



SAKELIGA
SELFSTANDIGE SAKEGEMEENSKAP

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Proposed Constitutional Amendment: Expropriation without Compensation

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Summarised submission by Sakeliga

to the Constitutional Review Committee; presented 7 September 2018

Introduction

In this summarised submission, Sakeliga expresses its opposition to an amendment of the Constitution that would facilitate expropriation without compensation. The summary is based on an extensive commentary submitted to the Constitutional Review Committee in July 2018.

Sakeliga's opposition to an amendment of the constitution is submitted with reference to:

- A) constitutionalism;
- B) international law;
- C) economics; and
- D) the errors of fact cited by the motion as passed in parliament.

Presented by Piet le Roux

CEO

Sakeliga

A: Constitutionalism

1. 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.
2. Any constitution purporting to allow for expropriation without compensation would cease to observe constitutionalism, and in that respect fail to be a legitimate constitution.
3. 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.
4. 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.
5. 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.
6. 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.

B: The International Law Standard of Treatment

1. 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.
2. 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.
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. 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.
5. Treaties have become the fundamental source of international law in the field of foreign investments.
6. 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.
7. Apart from treaties themselves, guarantees may derive from general international law on treaties and on the treatment of foreign nationals under international law.
8. 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.

9. 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.
10. A reconsideration of the 2015 Protection of Investment Act is inevitable should expropriation without compensation become a reality.

C: Economics

1. 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.
2. 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.
3. 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.
4. Economically speaking, the purposes of private property are to incentivise wealth creation, facilitate purposeful economic action and trade, and diminish conflict over resources.
5. 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.
6. 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.
7. 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.

D: Errors of fact in the motion

1. The motion by the EFF and ANC for expropriation without compensation rests on statistical fiction about land ownership patterns in South Africa.
2. 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.
3. 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.
4. 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.
5. 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.
6. 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.
7. 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.

Submitted by

Piet le Roux

CEO

Sakeliga