VERBAL COMMENTARY ON THE CONSTITUTION EIGHTEENTH AMENDMENT BILL

EWC: We Will Never Accept An Unconstitutional Order

Piet le Roux, CEO: Sakeliga

Our obligations when the state seeks to expropriate without compensation I have been invited to make a verbal representation on behalf of the business group Sakeliga (Business League) to an ad hoc committee of the Parliament of South Africa. The committee is responsible for drafting the text of a proposed amendment to the Constitution of South Africa to allow for expropriation without compensation, or as it puts it, expropriation 'where the amount of compensation is nil.'

Sakeliga is a business group, but the matter at hand is not of economic interest alone. I shall therefore start my presentation by establishing the relationship between constitutions and markets.
Second, I shall point out that constitutions are not legitimate foundational documents because they have been adopted in a certain way, but fundamentally because they conform to a certain basic structure and possess a certain basic content. Third, I shall point out that expropriation without compensation, properly understood, is confiscation, and therefore incompatible with the basic structure requirements of constitutionalism.

Fourth, I shall consider whether replacing the words 'expropriation without compensation' with 'expropriation with nil compensation' changes anything. To this I shall answer yes, but only in so far as it invites Parliament to incriminate itself in an act of public law legal fraud.
Concluding, I shall make recommendations to the committee, but also consider the consequences of passing the proposed Constitution Eighteenth Amendment Bill. To anticipate my conclusion: inserting expropriation without compensation into the text of the South African Constitution would oblige all sectors of society to a sustained campaign to restore constitutionality.

FIRST, THE RELATIONSHIP BETWEEN CONSTITUTIONS AND ECONOMIES

Markets and economies, as the economist, Wilhelm Röpke, reminded us, do not exist in a vacuum: 'the market economy is a form of economic order that is correlated to a concept of life and a socio-moral pattern [and it] can thrive only as part of and surrounded by a [constitutionally-oriented] social order.' Without a constitutional order, the market economy cannot exist, and without a market economy there is no prospect for South Africa as place where people can thrive. As Röpke elaborated: 'The real role of property cannot be understood unless we see it as one of the most important examples of something of much wider significance.'

That much wider significance – the constitutionality of our social order itself – is what is at stake in this matter, and it is apposite that businesses and business organisations are intimately involved in this matter not as one of personal interest, but of public interest.

SECOND, THE BASIC STRUCTURE OF CONSTITUTIONS

Superficially, what is debated is whether the Constitution should be amended to facilitate expropriation without compensation. However, Sakeliga submits that what is really in question is the constitutionality of the South African Constitution. Understanding this is essential for two reasons: First, for resolving the debate in an acceptable way. Second, for developing the ethical and moral foundation upon which, should the proposed amendment take place, civil society's unremitting refusal to accept that state of affairs, and its efforts to restore a constitutional order, can rest.

On the face of it, a constitution is the foundational legal text of a state, in this case South Africa, as adopted and amended from time to time according to applicable procedure. But scratch under the surface, and the issue becomes murkier. Inevitably, it must be asked whether it is sufficient for the legitimacy of a constitution simply that it passes formal requirements such as consultation and being carried by an arbitrary majority in a legislative body. To answer 'yes' to this question would be essentially to assert that constitutions can have arbitrary content, that their legitimacy is simply a question of administrative criteria. The evidently tyrannical implications of such a formalistic conception of constitutions should be enough to quickly dissuade reasonable people. And indeed, history is replete with examples of unacceptable, so-called 'constitutions', that any decent person today would reject. In a constitutional order, in a setting of rule of law, princeps legibus solutus est – the idea that the prince, or in this case, Parliament, has the final word – is untenable.

Contrary to the arbitrary content conception of constitutions, Sakeliga submits that there are fundamental requirements to which any constitution must adhere, for it to be a true constitution. As legal scholar Professor Koos Malan argues for Sakeliga in written submissions, a constitution is only a legitimate foundational legal text if it complies with the fundamental requirements of something called constitutionalism: the proper structuring of political power in the pursuit of justice for the whole of a polity. Constitutionalism rests, writes Malan, in the present context upon two crucial foundations.

The first is citizenship: a legal text, for it to be a constitution, must allow people the 'ability to participate independently and on an equal footing with all other citizens in the joint endeavour to govern the polity ...' The second is dispersal of power: If it wants to be more than mere decree, a constitution must further a dispersal of power. Writes Malan: 'Dispersal of power goes much broader than trias politica. It includes a rich plethora of power centres of civil society […]. The need for the dispersal of power among all these centres is a generally accepted prerequisite of sound modern-day constitutional law. In their absence the spectre of absolutism, more specifically of unrestrained governmental power which is by definition an outrage against the very foundation of constitutionalism, looms dangerously large.'

Any introduction of a power to the state to expropriate without compensation, including one which specifically permits such expropriation with regard to land, is incompatible with constitutionalism itself. It

detracts individually from the ability of citizens to participate with their property in the affairs of the polity, without compensating them for that detraction. In fact, it treats, without establishing guilt, such citizens as if they are criminals subject to asset forfeiture and reassigns their ownership to the state. Besides the individual infringement, such takings detract from the dispersal of power in society, by concentrating the means once held and exchanged in distributed civil and commercial society, into the hands of the state.

THIRD, EXPROPRIATION WITHOUT COMPENSATION IS CONFISCATION

While the term 'expropriation without compensation' has gained widespread use, it is legally more accurate to speak of 'confiscation'.

It is true, as many have pointed out these past three years, that expropriation is an accepted power of states. Without exception though, this power is accompanied by the obligation of payment, usually not only for the market value of that property, but often also of a solatium – an amount over and above market value – as consolation for the loss of the property. Expropriation, legally speaking, is therefore a concept that is always linked to a remedy in the form of payment for what a property is worth at a certain point in time.

Now, the question before this committee is decidedly about takings not accompanied by compensation. The term 'expropriation' is therefore mistaken. The correct term, when a taking constitutes an act with zero compensation, is 'confiscation', as argued by Professors Koos Malan and Hennie Strydom in Sakeliga's written submission.

It follows, and is important to point out, that in so far as any act of expropriation is with compensation, but below market value, that shortfall also constitutes a confiscation, albeit a partial one. This is not to say that there are not more or less desirable patterns of ownership, and that matters of justice (rather than the ideological idea of equality) do not necessitate reform. The answer here is to persist with the long and hard way, if though with more urgency and competency.

Examples of justified land reform include:

- The existing land restitution programme, which is about restoring land, or offering compensation, to those previous owners of land who were unjustly, with or without compensation, deprived of their land;
- Free market land reform, which simply means the buying and selling of land across race groups and communities, and which has been happening extensively with both urban and agricultural land;
- Formalising and providing title deeds for property owned in all but name, mostly by black people in townships and informal settlements; and
- The privatisation of state land.

FOURTH, OBFUSCATING CONFISCATION WITH ALTERNATIVE TERMINOLOGY IS PUBLIC LAW LEGAL FRAUD

Doing formally one thing when in substance an alternative is attempted, is a fraudulent endeavour, writes Martin van Staden, a legal fellow at Sakeliga in a forthcoming publication. 'Fraus legis,' he explains 'defrauding or evading the application of law – is a doctrine well-known to students of private law, but its application within public law, including constitutional law, remains largely unconsidered.'

Van Staden, and I agree with him and draw here from his work, submits that Parliament is at risk of committing this legal affront of fraus legis. It is at risk of implicitly doing something unconstitutional and illegal in order simply to avoid certain ramifications of doing so explicitly.

While the public and legal debate is generally concerned with 'expropriation without compensation,' the draft Constitution Eighteenth Amendment Bill provides instead for expropriation where 'compensation is nil'. This deliberate choice of words is introduced as if it matters substantially, when in fact it has no substantially different consequences. It is a distinction without a difference, yet it is introduced to make that which would otherwise appear unlawful appear legitimate. Consider the advice of Parliament's Constitutional and Legal Services Office (CLSO) on 21 February, where it advises against the use of 'expropriation without compensation' in favour of 'nil compensation'. Says the CLSO: 'The concept of compensation cannot be ousted, but it can be nil. Compensation as a concept is closely linked to the concept of expropriation. This is globally accepted.'

The CLSO clearly realises and advises that compensation and expropriation are legally and conceptually married, and that, as a result, it would be impermissible to expropriate without compensation. However, instead of advising against the amendment, they suggest other words for achieving the same thing. That is, instead, nil compensation should be 'paid', as if such a payment of 'nil' rand redeems the act of confiscation. The introduction of the 'nil' compensation concept is therefore an attempt to pretend that expropriation without compensation does not exist in South Africa, when in fact that is precisely what is being introduced. Attempting to conceal this fact in formality and thereby attempting to evade the full inspection and constrictions of law is, it is submitted, an admission and instance of Parliament inviting *action in fraudem legis.*

Whether Parliament considers itself at risk of acting in fraudem legis is doubtful. But even if the Constitution Eighteenth Amendment Bill is adopted into law and section 25 of the Constitution is amended, the courts must construe 'nil compensation' for its substance – meaning no compensation whatsoever – and have regard to whether such an arrangement satisfies the 'just and equitable' standard set in section 25(3) of the Constitution. On proper interpretation, that which is implicit in the constitutional amendment would thus have to be made explicit: expropriation at nil compensation is not an act of expropriation, but of confiscation.

The only difference therefore between the enactment of 'expropriation without compensation' and 'expropriation at nil compensation,' since they are both instances of confiscation, are the incrimination of Parliament for action in fraudem legis.

CONCLUSION: RECOMMENDATIONS AND PUBLIC CONSEQUENCES

In closing, let me point out where this state of affairs leaves Sakeliga, business in general, and the public. Constitutionally speaking, it is impossible to accept the proposed changes to the South African Constitution, no matter how many times it was adopted in Parliament or with whatever majority, and no matter how well all formalistic and procedural requirements were met. Amending the Constitution to facilitate confiscation would jeopardise the material basis on which citizenship and the dispersal of power – two essential attributes of constitutionalism – rests.

Should confiscation, regardless of whether it is called expropriation without compensation or expropriation at nil compensation, be written into the text of the Constitution, it would trigger certain obligations on our part, and I believe on the part of all bona fide role-players in society. These obligations flow from the fact that the text of the South African Constitution has been changed in a way that delegitimises the Constitution in so far as those changes are given any effect. By nature of this change, we would be obligated by the requirements of constitutionalism itself, and the pursuit of a flourishing society such as to which we are committed, to set in motion a sustained campaign to remedy the unconstitutionality of the South African Constitution and restore constitutionality – the constitutional character of the Constitution, in other words. It would be incumbent upon all constitutionally-minded people to put their full effort, as never before, behind the restoration of constitutionalism and in opposition to those who undermine constitutionalism.

Now, while such a campaign would be ethically and morally necessary, it would be accompanied by the political temptation to agitate for tension between the various communities in South Africa. It has happened and can be foreseen that actions in defence of constitutionalism will be made politically suspect and opportunistically attacked in racial terms. As a business organisation, Sakeliga will act to play the greatest role it possibly can to restore the foundations to constitutional order and prosperity in the country, as well as harmonious relationships between different communities. Thankfully, we are sure that this will be a priority for many organisations and role-players.

This submission, Mr. Chairman, is one that focusses on substance, and not on form. Sakeliga submits that the Constitution cannot be amended to facilitate confiscation as contemplated and remain a true constitution. It will lose its legitimacy in so far as it is so amended and effected and will regain that only after such an amendment and such effects are undone.

I recommend to this committee that it reports to Parliament that it was unable to propose an amendment that makes explicit provision for confiscation, because confiscation could never be implicit in a proper constitution and since introducing it would produce an unconstitutional order in so far as such introduction were given effect.

The above is an edited version of the verbal representation made by Piet le Roux, Sakeliga chief executive, on 23 March at hearings held by the ad hoc committee on amending section 25 of the Constitution of South Africa. Sakeliga NPC (or Business League) is a business group and a public interest organisation, with 12 000 members across South Africa and across industries. Sakeliga promotes healthy business environments in the interest of members and all communities where members do business.