

The politics behind South Africa's property clause amendment

By [Theunis Roux](#)

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It is hard to comment on a draft constitutional amendment that is apparently not in its final form. But the stakes surrounding the proposed change to Section 25 of South Africa's [Constitution](#) are too high to wait until the governing African National Congress (ANC) sets out exactly how it wants to alter it.



Image source: Gallo/Getty

As the draft [Constitution Eighteenth Amendment Bill](#), 2019 is currently worded, Section 25(2)(b) would be changed to provide that:

“ a court may, where land and any improvements thereon are expropriated for the purposes of land reform, determine that the amount of compensation is nil. ”

In addition, a new section 25(3A) would be inserted authorising parliament to set out the circumstances in which such an order could be made, subject to the Constitution.

Existing commentary on this proposal has tended to split into two camps.

On one view, expressed by the [Constitutional Review Committee](#) responsible for the draft Bill, the new section 25(2)(b) [merely makes](#)

“ explicit that which is implicit in the Constitution. ”

Since any legislation enacted under the amended provision would be subject to the rest of the Constitution, all that the draft Bill does is clear the way for the long-awaited (and necessary) change to the ANC's [willing buyer, willing seller approach](#) to land reform.

On another view, the proposed amendment sends needlessly worrying signals to an already jittery market. If the property clause as it stands provides for the payment of nil compensation, why gratuitously stoke local and foreign investor fears by

amending it?

This second view has some merit. But the impact of the proposed amendment on investor confidence is not what should truly worry friends of liberal constitutionalism in South Africa. Improved prospects for liberal democracy depend on the relegitimation of the country's racially skewed economic system. Redistributive land reform clearly has an important role to play in that.

Instead, friends of liberal constitutionalism should be worried about what the proposed amendment reveals about the fragility of the support for this form of government within the ANC.



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The real cause for concern

Superficially, the origins of the amendment lie in the ANC's need to project itself as the true custodian of the national liberation project. In the face of the left-wing populist challenge posed by the Economic Freedom Fighters (EFF), the ANC is simply monopolising the discursive space for that party's radical agenda.

This might be plausible, to a degree. But this interpretation treats the ANC as a unified actor with a single set of strategic priorities. This is patently not the case. The ANC is currently split between a pragmatic, market-respecting faction aligned to President Cyril Ramaphosa, and a radical economic transformation faction associated with secretary general, [Ace Magashule](#). Decision-making in the organisation is therefore a reflection of the relative strength of those factions.

Against this background, the proposed amendment to the property clause is not so much a populist containment measure as a political wedge.

The publication of the amendment followed a [unanimous decision](#) of the ANC's National Executive Committee. That the pragmatic faction in the party acceded to this change, however, should not be read as a wholesale endorsement of it.

As soon as the amendment was mooted, the pragmatic faction was essentially presented with a choice. Either they could oppose it, and thus take responsibility for any further loss of electoral support to the EFF. Or they could embrace it, and in so doing accept a fundamental shift in the ANC's ideological direction.

The pragmatic faction's participation in the National Executive Committee's decision amounted to choosing the second option in this wedge. As such, it is very revealing about their assessment of the strength of support for economic populism, both in the ANC and in the country more generally.

That, more than anything else, is what friends of liberal constitutionalism in South Africa should be worried about.



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The possible scenarios

Assuming that the public response to the draft Bill is overwhelmingly positive, there will be no stopping its adoption and the change to the ANC's attitude towards constitutional governance such a change would signal.

For the radical economic transformation faction, and by extension the EFF, this outcome would represent a clear victory. The moderate, liberal-constitutionalist party of Nelson Mandela would effectively be dead, and the country launched onto a new constitutional-populist trajectory.

On the other hand, if the public response to the draft Bill is mixed, or firmly against it, this would embolden the pragmatic faction to motivate for its withdrawal. Under this scenario, the failed constitutional reform process would arrest the momentum behind economic populism in South Africa, at least for the time being.

Even if the draft Bill is passed, there would still be some scope for the pragmatic faction to use the amendment to rededicate the ANC to the orderly land reform process it promised but which has been waylaid by maladministration. Much would depend on how the pragmatic faction spins the amendment, and whether it is able to influence the nature of any ensuing land reform measures.

For all these reasons, the proposed amendment to Section 25 represents a critical juncture in South African constitutional politics. The outcome of the current public consultation process will shape the nature of its constitutional democracy for years to come.

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