

# SC: Transport, Public Service and Administration, Public Works and Infrastructure

Workshop on Concepts related to the Expropriation Bill [B23B – 2020]



**PARLIAMENT**  
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Rethinking **Expropriation Law**



# Getting to Know the Expropriation Bill

Prof Hanri Mostert | Dr Richard Cramer | Mr Gaopalelwe Mathiba

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**Mr Gaopalelwe Mathiba**



**Dr Richard Cramer**



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# Programme

Introduction H Mostert

A1 Where does the power to expropriate come from? H Mostert

A2 Who can Expropriate? H Mostert

B What can be Expropriated? R Cramer

C When is it Expropriation? G Mathiba

Concluding discussion H Mostert



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# A1: Origins of the Power to Expropriate

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# Where does the power to expropriate come from?

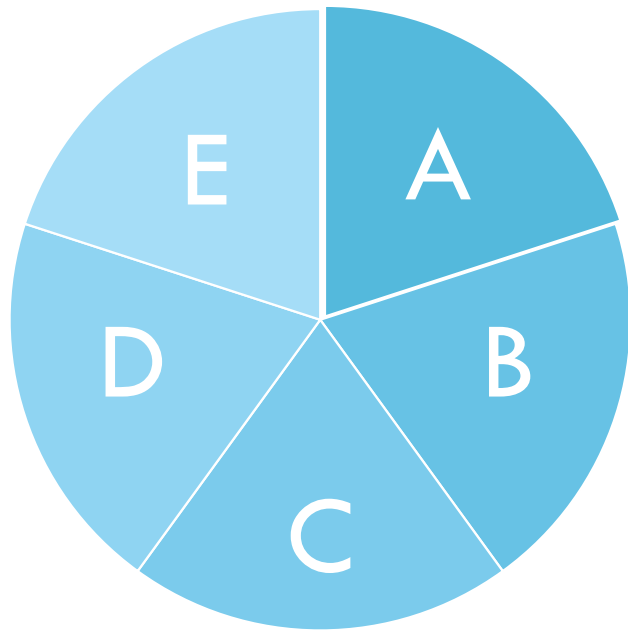
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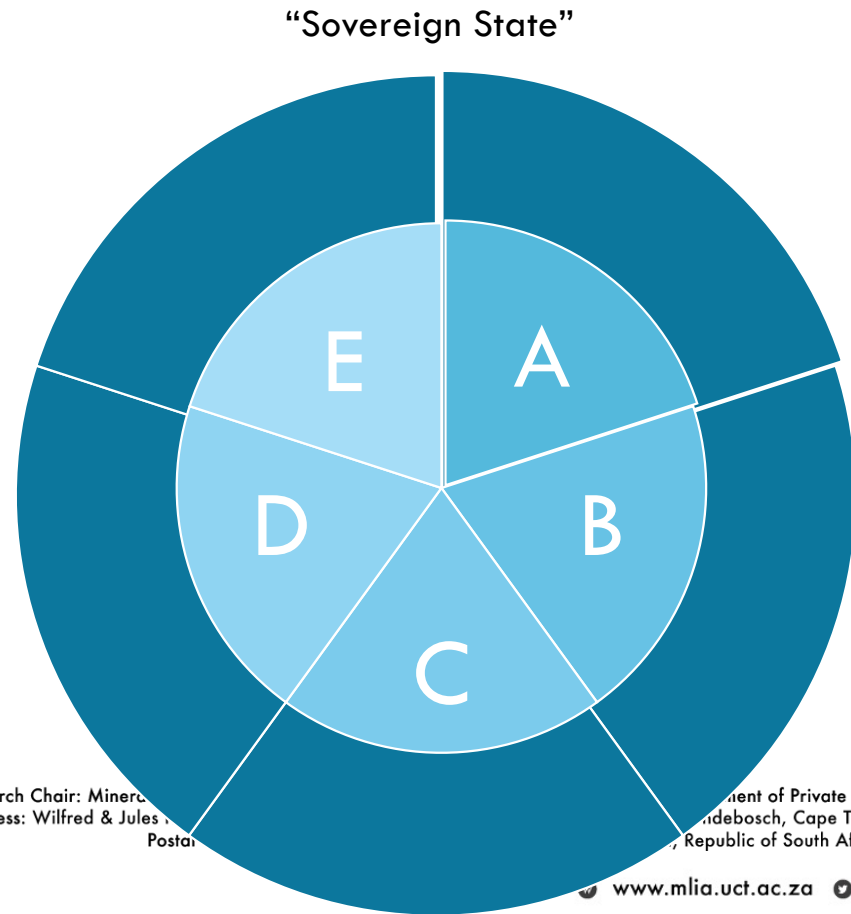
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# Where does the power to expropriate come from?



“State of Nature”



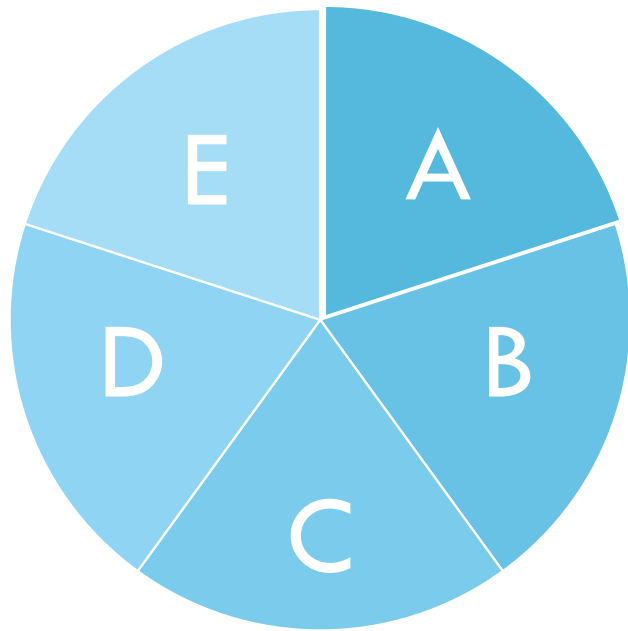
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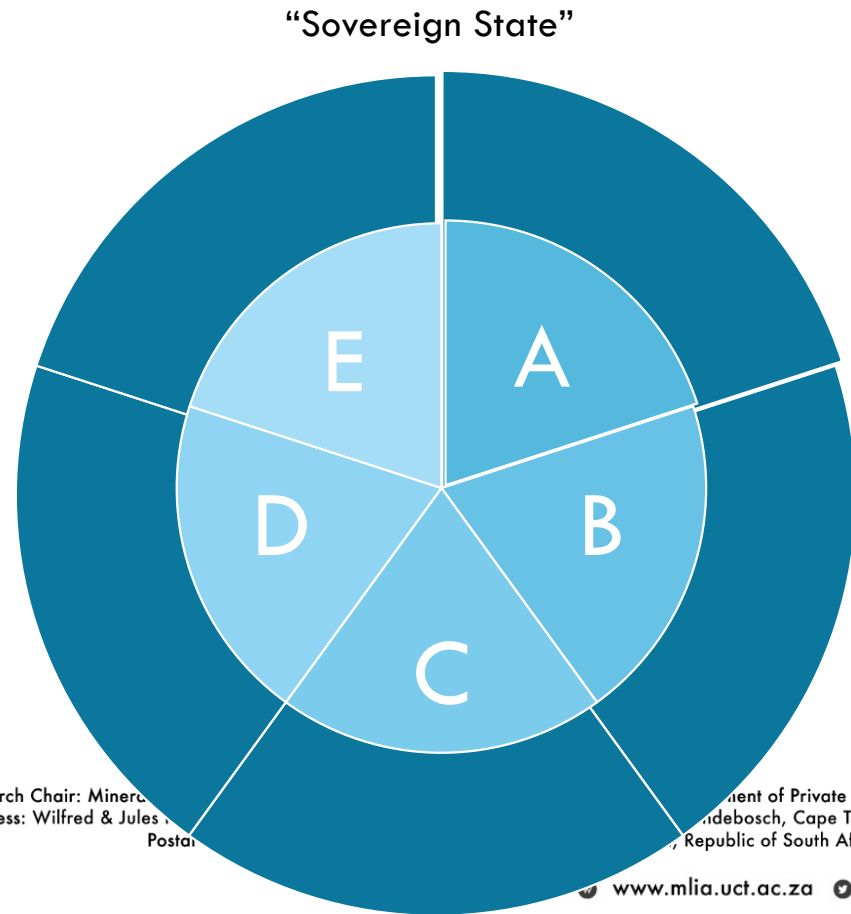


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# Where does the power to expropriate come from?



“State of Nature”



“Sovereign State”



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# Where does the power to expropriate come from?

- Before the State: Property
- Richard Epstein: “Twin Problems”
  - Control private aggression: Police Power
  - Centralised power to organize numbers: Eminent Domain
- Inherent in Eminent Domain: power to expropriate
- Fairness:
  - Just compensation = precondition for fair exercise of state’s distributive powers
  - Public use limits state’s coercive power



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# How the power to expropriate can shape society

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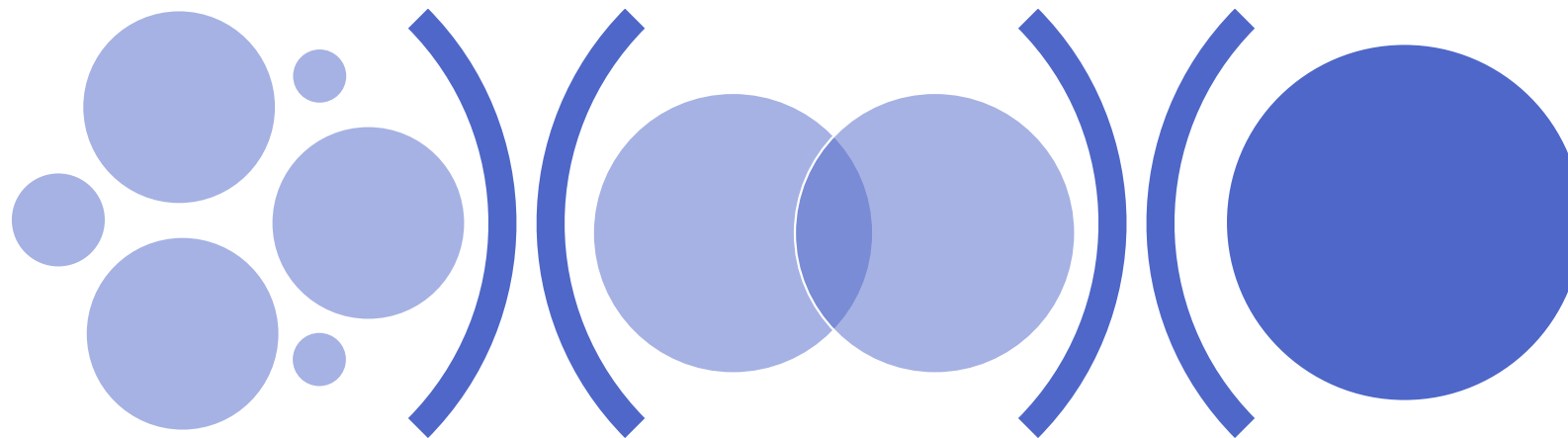


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# How the power to expropriate can shape society

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property

Regulation  
& territory

social order  
& sovereignty

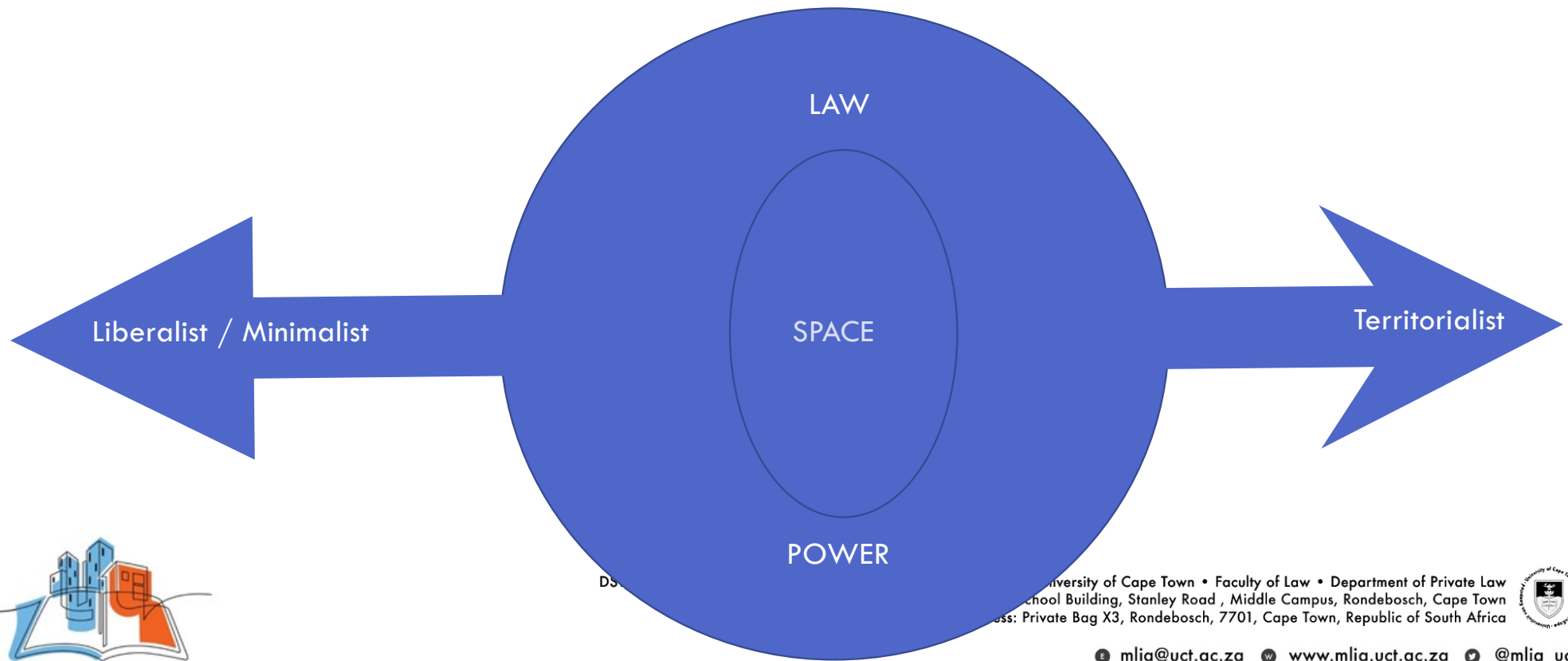


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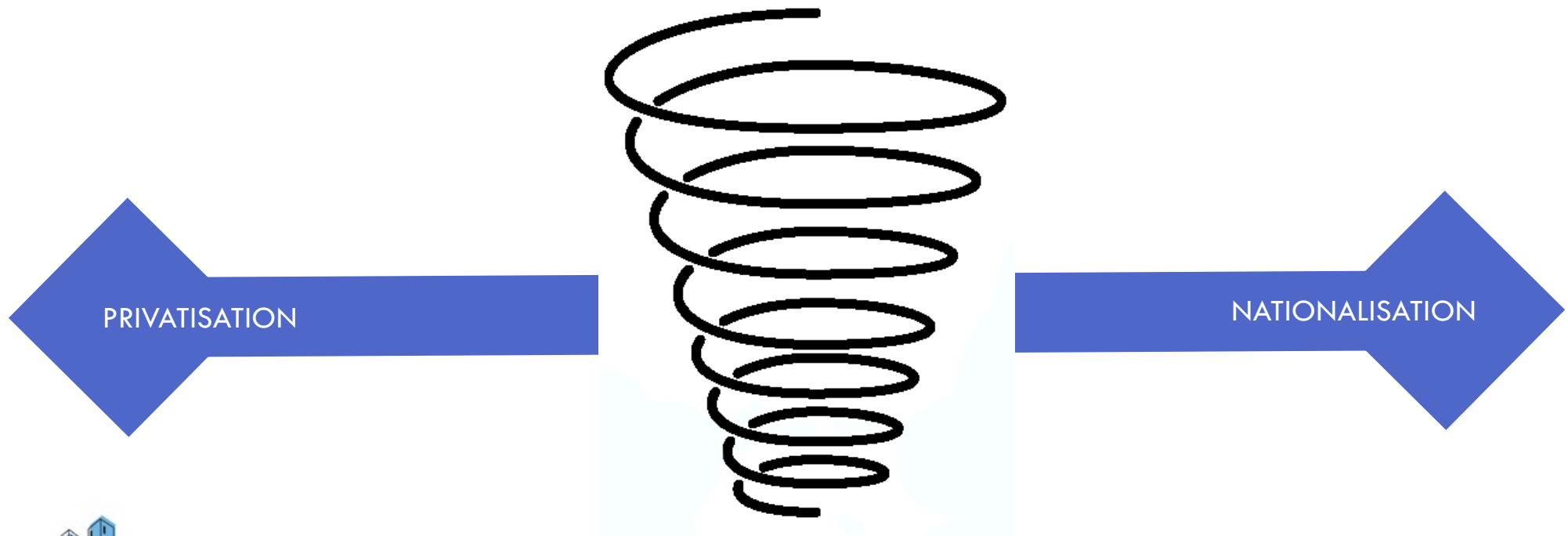
# How the power to expropriate can shape society





# What is the role of expropriation in a typical post-colonial transformative context?

# What is the role of expropriation in a typical post-colonial transformative context?



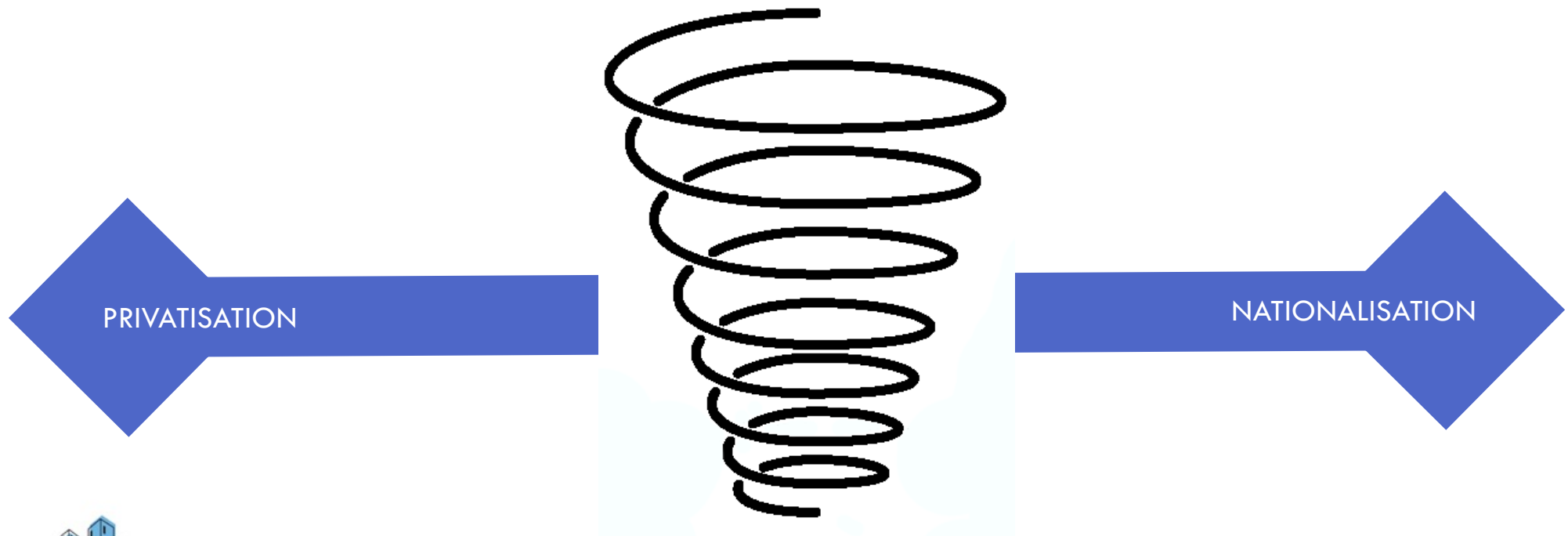
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# The drivers of decision-making



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## A2: Who can/may expropriate?

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# Empowering Legislation for Expropriation

Constitution, s 25(1) & (2)

Expropriation Act 63 of 1976, s2(1)

- empowers Public Works Minister; provincial executive councils

Constitution, s 156 (5);  
Mun. Systems Act 32 of 2002, s 8(1)  
Mun. Structures Act, s 83(1)

- all these provisions include municipal power to expropriate



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# Departments with Powers of Expropriation (1)

## Department of Public Works

## Department of Agriculture, Land Reform & Rural Development

- S 26: Extension of Security of Tenure Act 62 of 1997
- S 12: Land Reform: Provision of Land and Assistance Act 126 of 1993
- S 42E: Restitution of Land Rights Act 22 of 1994
- S 38 of the Communal Land Rights Act 11 of 2004

## Department of Transport

- S 41(3): National Roads Agency Limited and National Roads Act 7 of 1998
- S 16: Airports Company Act 44 of 1993



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# Departments with Powers of Expropriation (2)

## Department of Water & Sanitation

- S 64(1): Water Act 36 of 1998
- S 81 of the Water Services Act 108 of 1997

## Department of Economic Development

- S 5(1): Infrastructure Development Act 23 of 2014

## Department of Mineral Resources & Energy

- S 26: Electricity Regulation Act 4 of 2006
- S 55: Mineral and Petroleum Resources Development Act 28 of 2002
- S 32: Petroleum Pipelines Act 60 of 2003
- S 32: Gas Act 48 of 2001



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# Departments with Powers of Expropriation (3)

## Department of Basic Education

- S 58(1): South African Schools Act 84 of 1996

## Department of Environmental Affairs / Forestry & Fisheries

- S 80(1)(c): National Environmental Management: Protected Areas Act 57 of 2003
- S 36(1): National Environmental Management Act 107 of 1998
- S 49: National Forests Act 84 of 1998
- S 9(1)(c): National Environmental Management: Integrated Coastal Management Act 24 of 2008



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# Departments with Powers of Expropriation (4)

## Department of Sport, Arts & Culture

- S 46(1): National Heritage Resources Act 25 of 1999

## Department of Communications & Digital Technologies

- S 9: Sentech Act 63 of 1996

## Department of Public Enterprises

- S 7(1): Broadband Infraco Act 33 of 2007

## National Department of Science & Technology

- S 38(c): Astronomy Geographic Advantage Act 21 of 2007



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**Who  
is absent?**



Illustration 31865039 / Person Absent © Iqoncept | Dreamstime.com



# Empowering Legislation

*"... expropriation of land in order to enable a private developer to construct low-cost housing is as much an expropriation for public purposes as it would be if the municipality or provincial authorities had undertaken the task itself..." [para 15]*

*Offit Enterprises (Pty) Ltd v Coega Development Corporation* 2010 4 SA 242 (SCA)

A similar proposition was held in

*eThekweni Municipality v Spetsiotis* (14688/2009) [2009] ZAKZDHC 51

NB: all expropriations by municipality are subject to Expropriation Act



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# B: What Can Be Expropriated?

Land and Other “Constitutional Property”

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# What property does the Bill mention?

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# (1) LAND

## Clause 5(2)

- access

## Clauses 5(5)(b) & 6(1)

- consultation

## Clauses 7(3) & 8(2)(c)

- delivery of notices

## Clause 12(3)-(5)

- matters of compensation



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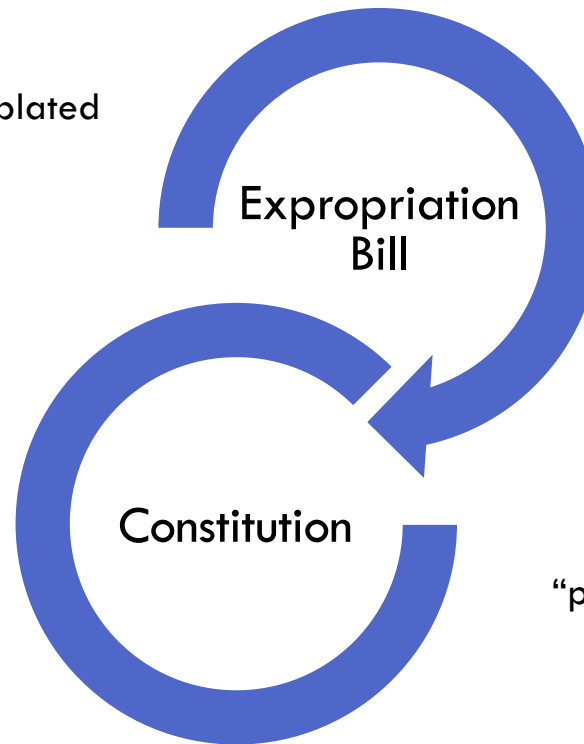


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## (2) OTHER

*“Property means property as contemplated in section 25 of the Constitution”*



*“property is not limited to land”*



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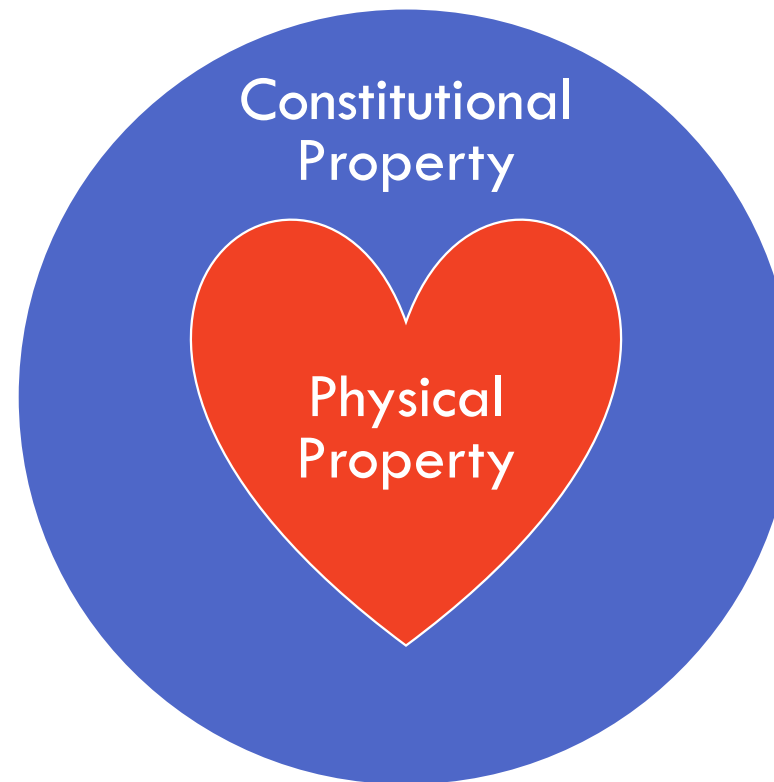


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# What is constitutional property?

## Examples

- Physical property (e.g., cars)



## Examples

- Rights to minerals
- Limited real rights
- Claim for unjustified enrichment
- Liquor license
- Intellectual property
- Shares

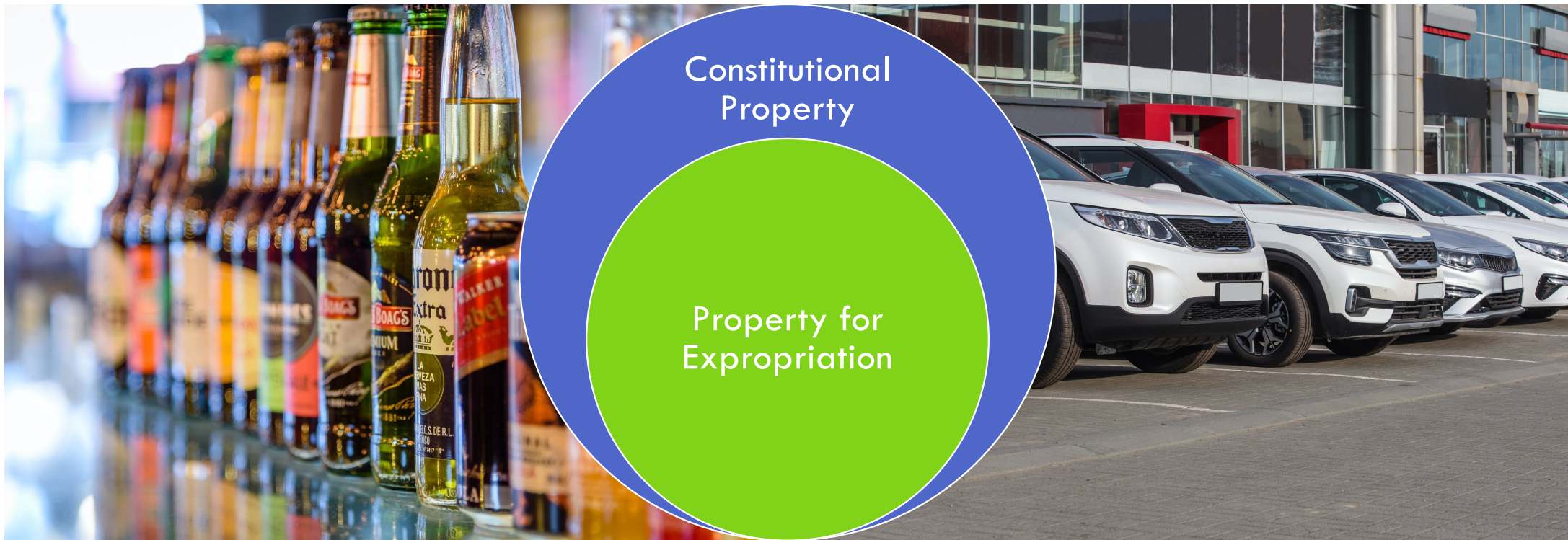


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# What can be expropriated?

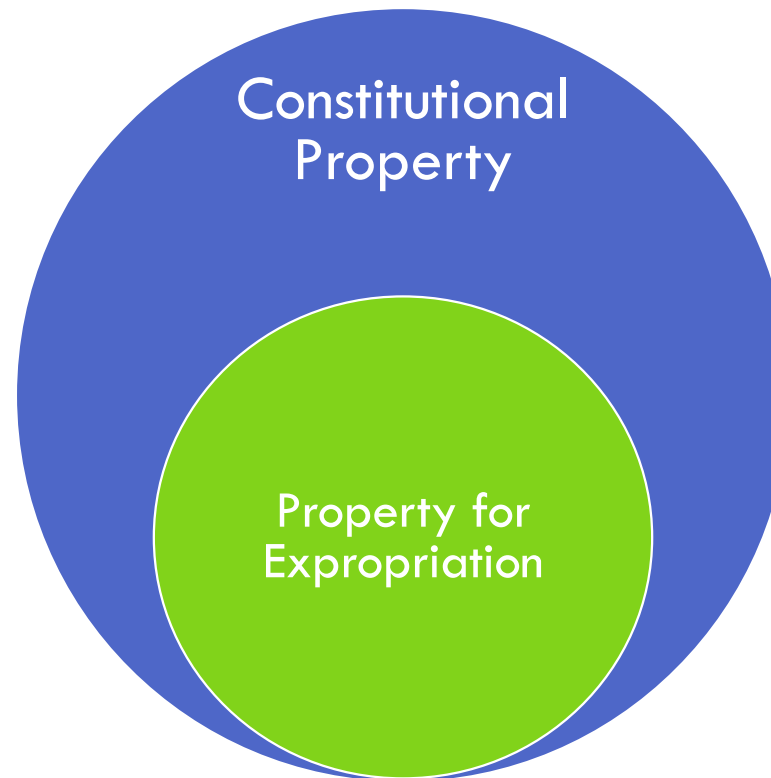


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# What can be expropriated?

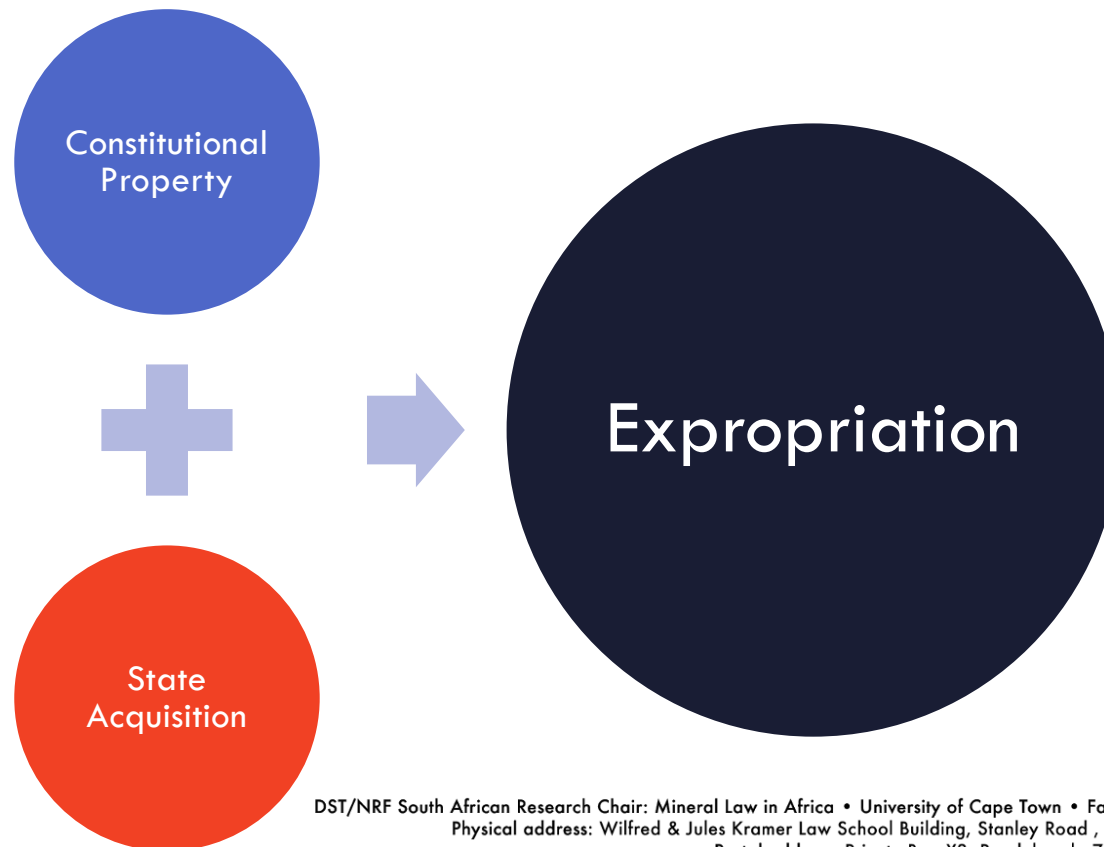


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# State acquisition & constitutional property

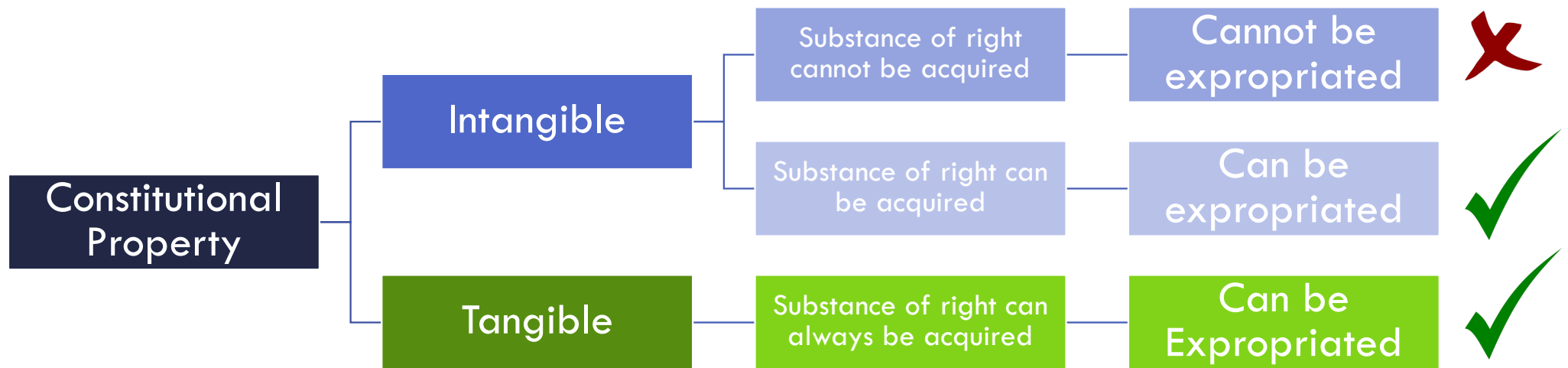


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# CHECKLIST: State acquisition & expropriation



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# C: When is it expropriation?

## Expropriation vs Other Forms of Acquisition of Ownership

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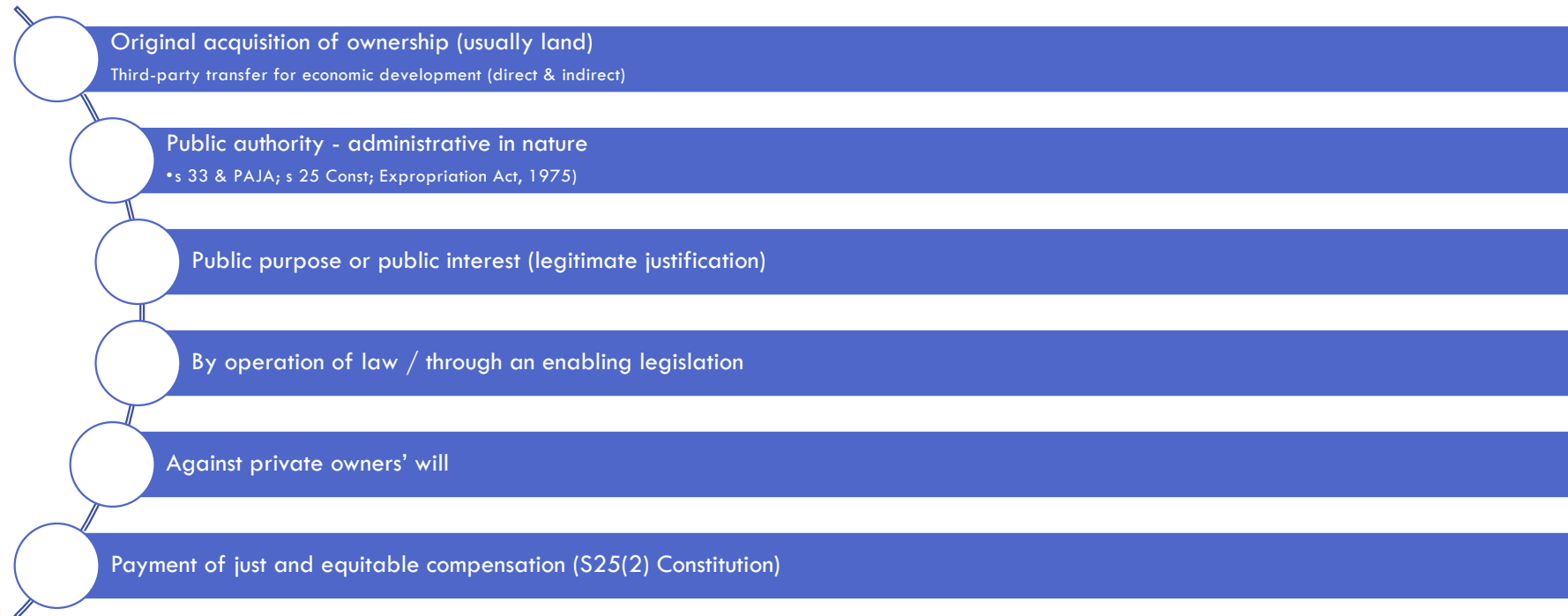
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Expropriation



# Definitional Elements of Expropriation



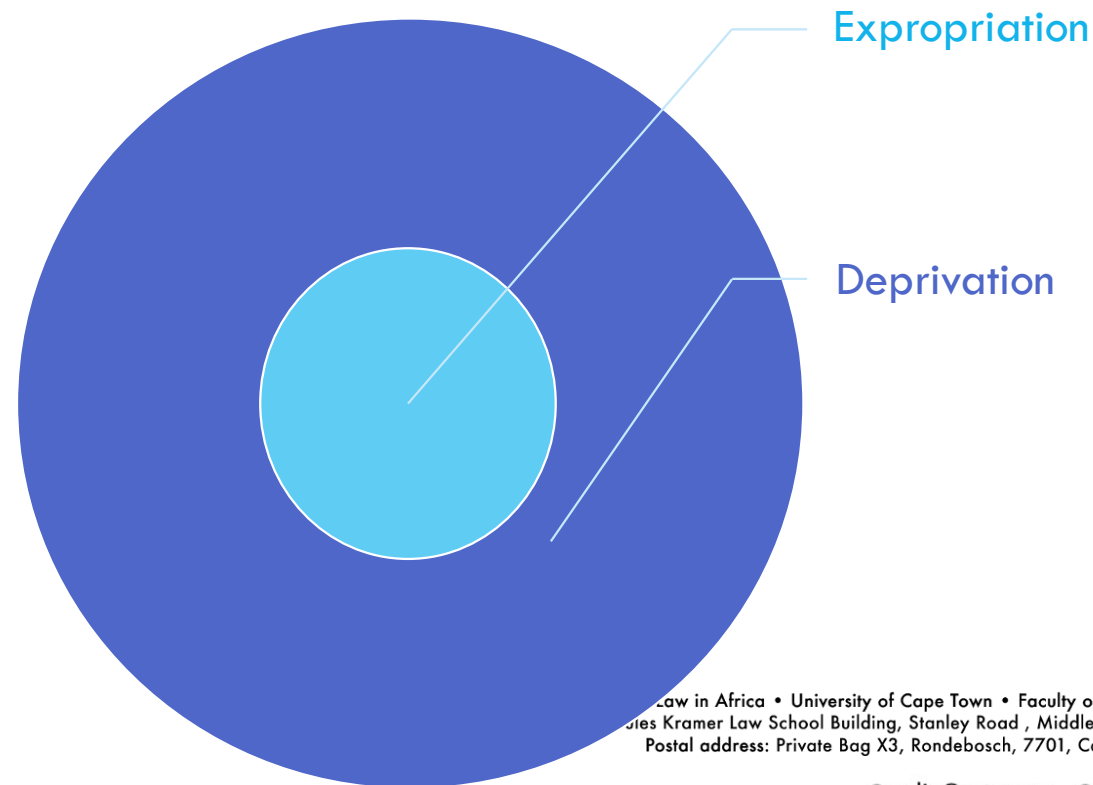
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# Expropriation as Deprivation

(S 25, Constitution)

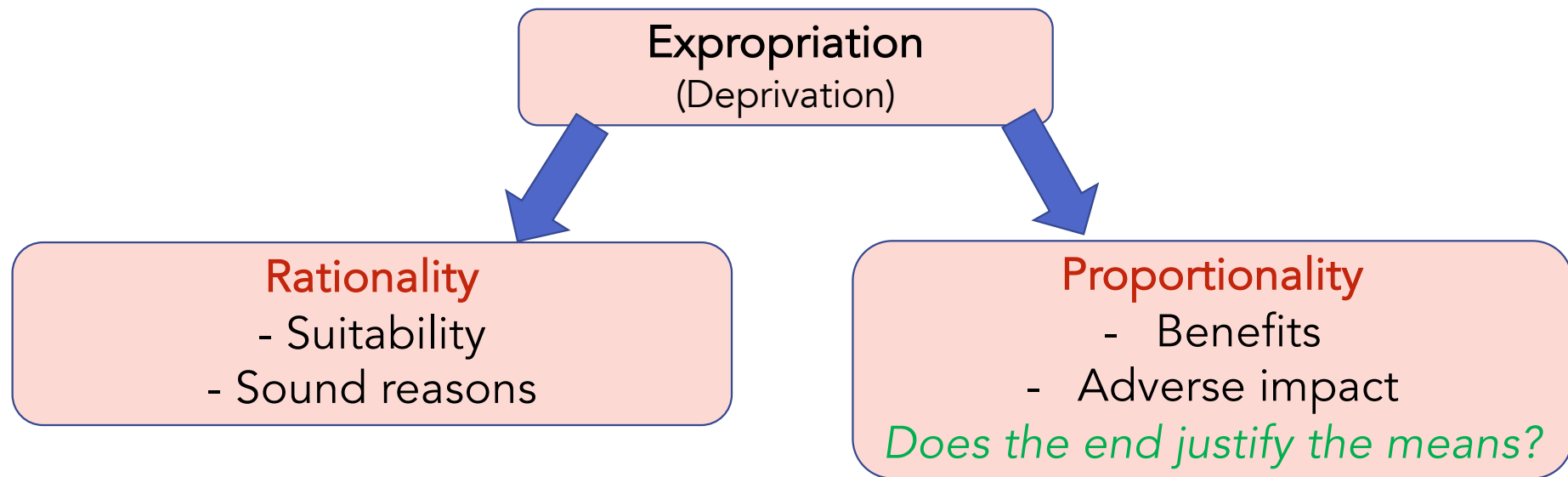


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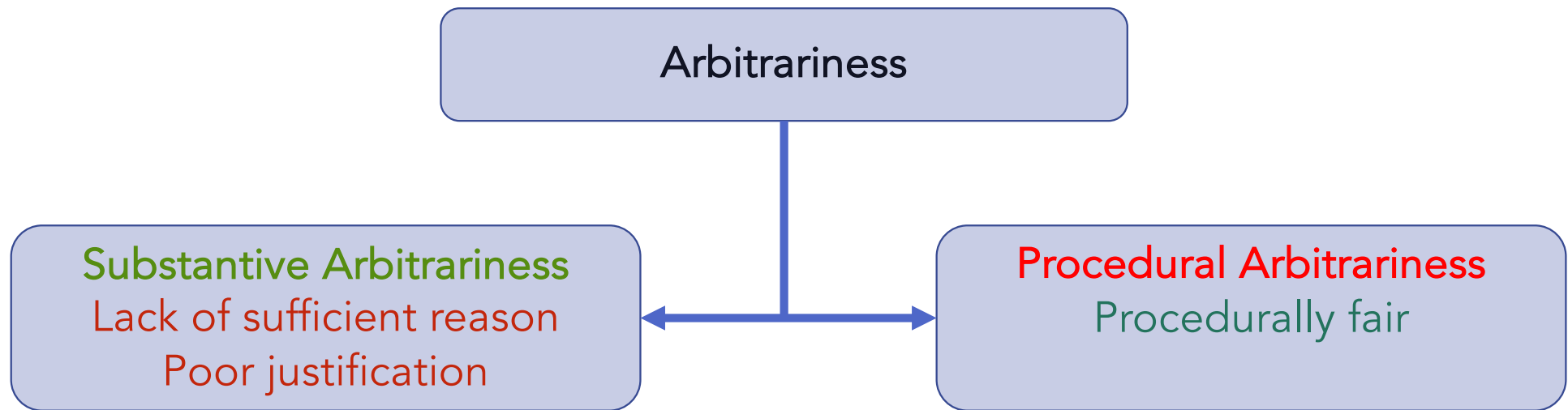
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# Legitimacy Test for Expropriation



# Legitimacy Test ... (continued)

- If legitimacy test NOT met: deprivation (i.e. expropriation) = arbitrary.





# Stages of the Expropriation Process

Investigation and valuation

Notice of intention to expropriate

Notice of expropriation

Verification of unregistered rights on property

Determination of compensation



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# Investigation & Valuation

Bill: pre-expropriation process

Expropriating authority **MUST** investigate, *i.a.*

- suitability for required purposes
- receipt and forwarding of evidence
- impact on municipal planning (revert within 20 days)

Expropriating authority **MAY** *i.a.*

- authorise a valuer to ascertain the value of the property through inspections and investigations
- call any relevant person to furnish information needed.



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# Notice of Intention to Expropriate

## Requirements: Notice MUST be

- served on the owner or any known holder of a right in property;
- published in the prescribed manner informing the public of such intention;

## Contents: Notice MUST include

- statement of the intention to expropriate;
- full description of the property;
- the purpose for which the property is required;
- the reason for intended expropriation of that specific property;
- intended date of expropriation;
- Invitation of comments, submissions and/or objections



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# Notice of Expropriation

If the expropriating authority decides to proceed with expropriation, he or she must serve an expropriation notice on the:

- owner or any known holder of an unregistered right whose rights in property stand to be expropriated;

A notice of expropriation must be made public.

A notice of expropriation must also be delivered to —

- The MM of a municipality where the property is situated;
- DGs of DRDLR, DMRE, Environmental Affairs, Water & Sanitation & any other relevant organ of state; and
- Holder of a mortgage bond registered against the property.



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# Notice of Expropriation

A notice must include information such as -

- statement of the expropriation of property;
- full description of the property;
- the purpose for which the property is required;
- the reason for the expropriation of that specific property;
- the date on which the right to possession of the property will pass to the EA;
- the amount of compensation offered by the EA;
- copies of reports detailing how the compensation amount was determined; and
- a statement on what the owner may do if the compensation amount is disputed.



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# Verification of unregistered rights

All unregistered rights are simultaneously expropriated, unless stipulated

The Bill outlines a process for the verification of claims by persons to have held unregistered rights in an expropriated property prior to date of expropriation and for which they have not been compensated, -

- request for evidence substantiating the claim;
- receipt and forwarding of evidence to the EA;
- determining the claim and notifying the unregistered right holder of such determination;
- If the claim is valid, negotiation on and payment of compensation.



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# Determination of Compensation

The Bill provides for the payment of just and equitable compensation, [as stated in Section 25(3) of the Constitution] which is to be determined by taking into consideration all relevant factors including (but not limited to) –

- The current use of the property;
- The history of the acquisition and use of the property;
- The market value of the property;
- The extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
- The purpose of the expropriation



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# Concluding thoughts

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How does political affiliations / convictions influence the understanding of expropriation?

How does civil service / bureaucracy view expropriation?

How does public at large view expropriation?

How do affected owners view expropriation?



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# Further reading

- AJ van der Walt *Constitutional Property Law* 3ed (2011) Chapter 3
- PJ Badenhorst & C Young “The Notion of Constitutional Property in South Africa: An Analysis of the Constitutional Court’s Approach in *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* 2015 6 SA 125 (CC)” (2017) 26 *Stell LR* 26.
- Hoops B *The Legitimate Justification of Expropriation: A Comparative Law and Governance Analysis* (2017) Chapter 6



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