

Press Release

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South African Institute of Race Relations
The power of ideas

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EWC decisions to be made by the executive, rather than the courts? – IRR

The ink has scarcely dried on the Draft Constitution Eighteenth Amendment Bill of 2019 (the Bill) – now up for public comment by 31 January 2020 – and already the ANC wants to change it so that the executive, rather than the courts, can decide when nil compensation on expropriation should apply.

As President Cyril Ramaphosa told the media after the ANC NEC's recent lekgotla, the party is 'encouraged' that the gathering endorsed the proposal that 'the power to determine the quantum of compensation for land expropriation should reside in the executive'.

Dr Mathole Motshekga, chairperson of the Ad Hoc Committee charged with drawing up the Bill, has now also supported the idea – indicating that the Bill will in time be changed to shift the power to decide on nil compensation on expropriation from the courts to the executive.

If this change is made, the courts will no longer be able to adjudicate on the 'nil' (or other) compensation to be paid. They will still be able to review the administrative decisions made by the executive and to set these aside if administrative justice norms (as set out in Section 33 of the Constitution and the Promotion of Administrative Justice Act of 2000) have not been met. But the courts will not be able to replace such flawed administrative decisions with their own rulings as to what compensation should be paid.

This will take us back to what the 2008 Expropriation Bill tried to provide. Under that bill, the courts could approve or disapprove the amount of compensation decided by the executive, but could never decide the matter for themselves.

Back in 2008, the then Expropriation Bill had to be withdrawn because ousting the jurisdiction of the courts in this way was contrary to Section 25 of the Constitution. Now the ANC's plan is to change Section 25 so that this objection can no longer be raised.

Though judicial review will still be available, expropriated home (and other) owners will find it harder and more costly to challenge executive decisions on compensation. Only those with the deepest pockets will be able to sustain the fight for a fairer outcome.

If this change to the Constitutional Amendment Bill is made, it will profoundly undermine the doctrine of the separation of powers.

It will also confirm the ANC's determination to keep chipping away at property rights until it has secured the comprehensive state control over land (and other means of production) it has long seen as integral to the success of its socialist National Democratic Revolution (NDR).

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