity to ensure that measures are taken to monitor and limit the exercise of powers this bill proposes to vest in State officials, so as to prevent unconstitutional racial discrimination.

In the interest of transparency, then, we propose that the bill includes a provision mandating a register to be kept setting out the race, and other relevant demographic characteristics, of expropriated owners and holders of property rights.

This register should be updated frequently and be made available to the public.

3.1.3 Perpetual expropriation

It is concerning to note that, on our reading of the bill, it provides very little protection for the property rights for those who should happen to receive property from the State, whether previously expropriated or otherwise.

One of the grounds listed in section 25(3)(d) of the Constitution, and, in turn, incorporated into the bill, refers to the “the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property”. By its very definition, receiving a plot of land (or, indeed, other property) from the State would seem to suggest that such property could be expropriated for next to nothing, in light of the large contribution made by the State in obtaining said property.

In other words, if the State expropriated Property X from Owner Y and bestowed it in ownership onto Beneficiary Z, then the State can in the future expropriate the property from Beneficiary Z – according to this bill – for nil or next to nil compensation due to the total direct State investment in the acquisition of the property. This would be an injustice to Beneficiary Z. We recommend that safeguards be incorporated into the bill to ensure such an event does not come to pass.

3.1.4 International law

Neither the Constitution, nor international instruments such as the Universal Declaration on Human Rights, make provision for arbitrary deprivations of property rights. The present bill, going further than the previous Expropriation Act, contemplates expropriation beyond the scope of particular projects or areas, the therefore runs the risk of permitting “arbitrary” selection of properties which may be no more or less suitable than others for expropriation. To avoid this pitfall, it is essential that a procedure be prescribed – or, at the very least grounds set out – to guide any determination of suitability (of particular properties) for expropriation.

Comments on specific clauses in the bill now follow.

3.2 Clause 2(2) and the unequal application of the law

Clause 2(2) of the bill gives organs of State a choice about whether their property may be expropriated by the Minister. There is no corresponding provision in the bill that bestows the same privilege upon private property owners.

Not only does this clause conflict directly with the guarantee of equality before the law contained in section 9(1) of the Constitution and the Rule of Law idea (see Addendum 2) that both governed and governor shall be bound by the same law, but this clause in fact also elevates government from its constitutional position of a servant of the people to a master. If government is regarded as an institution of public service, it is inconceivable that the public servant be granted a greater deal of rights than its supposed master.

We propose that South African expropriation law apply equally between private property owners and government. As such, clause 2(2) ought to be removed or redrafted to clarify that organs of State whose property have been targeted for expropriation will have no choice in the matter. Alternatively, private owners should, too, be granted a choice in the matter, so that they enjoy the same privilege as organs of State.

3.3 Clauses 2(3), 3(4)(b), and 15(1) and choice

Various clauses throughout the bill are premised on a misunderstanding of the notion of choice. For there to be choice – which is the underlying, fundamental feature of an “agreement” as well – there must be allowance for both acceptance and rejection, that is, yes and no. If only acceptance or rejection is acceptable, then there is no choice, and the notion of “agreement” does not arise.

Clause 2(3) of the bill allows government to expropriate property if it “has without success attempted to reach an agreement with the owner [...] for the acquisition” of that property “on reasonable terms”. If government approaches an owner to acquire that property, and the owner refuses such agreement, expropriation may occur. In other words, the notion of “agreement” does not arise. If a criminal approaches someone and offers to purchase their cellphone for R50 (far below market value), or else they will simply seize the cellphone anyway, that is not an example of a failed agreement, but an example of extortion.

It is trite that expropriation is a non-consensual method of property acquisition, however dressing the pre-expropriation process up in the language of consent and agreement makes light of this fact. The bill ought not create the impression of choice and agreement when the only answer acceptable to government is “yes” (that is, to agree to government’s acquisition of the property). We therefore propose that the language of clause 2(3) be reconsidered.

The same recommendation applies in respect of clause 15 (and accompanying provisions), which creates the impression that the owner has a choice and a say in the amount of compensation to be paid upon expropriation. It is evident that if government does not agree to the owner’s “claim” of compensation, government may “offer” an alternative (invariably lower) amount, and proceed to

expropriate on the strength of that amount of compensation. This is not how agreements work. In the absence of agreement on an amount of compensation, in fact the expropriation must cease, not proceed because one party has unilaterally decided on compensation.

Considering the coercive nature of expropriation, a better solution would be to draft such provisions in the bill in a way that bolsters compensation to tip in favour of the expropriated party. That would remove the need to dress up such coercive acts in contrived language of consent and choice.

Clause 3(4)(b) of the bill concerns partial expropriations being escalated to full expropriations. It provides that when only a portion of property has been expropriated, the Minister may expropriate the remainder of that property as well if *the Minister* “is satisfied” that the use or potential use of the property has been so impaired due to the initial, partial expropriation, “that it would be just and equitable to the owner” for the remainder of the property to be expropriated.

This clause, too, operates on a misapprehension of choice. Only the owner can decide for themselves whether it would be just and equitable *to them* whether the remainder of their property ought to be non-consensually seized. If government only requires a part of a property to be expropriated, it must be satisfied with that part of the property and leave the rest to the owner. Clause 3(4)(a) already provides that the owner may request that the rest of the property also be expropriated, and this should be sufficient. We therefore recommend that clause 3(4)(b) be removed from the bill.

3.4 Clause 3(2) and the prohibition on the Minister exercising judgment

Clause 3(2) provides that if one organ of State “requires” property for a public purpose or in the public interest, it must request that the Minister expropriate that property on its behalf, and the Minister then “must” do so.

This clause is clearly prescriptive and disallows the Minister from exercising judgment in the particular circumstances on whether such an expropriation would be rational, reasonable, or lawful. Such a provision which effectively proscribes the exercise of judgment, especially concerning as serious a matter as expropriation, would almost certainly yield a finding of unconstitutional conduct from a superior court.

We therefore propose that this clause be removed from the bill.

3.5 Clause 3(3) and confusion

Clause 3(3) is unclear, ambiguous, and confusing. It is not at all clear what this provision refers to.

Indeed, if one interprets it as allowing for expropriation for the “accommodation, land, and infrastructure needs of an organ of state”, that will contradict clause 3(1), not to mention section 25 of the Constitution, which provide that expropriations may only take place for a public purpose or in

the public interest. Here “public” does not refer to government – i.e., government purpose or government interest – but to the general public of South Africans. The accommodation, land, and infrastructure needs of a particular government agency or department are not necessarily related or properly aligned with the public interest, public purposes or even economic considerations of communities.

In light of the fact that clause 3(1) is sufficient, we propose clause 3(3) be removed from the bill. If the clause has a different meaning from the one assumed above, we propose it be redrafted to make that meaning clear.

3.6 Clauses 3(5)(a), 8(3)(f), 8(4)(a) 9(1)(a), and 17(1) and the dates of expropriation, possession, and compensation

Various clauses throughout the bill refer to the dates of expropriation, possession, and compensation. We comment on these as a single, general feature.

The constitutional and international best-practice standard for lawful expropriation is the payment of compensation, notwithstanding any recent politically-fuelled aspirations to no-compensation expropriations. This inherently means that compensation must precede the expropriation, in the same way one pays before one is allowed to walk out of a store with the property of the owner, or walk out of a restaurant after utilising the property of the owner. Payment precedes possession, use, and enjoyment.

This principle is logical, common-sensical, fair, and just, particularly in light of the non-consensual nature of expropriation. The least government can do is pay the owner fully before seizing their property.

We recommend that all clauses referring to the dates of expropriation, possession, and compensation, put it beyond any doubt that the owner of property that is in the process of being expropriated must be compensated in full before they are required to hand over possession, and before the transfer of ownership.

3.7 Clause 3(5)(d) and costs

Clause 3(5)(d) provides that when the Minister expropriates property for another State organ, the costs incurred by the Minister on behalf of an organ of State must be refunded by that State organ.

We propose that the relevant organ of State also be explicitly required to refund the expropriated owner for any costs the owner might have incurred in the process of complying with government in its expropriation of the owner’s property.

3.8 Clause 5(1) and financial and sentimental importance

Clause 5(1) provides that when government is considering expropriating a piece of property, it must ascertain the suitability of that property for the purpose for which it is being expropriated as well as the existence of registered and unregistered rights that attach to that property and their impact on that purpose.

We propose that before expropriation be decided upon, government must also factor into account the financial, sentimental and subjective importance of the property to the present owner of the property. In other words, whether the owner's livelihood depends on the property, whether the property has a long history of being in the owner's family, etc. If this is not done, then clause 5 is excessively government-centric, and ignores the rights and vested interests of the owner in particular and citizens in general.

3.9 Clause 5(2) and permission to enter upon property

Clause 5(2) generally provides that government may enter onto private property.

Clause 5(2)(a)(i) states that they may enter upon the property "at all reasonable times or as may be agreed to by the owner or occupier of the property". This clause creates a loophole that allows government to enter onto the property without permission from the owner but at a reasonable time.

We therefore propose that the word "or", between "times" and "as", be replaced with "and". Furthermore, we propose the clause "or occupier" be removed, as even if there is an occupier with rights attaching to the property, it is still in the final analysis the property of the owner, whose permission must be sought. Failure to rectify this mistake would potentially allow government employees to act in contravention of section 25(1) of the Constitution, thus rendering this clause unconstitutional.

Clause 5(2)(a)(v), furthermore, provides that government may "enter upon and go across another property" but contains no explicit mention of obtaining permission from the owners of such other property. We thus propose that it be made a requirement to obtain such permission. The same recommendation applies as regards clause 5(2)(b), within the context of valuing property.

3.10 Clause 5(5)(b)(i) and the material effect on functions and responsibilities

Clause 5(5)(b)(i) provides that government, in the case of expropriating land, must consult various organs of State plus any additional organs of State "whose functions and responsibilities will be materially affected by the intended expropriation".

No similar provision exists in respect of the owner or other private property owners whose interests might be materially affected by the expropriation. As discussed above, this is another example of

unequal application of the law, where government – being the supposed servant of the people – is placed in a superior position than the people themselves.

We propose that a provision be added making it compulsory for consultation with the owner of the property and any other landowners whose rights or interests might be affected by the expropriation, before deciding to expropriate a particular piece of property.

3.11 Clause 5(6)(b) and confusion

Clause 5(6)(b) creates confusion in that it provides that an owner may refuse a person entry onto their property if that person fails to comply with the requirements listed in clause 5(6)(a). This is confusing because the owner may already refuse to consent to entry as per clause 5(2)(a)(i). By retaining the present clause, the impression is created that only under certain circumstances may an owner refuse entry, which would be an unjust and unequitable provision that falls foul of section 25(1) of the Constitution.

As such, we propose that clause 5(6)(b) be removed from the bill.

3.12 Clauses 7(2)(g)(iii), 7(4)(d), 14(1)(f), and 24(4) and confusion around emails

Various clauses throughout the bill refer to “addresses” to which notices and the delivery of documents. We address those provisions as a single matter here.

South Africa, and indeed the world, is quickly moving away from physical mail and faxes. Increasingly, all business is transacted via email, instant messaging, and voice and teleconferencing facilities. Government is lagging this trend by still insisting on sending mail and faxes, for instance for traffic fines and CCMA documentation. Regrettably, this bill does not create the impression that government wishes to catch up.

However, given the particularly intrusive and rights-violating nature of the power to expropriate, government must make every conceivable effort to make the process as easy and painless as possible for expropriated owners and other interested parties whose rights may be detrimentally affected. As such, we propose that email be included in any clause in the bill dealing with the delivery, handing in, or submission of notices or any other relevant document to or from the owner and other parties. Given how easily mail could be lost and faxes could be unobtainable, we recommend that email, or delivery by hand, be the preferred methods of communication adopted in the bill.

3.13 Clause 7(4) and notice and publication

Clause 7(4) of the bill provides that owners responding to notices of intention to expropriate, if they have not received a notice, must do so within 30 days of the publication of that notice in a *Government Gazette* or other newspaper. This provision is evidently problematic.

In the first place, the clause creates the impression that it is lawful for owners to not be served with the notice of intention to expropriate. This cannot be the case. As alluded to above, owners must receive this documentation either via email or by hand, given the severity of expropriation. But under no circumstances can an expropriation process be allowed to proceed without the owner being properly notified. Given the nature of expropriation, it is only reasonable to ascribe a very high burden on the state for the serving of notices of expropriation.

In the second place, it is unjust and unequitable to assume that owners will simply be waiting for a notice in the newspapers they frequently read (which will always exclude the *Government Gazette*) from government that they intend to expropriate the owners' property. No normal person in an open and democratic society lives this way. By enacting this clause as it presently stands, owners will be placed in a chronically harmful psychological state, where they must constantly check the *Government Gazette* for the possibility that government might wish to take their property.

Given how much depends on the owner's response to a notice of intention to expropriate, we strongly recommend that this clause be reworded to make it clear that the notice *must* be handed to or emailed to the owner, before any further steps may be taken. We also propose that the 30-day window for a response be extended to at least three months (90 days).

3.14 Clause 7(5) and time periods

Clause 7(5) again introduces an unequal application of the law by giving government the authority to "acknowledge receipt in writing, consider and take into account all objections and submissions *timeously*" (our emphasis) before the expropriation process may proceed. In all other respects, property owners are subjected to short, specific time periods such as 30 days or 40 days. There is no good reason for government to be allowed to respond at its leisure, but citizens be compelled to act with haste.

We propose that either every time-period applying to property owners be replaced with "timeously" or that every government time-period, such as the one contained in clause 7(5), be replaced with a specific number of days comparable to the periods afforded to property owners.

3.15 Clause 7(7)(a) and the 40-day period

Clause 7(7)(a) provides that if government and the property owner cannot reach agreement "within 40 days", government must decide whether or not to continue with the expropriation.

We propose that this time-period be replaced with 365 days. It is unreasonable to expect an owner who might have owned a particular property for their entire lifetime be afforded only slightly more than a month to negotiate an adequate deal with someone intending to seize that property without the

owner's consent. A year, which we also consider too short a period for such a negotiation, is the least amount of time government must afford to property owners.

3.16 Clause 7(7)(b)(i) the importance of consensus

Clause 7(7)(b)(i) provides that government may decide to proceed with the expropriation even in the absence of an agreement on compensation with the owner. See also in this regard our remarks on "choice" as discussed above.

Given the problematic consequences of expropriation, it is our view that if government and the owner cannot come to an agreement on compensation, the expropriation process must wherever possible be abandoned and the intention to expropriate must be withdrawn. It is always useful to bear in mind that expropriation is by its nature a non-consensual and coercive phenomenon, meaning victims thereof have no choice about whether or not their property will be expropriated. It is not a sale, where the compensation (the price) the owner receives to part with their property is arrived at through a complex market-based process and personal choice to sell. This is all the more reason why at the very least, an owner must be given substantial leeway when it comes to the amount of compensation. *They do not wish their property to be seized, and for this reason they must be allowed considerable influence to affect the amount of compensation they receive for their property.*

We propose, therefore, that clause 7(b)(i) either be removed or be reworded to make it clear that government may not proceed with an expropriation in the absence of an agreement with the owner on compensation. If the State decides to proceed with expropriation, it must pass significant, clearly defined, and substantive barriers to justify proceeding with expropriation.

3.17 Clauses 8(3)(h) and 17(3) and the transfer of possession or ownership

Clause 8(3)(h) provides that in cases where the amount of compensation is disputed, a statement must be included in the notice of expropriation declaring that the owner may approach a court within 180 days "of the date of expropriation" to challenge the offered amount. Clause 17(3), in turn, provides that possession of the expropriated property must still pass to government notwithstanding any delay in payment of compensation. See also in this regard our remarks on the dates of expropriation, possession, and compensation above. Those remarks apply *mutatis mutandis* here.

No property ought to pass in possession or ownership from the owner to government without 1) the finalisation of any and all judicial proceedings arising out of the expropriation, and 2) the full payment of compensation. It would be a matter of grave injustice, contrary to the spirit of the Constitution and constitutionalism, to allow a victim of expropriation to lose their property and at the same time be without any compensation. Such a state of affairs must never be clothed in the language of law.

3.18 Clause 8(5)(a) and notices of expropriation to different owners

Clause 8(5)(a) provides that property rights may be expropriated from more than one owner at a time, and that such an expropriation need only have one expropriation notice. We propose that it be made clear that a separate notice of expropriation must be delivered to each owner by hand or email, even if it is the same act of expropriation.

3.19 Clauses 9(3)(b), 10(6), and 11(5) and owner culpability

Clause 9(3)(b) provides that if an expropriated owner “wilfully or negligently fails” to maintain the property that is being expropriated, and the property as a result loses (presumably market) value, government may recover the amount of value lost from the owner. Clause 10(6) provides that government may require the expropriated owner “to compensate a person who held an unregistered right” in the expropriated property, “if that person was not given notice of the expropriation” and “if the owner ought reasonably to have identified that person”. Clause 11(5) provides that if an owner knew of unregistered rights in the property and failed to inform government of those rights, they will be liable to government “for any loss incurred in the event of the expropriating authority having to pay compensation for the expropriation of the unregistered right after the date of payment of compensation”.

Given the non-consensual nature of expropriation, it must be evident that a victim of expropriation can never justly be at fault for any of the consequences that flow from the initial act of expropriation. Owners do not ask for their property to be expropriated – it is government that takes the initiative and interferes in the private affairs of the owner. The law of evidence speaks of the *fruit of the poisonous tree* principle that proscribes the use of evidence obtained illegally in court. In our present context, the poisonous tree is expropriation, and the fruit government is attempting to benefit from is the apparent culpability of owners for various omissions as mentioned above. In all three instances, owners are being held liable for things government should properly be liable for as a result of its decision to engage in expropriation.

It is furthermore quite arguable that these clauses infringe on section 13 of the Constitution, which guarantees to every person the right to not “be subjected to slavery, servitude or forced labour”. Should these clauses pass into law, they will be forcing owners to labour on behalf of government interests, despite such owners not being guilty of any criminal offence and themselves not having initiated the expropriation.

In other words, it is government that must maintain property it intends to benefit from in the future up to its standards, and it is government that must bear the onus of identifying, notifying, and compensating the holders of unregistered rights in the property it has targeted. These obligations can never properly fall to a victim of expropriation. It is thus that we strongly propose that clauses 9(3)(b), 10(6), and 11(5) be removed from the bill.

3.20 Clause 12(2) and determining the amount of compensation

Clause 12(2)(a) provides that the fact that property is being seized non-consensually from the owner must not factor into determining the amount of compensation for an expropriation.

We find this clause quite revealing and shocking. Indeed, this fact should be highest on the list of factors going into determining the amount of compensation. Expropriation is not something that is invited – it is an injury being done to a legal subject who is in all respects blameless. They are not a convicted or even a suspected criminal, nor have they committed any civil wrong. It is thus that they must be very handsomely compensated, perhaps even above market value,³ for the harm being done to them in the public interest.

This clause also falls foul of section 25(3) of the Constitution, which provides that the amount of compensation must be determined “having regard to all relevant circumstances”. It is fervently submitted that there is no more relevant circumstance than the non-consensual nature of an expropriation.

We propose that clause 12(2)(a) be removed from the bill. It would be a great indictment indeed on the intentions of the present government if this clause were to make it into the final draft of this bill.

Clause 12(2)(b) provides that the usefulness of the property to government for the (public) purpose it is being expropriated for may not be factored into the determination of the amount of compensation. We agree with this part of this clause, provided that if the usefulness of the property in the case would lead the expropriating authority to render compensation equal or higher to that claimed by the owner, the usefulness must be factored in.⁴ However, the clause continues, providing that this *may* be factored into the determination if it is likely that the property would have been purchased for that purpose on the open market. We regard this latter clause as unnecessary and potentially rewarding the expropriating authority with more legal protection than the owner, and thus recommend that it be removed.

We submit that clause 12(2)(e) should be removed for the same reasons contained in the above remarks on owner culpability.

We further propose that a provision similar to that of section 12(2) of the Expropriation Act (63 of 1975) be included in the bill, to make good for any emotional loss and/or distress caused by expropriation. This provision should therefore provide that in addition to the determined

³ It would not be inappropriate to build the doctrine of compensation for emotional loss/distress into the bill's provisions regarding compensation. Section 12(2) of the Expropriation Act (63 of 1975) makes provision for such additions to be made to the amount of compensation.

⁴ We assume, however, that this clause is meant to guard against the offering of compensation lower than that claimed by the owner.

compensation, an additional percentage (of a substantive nature) determined with reference to the market value of the property, shall be paid by the expropriating authority in all cases.

It must here again be emphasised that the victims of expropriation are not guilty of any crime or wrongdoing, and as such expropriation must not be conceived of as a measure of punishment.

3.21 Clauses 12(3) and 12(4) and expropriation without compensation

Clause 12(3) is perhaps the most significant clause in the bill, in that it introduces a new legal concept into South African law that is not only completely inconsistent with existing constitutional law and South African common law, but also inconsistent with international legal best practice.

If clause 12(3) is adopted prior to the amendment of section 25 of the Constitution to allow for expropriation without compensation, the clause and arguably the entire bill would be unconstitutional. In fact, the bill repeats section 25 of the Constitution, in its pre-amended form, in the bill's preamble, despite the glaring inconsistency between clause 12(3) and section 25.

As should be evident in Addendum 5, Sakeliga vehemently opposes the process to amend the Constitution and urges government to leave the Constitution's integrity intact, and rather embark upon a pro-private property rights land reform programme that entails the transfer of State land, in full ownership title, to present legal occupants and deserving beneficiaries.

Assuming, however, that the Constitution will be amended, and that the bill will be adopted only after that has happened, we propose the following:

The words "having regard to all relevant circumstances, including but not limited to" should be replaced with "under the following circumstances".

In clause 12(3)(a), the words "but to benefit from appreciation of its market value" should be removed. Land speculation is a legitimate enterprise. Its effective prohibition in terms of this clause assumes that there is a shortage of land being utilised for other (most likely agricultural) purposes in South Africa, a fact that can only be determined by market forces.

In clause 12(3)(b), the words appearing after "core functions" should be removed.

In clause 12(3)(c), the word "failing" should be replaced with "no longer intending". The *failure* of the owner to retain control of the property can be due to no fault of the owner, for instance when unlawful occupiers effectively evict the owner who must then start a long and arduous legal challenge. In law, property only becomes a *res derelicta* if the owner's (manifested) subjective intention is no longer to be the owner. One cannot argue in good faith that someone has "abandoned" something they still intend to own.

In clause 12(3)(d), it must be made clear that that provision is only of application to owners who were present at the time of the State investment in the property. It would be unwise and unjust to expropriate property without compensation from a subsequent owner who had paid the full market price of the property, simply because at some point the past the State invested considerable resources in the property. There is no reason to punish such a blameless owner, who did not in any way benefit from the State investment. In this respect there also arises a retrospectivity of laws issue. When the State invested in an owner's property, the threat that government would be able to expropriate the property without any compensation at a later date as a result, was not conceivable. Had owners at the time known this, they would likely have refused or reconsidered the investment or subsidy. In other words, should this provision be adopted, a severe legal liability and financial risk is created for owners based on something they did in good faith before this new legal regime came about. Such a detrimental retrospective application of law would infringe on a basic tenet of the Rule of Law, which is a supreme value of South Africa's constitutional order as ensconced in section 1(c) of the Constitution. This comment must be seen in light of Sakeliga's total opposition to the notion of expropriation without compensation.

In clause 12(3)(e), the word "serious" should be added after "poses a" and before "health". If *any* health, safety, or physical risk posed by the condition of a piece of property could be grounds for that property to be expropriated without compensation, then no property or land in the country will be safe from expropriation without compensation. The risk must be serious or material.

We further propose that clause 12(4) be removed from the bill. The clause provides that nil compensation may be just and equitable in cases where labour tenants have been granted a right in a piece of property occupied by them. If this provision remains in the bill, it would amount to potentially granting persons with inferior claims to a particular piece of property more rights to that property than the owner. To us the inclusion of this clause makes no sense, opens the door to abuse and unforeseeable consequences, and ought to be excised.

Sakeliga's full submission on the notion of expropriation without compensation is attached as Addendum 5.

3.22 Clause 13(c) and availability or dispatch

Clause 13(c) provides that interest due on compensation must be regarded as having been made on the date on which the compensation "has been made available or dispatched to the expropriated owner". We propose that this language be replaced with "has been received by the expropriated owner".

3.23 Clause 18 and mortgages

It is clear that the current bill places expropriated owners in a desperate position in the case of property being subject to mortgages. Owners' personal contractual obligation to repay loans remain

intact, regardless of the fact that the property has been expropriated – and will remain so until an apportionment agreement is able to be reached between said owners and the lender. In addition, compensation is not paid out until an agreement is reached between the owner and the lender.

This creates a perverse incentive. In such a case, the owner is likely facing severe financial constraints – especially considering their recent loss of their property. This, coupled with the remaining obligation to service their debt is likely to place the owner in a desperate financial position. The owner is, accordingly, very strongly incentivised to reach a settlement with the lender. Conversely, the lender has little incentive to reach a speedy agreement. Lenders are typically large institutions, more able to absorb temporary financial strain. In addition, as the owner is still obligated to continue payments, the lender's day-to-day finances are not affected in any case.

Accordingly, it is foreseeable that large, institutional lenders would press for settlements disproportionately in their favour and take advantage of the serious financial pressures on owners. It would be unjust and unequitable for the bill to pass into law while benefiting large financial institutions at the direct expense of ordinary persons in this way.

3.24 Clause 22 and “urgent expropriation”

Clause 22 provides generally for so-called “urgent expropriation”, however, in our view what the clause in fact deals with is “temporary expropriation”. This difference in language is important, as “urgent” and “temporary” do not mean the same thing – urgency conveys a degree of importance, whereas temporariness is merely concerned with a period of time without judgment on its importance or lack thereof. As such, we propose that this clause's (and the chapter's) title be changed to “temporary expropriation”.

Furthermore, clause 22(1) provides that property may be expropriated temporarily “if [it] is required on an urgent basis”. We propose that in addition to this line, a sub-clause be added providing that it “is required on an urgent basis for a public purpose” to bring it in line with the standard contained in section 25 of the Constitution. We exclude “in the public interest” as we regard it as inconceivable that any public-interest expropriation could be “urgent” or even temporary, given that such expropriations deal with land reform and equitable access to natural resources. Only public-purpose expropriations, such as infrastructure projects, could conceivably be urgent. The importance of sticking to public purposes as a reason for temporary expropriations is reinforced by clause 22(3) which exempts government from complying with clauses 5(1), 6(1), and 7(1), which are important safeguards protecting against arbitrary expropriations.

Finally, clause 22(9) is deeply problematic, as it intends to allow a temporary expropriation “at any time” to be converted into a full (permanent) expropriation. We regard it as quite unfair for government to inform owners of a mere temporary expropriation, thus creating the expectation that the property will be returned to the owner within an acceptable period of time, only for government to later make the expropriation permanent.

There is a further issue with this clause. It conceivably allows government to circumvent certain safeguards in the bill under the guise of a temporary expropriation, and thus take possession and “temporary” ownership of the property, and thereafter begin the process of a full expropriation. The problem here is that government already has possession of the property, meaning the owner’s negotiating power for adequate compensation has been severely curtailed. Government is essentially placed in a position to dictate terms absolutely.⁵

As such, we recommend that clause 22(9) be removed from the bill. Failing this, we suggest clause 22 as a whole be removed from the bill, as the prospect of converting a temporary expropriation into a permanent one appears to us to be unacceptable under all circumstances. If government wishes to take ownership of private property, it must commence an ordinary expropriation complying with all the relevant safeguards contained in the legislation.

3.25 Clause 28(1) and regulation-making

Clause 28(1) of the bill empowers the Minister to make regulations on virtually anything related, however remotely, to the bill and the topics it addresses. This amounts to Parliament essentially delegating its law-making power to a single government minister. As such, we regard this delegation of authority to be overbroad and in conflict with the spirit of the separation of powers contained in the Constitution.

We therefore recommend that an additional sub-clause be added to clause 28 that substantively curtails, defines, and limits the regulation-making power of the Minister. Such criteria must be substantive and not merely formal. In the absence of adequate constraints placed upon this power, we propose that clause 28 be removed from the bill in its entirety.

3.26 Clause 29(1)(b)(ii) and rights, interests, or duties

Clause 29(1)(b)(ii) of the bill provides that any “regulation or notice, or an authorisation, document, made or issued in terms of” the bill, “may be amended or replaced without following a procedural requirement of” the bill “if the correction does not change the rights and duties of any person materially”.

We propose that the phrase “rights and duties” be replaced with “rights, interests, or duties”. The right to property guaranteed in section 25 of the Constitution is meant to protect the property *interests* of legal subjects, it is therefore important that documentation relating to potential detrimental effects on interests also be included within the purview of this provision. Furthermore, if the word “and” is used in this context, it means both rights and duties must be present, meaning if rights are

⁵ Government is already in a very powerful position to dictate compensation as the bill currently stands, but this provision would add an unacceptable amount of power and leverage to that which government already possesses.

detrimentally affected but not duties, notices or documents can be changed without adhering to the bill's procedural requirements. It is such that the word "or" must be utilised instead.

4. Conclusion

Expropriation law is undoubtedly one of the most contested fields in any country's legal regime. An evil no doubt it is, expropriation law must still balance interpretations of public utility to the constitutional rights and interests of private property owners. In this respect, it is well worth bearing in mind that protecting the rights of private property owners might benefit the public interest far more than expropriating their property.

The Expropriation Bill, 2020, is ostensibly geared toward bringing South Africa's largely-1975-based expropriation law regime in line with the Constitution. We are concerned, however, that many aspects of the bill weaken property rights and thus fall foul of the Constitution and of constitutionalism. Sakeliga, as a result, has made various recommendations for the bill's improvement, and urges government to make the necessary changes before proceeding with what is presently an unconstitutional piece of proposed legislation.

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Addendum 1: Common law constitutionalism⁶

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.

⁶ 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. The full submission on expropriation without compensation is contained in Addendum 5.

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.⁷ 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".⁸ 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.

⁷ See <https://dictionary.cambridge.org/dictionary/english/enshrine>.

⁸ 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.

Addendum 2: Section 1 of the Constitution⁹

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

⁹ 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.

empowered to disregard the human rights and freedoms of the jobless in favour of those with trade 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 Act¹⁰ 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 it 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 racist 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 racist 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.

¹⁰ National Minimum Wage Act (9 of 2018).

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:

"[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".¹¹

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".¹²

¹¹ *Van der Walt v Metcash Trading Ltd* 2002 (4) SA 317 (CC) at paras 65-66. Citations omitted.

¹² Good Law Project. *Principles of Good Law*. (2015). Johannesburg: Law Review Project. 14.

The report also identifies four threats to the Rule of Law,¹³ the most relevant of which, for purposes of this submission, is the following:

“[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”.¹⁴

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”.¹⁵

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”.¹⁶ 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”.¹⁷

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.

¹³ Good Law Project 29.

¹⁴ Von Hayek FA. *The Constitution of Liberty*. (1960). Chicago: University of Chicago Press. 206. Our emphasis.

¹⁵ Dicey AV. *Introduction to the Study of the Law of the Constitution*. (1959, 10th edition). London: Macmillan. 202-203.

¹⁶ Dicey 184.

¹⁷ Dicey 198.

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.

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.

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.¹⁸

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”.¹⁹

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.

¹⁸ *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at para 10.

¹⁹ *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”²⁰ 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”.²¹ (our emphasis)

²⁰ Von Hayek FA. *The Constitution of Liberty*. (1960). Chicago: University of Chicago Press. 311.

²¹ *Ferreira v Levin* 1996 (1) SA 984 (CC) at para 49

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 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.

Addendum 4: Competition policy and the law of unintended consequences

Competition as a market process

Competition develops as a natural outflow of the ever-fluid process of entrepreneurship in real-life markets. Apart from ensuring the contestability of markets, through the removal of legal obstacles, legal privileges, and monopolies in the public sector – all of which we regard as mostly of government's own making – competition requires little promotion through government policy.

We say this on the basis of the fact of entrepreneurs continually striving to provide consumers with goods and services they prefer. This is the basis of entrepreneurial success in contestable free markets. Even in relatively free markets the only way to attain and maintain any significant (and often precarious) market position is by serving consumers very well. In that sense a large market share is a reward for producing goods and services many people want to consume. Sylvester Petro writes:

“A free competitive market is not a condition which requires for its existence large numbers of producers. It only requires freedom on the part of all people to produce if and when they wish. If the unlikely situation should exist that in a certain line of production a single firm could most economically satisfy the whole market, then, of course, you would have a condition which might be called monopoly. But this is not the aspect of monopoly that people fear. **What really disturbs people about monopoly is not that a single person or firm has control over a commodity but that force, compulsion, or special privilege has been used to keep other people out**”.²²

Profits signal to entrepreneurs where resources are most urgently desired by consumers. This implies a **market process** of economic adjustment and entrepreneurship. Notions and evaluations of “static equilibrium conditions” is not very helpful when we regard the market as continually adjusting to changing conditions, technologies and consumer preferences.

However, in interventionist economies, legal barriers to entry are often established and do support conditions for harmful monopolies to arise. We consider these legal privileges as problematic and part and parcel in sustaining harmful regulatory monopolies in important sectors. It is these factors that, in our view, require the attention of competition authorities.

David Solomon writes:

“[G]overnment's competition policy should be to remove the artificial props presently supporting these giant state monopolies and to subject them to competition from international colossi. [By] merely avoiding the erection of artificial barriers to entry, the government can

²² Petro S. “Do Antitrust Laws Preserve Competition?”. (1958). 5 *The Freeman*. 410. Our emphasis.

facilitate an environment in which new and surprising changes in market structure can take place. No bill, [A]ct or tribunal is needed to accomplish this”.²³

We, therefore, support the repeal of laws and regulations which grant economic privileges to special interest groups and industries with regulatory government monopolies to subject these industries to market competitors.

The nature of competition policy

It should be noted from the onset that even among economists competition policy has always been contentious. Policy prescription on competition policy also differs widely among many pundits in the field. However, even mainstream “neo-classical” economists have raised important criticisms on many of the accepted notions of the competition policy and its enforcement. We briefly highlight some of these critiques to illustrate:

- Non-regulatory ‘monopolies’ may actually be beneficial for innovation and progress. Businesses making monopoly profits are able to invest those profits into new technologies and product development, which in the end may benefit consumers.
- In the absence of regulatory privileges a big market share is a reward for serving consumers’ preferences. This is important, especially when we consider that, as we have argued in our previous submission, it is better to think of competition not as rival firms selling similar goods or services, but rather as individual firms competing with every possible other use of the consumer’s money, which includes saving.
- Even just the potential for competition may play a role in driving businesses to keep prices down. In markets with few regulatory monopolies enterprises must remain ever vigilant of new competitors and new technologies, which may upset a market at any time
- Lastly, we emphasize that competition authorities do not have complete knowledge about all the dynamic, interrelated and multifaceted conditions of markets. For this reason, even well-intended interventions may go awry and cause failures of intervention, which harm consumers and producers (government failure as opposed to market failure).

From a strict natural rights perspective, however, each individual should have as much freedom as possible in the peaceful ownership, use and disposal of their property, including property owned in businesses. Dominique Armentano cogently illustrates a natural rights perspective of property as follows:

“This [natural rights] perspective would hold that it is right to own and use property; it is right to employ that property in any manner that does not infringe on anyone else’s property rights;

²³ Solomon D. “Whither competition policy?”. (1998). Free Market Foundation Briefing Paper. 2.

it is right to trade any or all of that property to anyone else on any terms mutually acceptable; and that it is right to keep and enjoy the fruits of that effort”.²⁴

At this juncture one has to be explicit about what competition policy assumes. Either by regulating prices, breaking up supposed monopolies, penalizing or restricting mergers or other commercial agreements, among others, governments assume the right to apply regulatory force to direct the utilization of private property and the market allocation of economic resources.

While regulators and governments assume – correctly or incorrectly – that governments do have the right to regulate private property through competition policy, we assume the exercise of this power cannot be arbitrary or absolute. For instance, while many consumers may appreciate an increase in the supply of services such as live music, which *ceteris paribus* should drive down the price and increase the quantities of these services provided, it would be gravely wrong, however, for bureaucrats to force musicians to increase their supply music services against their will through coercive state action. One must be careful not to allow competition policy to become vehicles of such wrongful coercion.

It is reasonable and perhaps even constitutional to suggest that any policy that interferes with the free and peaceful conduct of individuals on markets either as consumers or as producers must be thoroughly, reasonably and morally justified. Equality under our constitution, we suppose, should mean that both consumers **and producers** deserve equal treatment under the law.

A misapplication of competition policy clearly runs the risk of infringing on what some economists term the “self-sovereignty of individuals”; that is the right of individuals to exercise reasonable control over his or her person, actions and property. We deem it important to emphasize the self-sovereignty of both consumers **and producers** as a prerequisite for the formulation of reasonable rules for economic conduct.

Where such policies are developed, we contend, the onus should be on regulators to ensure that the rights of individuals both as consumers and as producers are protected and not harmed in competition policy. In this context, we deem it necessary to emphasize the constitutional cumulative right to enterprise (cf. Addendum 2)

Prof Duncan Reekie points to what we consider as a reasonable basis for competition policy:

“[C]ompetition policy should be aimed at ‘making markets work’. This is done by ‘deregulating product and labour markets’ and by ‘removing government-imposed special favours resulting in entry barriers to industries and occupations’. This policy should, furthermore, commit South

²⁴ Armentano DT. *Antitrust and Monopoly: Anatomy of a Policy Failure* (Independent Studies in Political Economy). Independent Institute. Kindle Edition. 8.

Africa to international free trade and privatise monopolistic State-owned enterprises by 'restoring the rights of ownership to the citizens of the country'.²⁵

Racial transformation

In our estimation, competition policy is the wrong regulatory instrument to use for the purpose of racial transformation for at least three reasons.

Firstly, in our estimation, government has many other means less harmful to commerce than burdening producers with the potential for costly and likely dubious litigation for anti-competitive behaviour. Government can instead **subsidise** firms owned by historically disadvantaged persons without violating the rights of other firms. Ideally, government can **liberalise** the economy thoroughly by getting rid of red tape and State monopolies, thereby making entry for all firms, especially small firms inevitably owned by historically disadvantaged persons, easier. Finally, government **can continue encouraging** firms to transform, without threatening or actually using the violence force of law to compel it.

Secondly, we are of opinion that racialising competition policy will mean that this regime, with the inclusion of implied racial considerations for anti-competitive behaviour, will become increasingly arbitrary and unfair. Businesses may transgress provisions in such policy with no reasonable way of knowing it.

Thirdly, we think that infusing racial considerations into policy will force businesses in important sectors to increasingly make decisions on the grounds of less efficient non-market considerations. This may mean less efficient production of goods and services and harm to consumer welfare through a less efficient output of goods and services. This invariably harms the very poor and marginalised communities such policy is intended to help the most.

The truism of unintended consequences

The law of unintended consequences is an economic truism which dictates that every political interference in the market will, despite its intention, yield detrimental consequences that were likely unforeseen by the interventionists. These detrimental consequences will usually not be limited only to the targeted persons – private monopolies or big businesses in the case of competition policy – but will accrue to consumers.

Claude-Frederic Bastiat articulated the law of unintended consequences, writing that an intervention in the economy does not only give rise to one consequence, but to a series of consequences. "Of these effects, the first only is immediate; it manifests itself simultaneously with its cause – it is seen. The others unfold in succession – they are not seen: it is well for us if they are foreseen". Bastiat

²⁵ Reekie DW. *Monopoly and Competition Policy*. (2000, 2nd ed). Johannesburg: Free Market Foundation. 20.

continued, arguing that the difference between a good and a bad economist is that the good economist takes account of all the consequences, and the bad economist merely takes account of the first, visible consequence.²⁶

This was echoed years later by Henry Hazlitt, who wrote that economics can be reduced to one “lesson”, and that lesson is:

“The art of economics consists in looking not merely at the immediate but at the longer effects of any act or policy; it consists in tracing the consequences of that policy not merely for one group but for all groups”.²⁷

An example of this law is seen in the increasing corporate taxes. While the intention behind increasing the corporate tax rate is to increase government revenue for more social spending, the unintended consequences are that those companies subject to the increase will delay wage increases and likely increase the cost of their goods or services. Most worryingly, it may also induce them to delay employing more people. Only the increase in government spending on social services will be ‘visible’, and will certainly be touted by the government. The job losses and higher prices, however, which usually set in over time, won’t immediately be traceable back to the increase in the corporate tax rate.

Absent the increased corporate tax rate, these companies will once again have more money at their disposal to pay their employees and lower prices.

²⁶ Bastiat C-F. “What is Seen and What is Not Seen”. In Rupert C (ed). *The Economics of Freedom*. (2010). Arlington: Students For Liberty. 1.

²⁷ Hazlitt H. *Economics in One Lesson*. (2008 ed) Auburn: Ludwig von Mises Institute. 5.

Addendum 5: Sakeliga (then known as AfriBusiness) submission on expropriation without compensation

Submission made by AfriBusiness to the Constitutional Review Committee

June 2018

Contents

- Executive summary
- About AfriBusiness
- **Part 1:** Executive statement
- **Part 2:** The implications of expropriation without compensation for constitutionalism
 - *by Prof. Koos Malan, Professor of Constitutional Law, University of Pretoria, for AfriBusiness*
- **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*
- **Part 4:** The economics of expropriation
 - *by Russell Lamberti, Strategist, ETM Macro Advisers, for AfriBusiness*
- **Part 5:** Amendment of article 25 of the Constitution: Motion of Mr J.S. Malema in Parliament
 - *by Johann Bornman, AgriDevelopment Solutions, for AfriBusiness*
- **Part 6:** AfriBusiness's position on expropriation without compensation and constitutionalism
 - *by Piet le Roux, CEO of AfriBusiness*

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 cease 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 *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 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

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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 enterprises 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 intention 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 broad 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 compensation, 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

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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

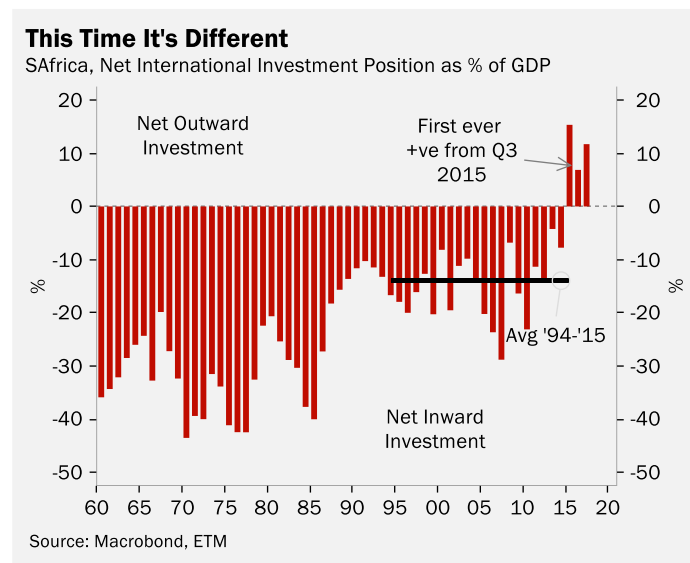
produce more inflation, robbing people of the value of their money savings. The mining charter and BEE codes strip asset owners of control of their assets, diminishing their effective ownership.

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.

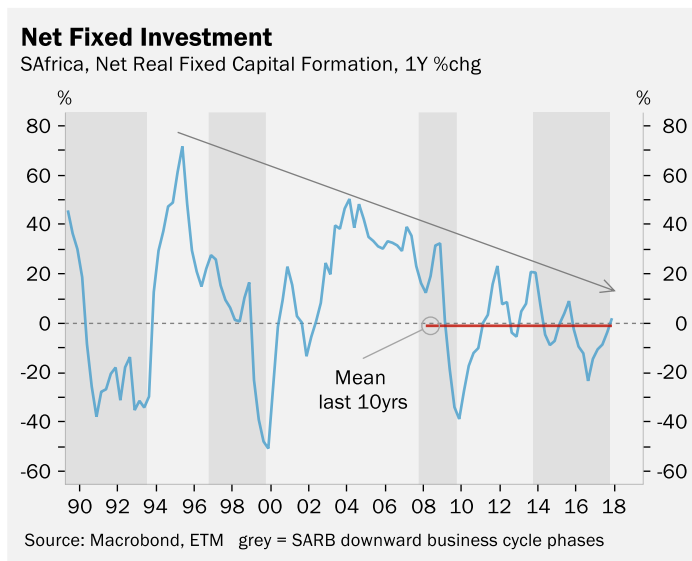
Already, for the first time on record, South Africans invest more abroad than foreigners invest in South Africa, a sure sign of the loss of investor confidence during the Zuma era (chart below). The near-25% of GDP swing in the net international investment position from the 1994-2015 average to levels 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.



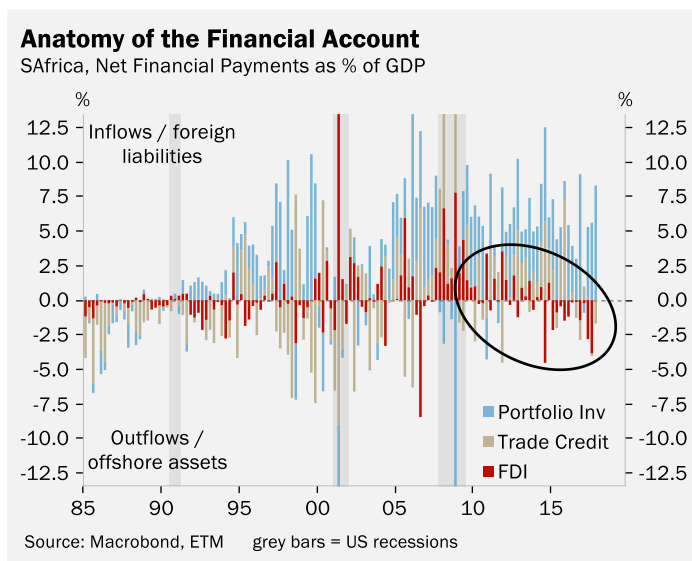
Meanwhile, the level of new fixed capital formation, adjusted for inflation and net of capital depreciation, has stagnated for the past decade, according to Stats SA and SA Reserve Bank (SARB) estimates. This doesn't mean that the stock of capital has stagnated, but that the additional amount of net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

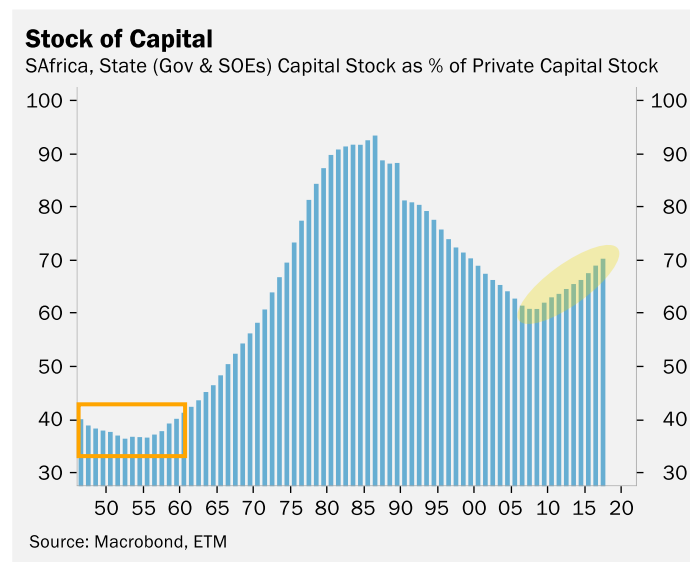
But it's not just the *quantity* of investment that has suffered under a regime of policy uncertainty and rising state economic control.

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 uncondusive 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.

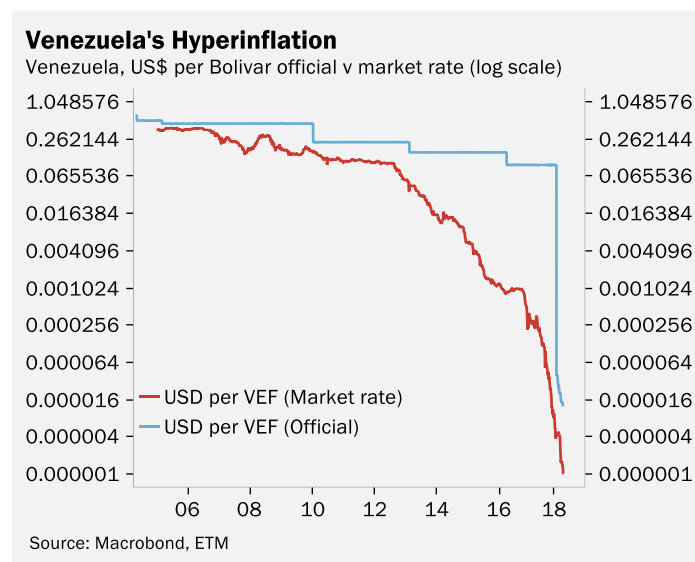
Without reforms of this nature, investors and businesses will have to either continue seeking opportunities to deploy their capital abroad or find ways to 'state-proof' as much as reasonably possible their investments and businesses domestically.

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.

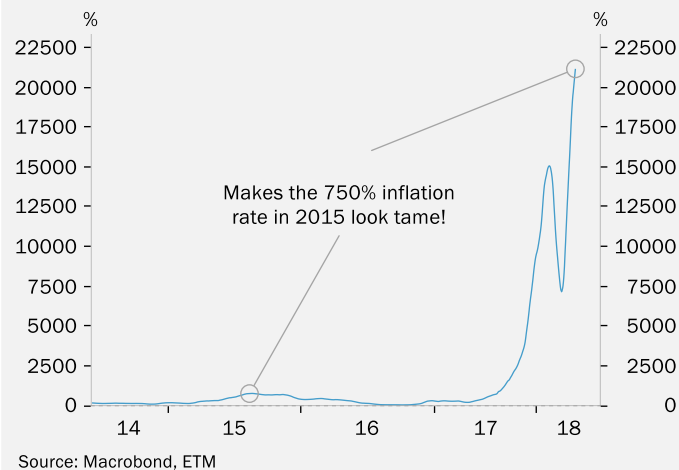
Venezuela's currency, the bolivar, could acquire a quarter of a US dollar - 25¢ - a decade ago. Today it can only purchase *1-millionth* of a US dollar, or 0.0001¢, due to rampant monetary corruption and printing which is causing hyperinflation and impoverishment.

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



Inflation Rampant

Venezuela implied y/y price inflation



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.