

What does a 'clarification' amendment mean?

The Constitutional Review Committee yesterday revealed their decision to recommend an amendment to section 25 of the Constitution to 'clarify' that expropriation without compensation can take place under section 25 of the Constitution. The details of this proposal are still unclear and one will only be able to fully assess the impacts of such an amendment once the conditions are made public, however, it is worth dissecting what a 'clarification' amendment could entail.

During the public hearings, constitutional law experts were at odds about whether or not the current formulation does in fact make it possible to expropriate without compensation. Stated differently, most experts agreed in theory that there might be instances where it would be just and equitable to award no compensation, but no one knows for sure what such circumstances could be. A 'clarification' amendment could be designed to influence the interpretation of 'just and equitable' by removing the ambiguity as to whether or not it is possible. Ironically, an amendment to the effect that 'just and equitable can be zero' creates another bout of uncertainty as one would still not know what circumstances could justify a zero amount. This clarification will likely only start to crystallise in the event that amendments are made to the Expropriation Bill to outline the conditions and circumstances that may warrant zero compensation.

A little-known fact is that section 25 of the Constitution has previously undergone an amendment of sort to 'clarify' a certain provision, although admittedly it was of a much less controversial nature. The predecessor to our current Constitution, known as the 'Interim Constitution' of South Africa, 1993, contained a property clause akin to the current section 25. Section 28 of the Interim Constitution, as it was, only made provision for property to be expropriated for a 'public purpose', and not in the public interest. Although it did not survive long enough to be fully tested by the courts, there was debate as to whether or not the expropriation of property from one owner to redistribute to others (land reform) would be regarded as a public purpose? I.e. is it a public purpose if the state does not acquire the property for public use?

The short duration of the Interim Constitution did not justify an amendment as such, however when section 25 of the Final Constitution (the current constitution) was drafted, special provision was made for expropriation in the 'public interest', and a provision was added to 'clarify' that the public interest includes the nation's commitment to land reform.

The amendment currently being proposed certainly has the potential to have much greater, adverse consequences. However one will only know those consequences once the draft wording of this proposed amendment is made public.

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