

Expropriation Bill unconstitutional in the absence of a constitutional amendment

By [Gary Moore](#)

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The 1975 Expropriation Act authorises the Minister of Public Works to expropriate property for public purposes, and provides for the payment of compensation to the dispossessed owner, not exceeding the property's market price, determined either by agreement between government and the owner, or by a court.



Source: [Pexels](#)

The Constitution says property may be expropriated in terms of “law of general application” for a public purpose, or in the public interest (including for land reform), and subject to compensation in an amount either agreed by those affected or decided by a court.

The amount of compensation, says the Constitution, must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including certain listed ones.

In 2020, the Minister tabled an Expropriation Bill intended to replace the 1975 Act with one which replicates the 1975 statute by and large, but which includes clauses that take into account provisions of the Constitution.

"If the Minister is considering expropriating property, she may authorise an inspector to enter a particular property to ascertain if it is suitable."

The 2020 Bill repeats in broadly similar terms the 1975 Act's provisions which say that, if the Minister is considering expropriating property, she may authorise an inspector to enter a particular property to ascertain if it is suitable and to determine its value.

But while the 1975 Act says, if the occupier doesn't consent to the inspector's entering any building on the land, the inspector can nevertheless do so on 24 hours' notice, the Bill in contrast says (in deference to the fundamental rights to dignity and privacy), if the occupier doesn't consent to the entry and inspection, the government must get a court order authorising access.

Like the 1975 Act, the Bill (with minor adjustments) says that, in determining the amount of compensation to be paid, account must not be taken of the fact that the property has been taken without consent, or of any enhancement or depreciation in its value which is attributable to the purpose for which it was expropriated.

The Bill then repeats the Constitution's property clause wording, that the amount of compensation must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances.

But the 2020 Bill then takes a step too far and ceases to be "law of general application" envisaged in the Constitution. The Bill contains a clause which seeks to stipulate when it may be just and equitable for "nil" compensation to be "paid". The word nil is the contracted form of the Latin word nihil, which means "nothing".

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The clause states that it may be just and equitable for nil compensation to be "paid", "where land is expropriated in the public interest".

The Bill's clause then lists precise circumstances which it deems to be relevant, and to which it requires that regard be had in determining when it may be just and equitable for nil compensation to be "paid" where land is expropriated in the public interest.

These listed circumstances are (*slightly abbreviated*):

- * where the land is not being used and the owner's main purpose is not to develop it or use it to generate income, but to benefit from appreciation of its market value;
- * where an organ of state holds land that it acquired for no consideration and is not using for its core functions and is not reasonably likely to require for those functions;
- * where the owner has abandoned the land by failing to exercise control over it;
- * where the land's market value is equalled or exceeded by the present value of direct state investment or subsidy in the acquisition and capital improvement of the land; and
- * when the nature or condition of the property poses a health, safety or physical risk to persons or other property.

But it is not for this clause of the 2020 Expropriation Bill or for any Act of Parliament to specify circumstances when it may be just and equitable for nil compensation to be "paid".

It is not for the legislature to lay down how the courts should interpret the Constitution's property clause in particular cases, and the Constitution does not envisage that the legislature may do so.





This clause in the Expropriation Bill infringes the separation of powers which is implicit in the Constitution.

The separation of powers does not imply rigidly demarcated functional roles between the judicial and legislative branches. But, says the Constitutional Court, there is need for caution on the part of each such branch of government against intruding into the constitutionally-assigned operational space of the other one.

The Constitution envisages that the superior courts decide constitutional matters. Whether an amount of compensation offered for an expropriation is a just and equitable amount is just such a constitutional matter.

"It is not in the compass of the legislature to encroach on the domain of the courts by prescribing circumstances when nil compensation would be just and equitable."

It is not in the compass of the legislature to encroach on the domain of the courts by prescribing circumstances when nil compensation would be just and equitable, unless an amendment of the Constitution is adopted which alters the property clause in the Constitution to allow for such legislation.

Indeed, there was a very recent attempt to bring about just such an amendment to the property clause in the Constitution, but the attempt failed. A Constitution Amendment Bill of 2021 sought to amend the property clause so as to provide that where land and its improvements are expropriated for land-reform purposes the amount of compensation may be nil, and that legislation must set out circumstances where the amount of compensation is nil. That Constitution Amendment Bill failed to achieve the required affirmative vote of two thirds of the members of the National Assembly and has accordingly lapsed.

In the circumstances, the 2020 Expropriation Bill's clause that seeks to stipulate when it may be just and equitable for nil compensation to be paid is unconstitutional and invalid, and the National Assembly's Portfolio Committee on Public Works should accordingly remove the clause from the Bill.

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