



COMPULSORY ACQUISITION UNDER GHANA'S NEW LANDS ACT: THE GOOD, THE BAD AND THE UGLY

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Abstract: The exercise of the power of eminent domain—the compulsory acquisition of property (particularly land) in the public or national interest—is often accompanied by a number of challenges. Ghana has had its fair share of these problems. This paper examines the shortfalls that characterized the exercise of the power of eminent domain prior to the promulgation of the Land Act, 2020 (Act 1036). It also points out the laudable initiatives introduced by the Act to remedy the challenges which hitherto existed.

1. Introduction

The State's power of eminent domain, by means of which the State may compulsorily acquire private land for the greater good of the community, is not of recent vintage. In almost every country, this power has been given to the State. Without it, it would be near impossible for the State to function. The power of eminent domain is therefore considered to be an inherent and necessary power for the existence of all governments.¹ So, Bynkershoek would remark forcefully that "*this eminent authority extends to the person and the goods of the subjects, all would readily acknowledge that if it were destroyed, no state could survive.*"²

Hugo Grotius, one of the most serious thinkers that history has ever known, and who is regarded as the father of the modern power of eminent domain, spoke of the state's power of eminent domain as long ago as the seventeenth century in the following apposite terms:

"[...] the property of subjects belongs to the state under the right of eminent domain; in consequence the state, or he who represents the state, can use the property of subjects, and even destroy it or alienate it, not only in case of direct need, which grants even to private citizens a measure of right over others' property, but also for the sake of the public advantage; and to the public advantage those very persons who formed the body politic should be considered as desiring that private advantage should yield."³

¹ Stoebeck W.B. (1972), "A General Theory of Eminent Domain", 47 Wash. L. Rev. 553, 559.

² Bynkershoek C. (1930), Quaestionum Juris Publici 218 (T. Frank transl.), as quoted in William B. Stoebeck, A General Theory of Eminent Domain, 47 Wash. L. Rev. 553 (1972) 559, at 560.

³ Kelsey F.W.(tr) & Grotius H. (1925), "*De Jure Belli Ac Pacis Libri Tres*" (Oxford: Clarendon Press,) 807.

In effect, Grotius expresses the opinion that it is desirable for the persons who form the Government to consider “public advantage” as having primacy over “private advantage”. It has since become incontestable that the State has power to compulsorily expropriate property belonging to a private person for the public advantage.

In Ghana, since the period of colonial rule and before the enactment of the Land Act, 2020 (Act 1036), many pieces of legislation have been enacted to regulate the State’s exercise of the power of eminent domain. Unfortunately, these legislation could not do enough. Many loose ends existed in the previous legislation, thereby creating a myriad of challenges in the compulsory acquisition of property (land). This paper identifies the key challenges that bedeviled the regime of compulsory acquisition before the coming into force of the Land Act and the innovations introduced by the Act to solve these problems.

2. Shortcomings of the Old Regime

The Constitution places an obligation on the Government to ensure that compulsory acquisition is made under a law which makes provision for prompt payment of fair and adequate compensation to the property owners and access to the Court. Upon coming into force in 1993, the 1992 Constitution of Ghana continued to recognize and give validity to the provisions of all existing laws which are in accordance with the letter and spirit of the Constitution.⁴ In this regard, the State Lands Act, 1962 (Act 125)—though predating the Constitution—remained the operative law to give effect to the constitutional provisions that spelt out the power of eminent domain of the State.

The State Lands Act gave the President the power to compulsorily acquire land using an executive instrument where it appears to the President that it is in the public interest to do so.⁵ This provision has come under scrutiny and criticism for several reasons. According to Nyarko, the power conferred on the president is problematic because it clothes the political authority with unilateral powers to acquire land without any oversight. He argues that this is not in accordance with international best practice which requires that the entity effecting the compulsory acquisition should be independent and ensure procedural impartiality.⁶ Furthermore, the publication of the executive instrument automatically extinguishes the legal interest of the landowner in favour of the State. Yet, the notice of acquisition is often brought to the attention of the landowner after the publication of the executive instrument.⁷

Scholars raised concerns about the potential conflict of interest issues, especially where the Lands Commission—a state institution—is given the power to assess the compensation. According to proponents of these arguments, the international best practice is to ensure that the assessment of compensation is conducted by an independent entity that is not susceptible to any influence from the State.⁸ There is potential to argue that the law gives an aggrieved party an opportunity to appeal against the assessed compensation by the Land Commission. However, some scholars argue that the avenue to challenge the assessed compensation determined by the Lands Commission before the High Court does not account for the inability of some marginalized groups, such as the poor, to afford the services of lawyers.⁹

Further to the point above, the Constitution makes provision for the prompt and adequate payment of compensation to be made pursuant to law and also guarantees the right of access to the Court by an aggrieved landowner.¹⁰ As such, the State Lands Act, which was the operative law at the time, stipulated that a compensatory claim by an aggrieved landowner whose land has been compulsorily acquired shall be made within six months from the date of the publication of the executive instrument with the following information:

- a. particulars of the claim or interest in the land of that person,

⁴ 1992 Constitution, Articles 11(1), (4) and (6).

⁵ Land Act, 2020, (Act 1036), section 1.

⁶ Nyarko M.G. (2019), "The Right to Property and Compulsory Land Acquisition in Ghana: A Human Rights Perspective" 27:1 Afr J Int'l & Comp L 100.

⁷ Nyarko M.G. (2019), "The Right to Property and Compulsory Land Acquisition in Ghana: A Human Rights Perspective" 27:1 Afr J Int'l & Comp L 100.

⁸ See the African Commission Case of Human Rights and Development in Africa (on behalf of Esmaila Connateh & 13 others v Angola (2008) AHRLR 43 (ACHPR 2008) at para 73).

⁹ Nyarko M.G. (2019), "The Right to Property and Compulsory Land Acquisition in Ghana: A Human Rights Perspective" 27:1 Afr J Int'l & Comp L 100.

¹⁰ 1992 Constitution, article 20(2).

- b. the way the claim or interest is affected by the executive instrument issued under this Act,
- c. the extent of the damage done, and
- d. the amount of compensation claimed and the basis for the calculation of the compensation.

The compensation framework of the State Lands Act has come under criticism. The State Lands Act does not stipulate the time within which the compensation must be paid, even though the 1992 Constitution provides for the 'prompt' payment of compensation. The incentive to delay payment for years was prevalent in the old regime. The regime failed to establish a period within which the Government must meet its financial obligations to landowners. This practice emboldened the Government to take possession of lands under the guise of compulsory acquisition for many years without paying compensation to the affected individuals, families, skins or stools.¹¹

Another shortcoming of the regime under the State Lands Act is that it failed to consider other subsisting interests in the land. In Ghana, there are a handful of legal interests which could operate concurrently over land at a given time. These include the allodial interest, customary freehold interest, common law freehold interest, leaseholds and customary tenancies. The foregoing interests are the prevalent interests in land in Ghana. It is often the case that during the compulsory acquisition of land, customary interests such *abunu* and *abusa* are often ignored partly due to the lack of formal documentation evidencing these transactions or interests.¹² In rare cases, these interests may be captured in formal proceedings such as a judgment by a Court, yet these interests are often sidelined in the computation and payment of compensation.

As a result of these shortcomings, the old regime fell short of international standards such as the African Commission ESCR Guidelines,¹³ the State Party Reporting Guidelines for Economic, Social and Cultural Rights¹⁴ and the Voluntary Guideline.¹⁵ These soft law instruments recommend that the power of eminent domain ought to be exercised by the State in accordance with due process and must guarantee the rights to participation of all affected parties and ensure the transparency of the process.¹⁶ Yet, the State Lands Act barely encouraged the participation of the landowners whose lands and lives were either being affected by the acquisition or had the potential of having their lives affected. By encouraging the participation of a Site Advisory Committee in the decision-making process, the Act focused on the technical support that the President may rely on in acquiring any land.¹⁷ The Site Advisory Committee was responsible for technical functions such as identifying and making recommendations to the President in the exercise of his power of eminent domain. The failure to ensure the participation of people or community meant that there were instances where affected persons became aware of the acquisition of their lands only when government officials visited the land for purposes of survey.¹⁸

As can be expected, the loopholes in the old legal regime birthed what I refer to as the grandfather problems of compulsory acquisition. These include encroachment of compulsorily acquired lands, outstanding compensations for compulsorily acquired lands, stealing of lands by state officials and the landlessness occasioned to pre-acquisition owners.

¹¹ FAO (2009), "*Compulsory Land Acquisition and Compensation* ", paras 2.12 2.15.

¹² Larbi W.O. (2008), *Compulsory Land Acquisition and Compensation in Ghana: Searching for Alternative Policies and Strategies*, at 12.

¹³ African Commission (2011), "*Principles and Guidelines on Economic, Social and Cultural Rights in the African Charter on Human and People's Rights.*"

¹⁴ African Commission (2011), "*Principles and Guidelines on Economic, Social and Cultural Rights in the African Charter on Human and People's Rights*"., Guideline 7(A)., paras 51 55.

¹⁵ FAO (2012) "*Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security.*"

¹⁶ Nyarko M.G. (2019), "The Right to Property and Compulsory Land Acquisition in Ghana: A Human Rights Perspective" 27:1 Afr J Int'l & Comp L 100, at 106.

¹⁷ State Lands Regulations, 1962 (LI 230), regulation 1.

¹⁸ Kotey N.A (2002), 'Compulsory acquisition of land in Ghana: does the 1992 Constitution open new vistas?', in C. Toulmin, P. L. Delville and S. Traore (eds), *The Dynamics of Resource Tenure in West Africa* (James Currey, 2002), p. 121, at 126.

3. Inroads Introduced by the Land Act

The 1992 Constitution and the Land Act, 2020 (Act 1036) are the operative laws on compulsory acquisition. The Land Act has made significant inroads into the old regime under the State Lands Act and has introduced significant safeguards which guarantee human rights, due process and transparency of the process. The subsequent paragraphs discuss the inroads introduced by the Land Act and the potential implications of these inroads.

To begin, the Lands Commission being the public entity with capacity to act on behalf of the State¹⁹ in the acquisition process is required to ensure proof of funds to meet the State's obligation to pay compensation to affected landowners in accordance with the Constitution and to cover associated costs arising out of the acquisition. Prior to the passage of the Land Act, the Land Policy document recommended that an independent uninterested entity be established in place of the Lands Commission in this context. According to the drafters of the policy documents, this is in line with international best practice and avoids issues of conflict of interest. To show that there is proof of funds to meet the State's obligation to pay compensation, the Lands Commission is required by the Land Act to ensure that the funds are paid into an interest yielding escrow account before the compulsory acquisition is carried out.²⁰ The idea of setting up an escrow was first introduced under the Land Policy document which recommended that to ensure that compensation is 'prompt' and 'fair and adequate', there is a need to set up an escrow account.²¹

Furthermore, the Land Act fleshes out the escrow scheme by stipulating that where the State acquires land for use by a public body that solely relies on public funds to operate, the public body is under obligation to obtain Cabinet approval for payment of compensation and cost of the process before proceeding to acquire the land in question.²² On the other hand, where the State acquires the land for the use of a public corporation or statutory corporation which is not a public service, the funds for the acquisition must be paid into an interest yielding escrow account before the commencement of the acquisition.²³ To a large extent, the spelling out of how the funds will be generated and paid into the escrow account guarantees some transparency and a measure of accountability in the process.

Another inroad made by the Land Act is that it stipulates the categories of people who are potentially entitled to receive compensation. The list covers all known interests in Ghana's land tenure system such as the allodial title, customary law freehold, common law freehold, usufructuary interest, leasehold interest and customary tenancy.²⁴ In addition, the lawmaker expands the list to cover any other interest or right in the land which may be regarded as interests.²⁵

A claim for compensation must be made within six months of the date of publication of the Executive Instrument that acquires the property. In making or presenting their case, the affected persons must give particulars of their claim or interest in the land, the way the claim or interest has been affected by the power of eminent domain and finally, the amount and basis for the calculation of the compensation claimed.²⁶

Furthermore, the Lands Commission is under the obligation to carry out an assessment and to ensure that the compensation is fair and adequate. Where there is no dispute as to the interest in the land and the compensation assessed, the Lands Commission is required to make prompt payment to the applicant.²⁷ However, where there is dispute as to the right or interest in the land, the Lands Commission is required to proceed with the assessment, save the compensation in an escrow account and eventually release the compensation to the victorious party upon the

¹⁹ Land Act, 2020, (Act 1036), section 237.

²⁰ Land Act, 2020, (Act 1036) section 238(1).

²¹ Duncan J. *et al.*, (2013) 'The Land Bill (Draft 3): Analysis and Policy Recommendations' Land Access and Tenure Security Project, at 23.

²² Land Act, 2020, (Act 1036) section 238(2).

²³ Land Act, 2020, (Act 1036) section 238(3).

²⁴ Land Act, 2020, (Act 1036) sections 250(2) and (3).

²⁵ Land Act, 2020, (Act 1036) sections 250(2) and (3).

²⁶ Land Act, 2020, (Act 1036) section 250(1).

²⁷ Land Act, 2020, (Act 1036) section 253.

final determination of the dispute.²⁸ Also, it is mandated to issue a valuation report of the assessment it has carried out for the benefit of the State, the public and interested persons.²⁹

The Land Act establishes avenues to challenge the assessment carried out by the Lands Commission. The claimant has the option to apply for a review before the Lands Commission or proceed to the Court to seek redress. Where the claimant applies for the former and is dissatisfied by the decision of the Lands Commission, the Act allows the claimant to explore other dispute resolution mechanisms under the Alternative Dispute Resolution Act, 2010 (Act 798). However, a claimant may challenge the assessment made by the Lands Commission by proceeding to seek redress from the Court without applying for a review of the assessment before the Lands Commission.³⁰

It is worth noting that the Ghana Land Policy Node³¹ recommended that the new Land Act outlines the nature of challenges which could be made in respect of the assessment of compensation. It recommended that the challenge available to an aggrieved party ought to be against the purpose of the project, the procedure of acquisition and the compensation award.³² Nevertheless, the lawmaker resolved to make available two forms of challenges, that is, a challenge based on assessment and payment of compensation and a challenge based on conflicting interests and rights.

Additionally, the Land Act stipulates the basis upon which the Lands Commission should compute the compensation. It assesses compensation in accordance with the market value at the date of the publication of the Instrument in the Gazette.³³ According to section 256 of the Land Act, an assessment of compensation to be paid by the Lands Commission to affected parties by virtue of the exercise of power of eminent domain must be based on the following factors:

- a. any damage sustained or likely to be sustained because of the acquisition;
 - b. any damage sustained or likely to be sustained by reason of the acquisition adversely affecting the other property of the claimant, in any other manner;
 - c. the need to change residence or place of business and reasonable expenses incurred because of the change;
 - d. an undertaking by the State, person, or corporation on whose behalf the acquisition is made, to construct roads, drains, walls, fences or provide other facilities benefiting any part of the land which is not affected by the acquisition;
 - e. any other cost that is necessary for the compulsory acquisition; and
- a. the resettlement of a displaced claimant on suitable alternative land.

These factors are progressive and commercially sensitive. In respect of the option to resettle displaced claimants, the Act simply reiterates the requirement of the Constitution that the State resettles the affected persons on “suitable alternative land with due regard to their economic well-being and social and cultural values”.³⁴

Another laudable intervention introduced by the Land Act is the provision of a disbursement scheme that governs the distribution of compensation among the respective interests in the land affected by the exercise of power of eminent domain. The disbursement scheme brings clarity to the challenge of disbursing the compensation that has existed since time immemorial.

According to the dictates of the Land Act, where the interest in the land is made up of the allodial title and usufructuary interest only, the latter receives sixty percent of the proceeds designated as the compensation and the

²⁸ Land Act, 2020, (Act 1036) section 254(3).

²⁹ Land Act, 2020, (Act 1036) section 254(3).

³⁰ Land Act, 2020, (Act 1036) section 254(3).

³¹ Duncan J (2013) *et al*, ‘The Land Bill (Draft 3): Analysis and Policy Recommendations’ Land Access and Tenure Security Project’

³² Duncan J (2013) *et al*, ‘The Land Bill (Draft 3): Analysis and Policy Recommendations’ Land Access and Tenure Security Project’ at 32.

³³ Land Act, 2020 (Act 1036) section 255(1) and (2).

³⁴ Nyarko M.G. (2019), "The Right to Property and Compulsory Land Acquisition in Ghana: A Human Rights Perspective" 27:1 Afr J Int'l & Comp L 100, at 114.

allodial title receives forty percent.³⁵ However, where the land is under a customary tenancy, the allodial title receives forty percent of the proceeds and the usufructuary and customary tenancies split the remaining amount equally. Where the subsisting interest is made up of the allodial title and the customary tenancy only, the former receives sixty percent of the proceeds and the customary tenant receives the remaining forty percent.³⁶

It is important to emphasize that from the disbursement scheme, the lawmaker fails to make any allocation to leasehold interest holders. In the author's view, it is likely to raise potential future challenges in respect of the disbursement scheme. It is also necessary to note that a person aggrieved by the delay in the payment of compensation may apply to the High Court to order prompt payment of the compensation. In such instances, the Court may award interest in favour of the aggrieved party against the State.³⁷

Another significant inroad made by the Land Act is the duty of the State to consult the people who are likely to be affected by the acquisition and take into consideration their concerns. The lawmaker outlines the categories of people that the State owes this duty to, namely the occupiers of the land, the traditional authorities and community leaders.³⁸ The foreseeable challenge with this inroad, which the lawmaker does not address, is the absence of a definition for 'community leaders'. This omission is vulnerable to abuse by officers of the Lands Commission.

As part of their duty to consult, the Lands Commission is obliged to prepare, publish and furnish people with a report after the consultation. Once again, the lawmaker defines the class of persons entitled to a copy of the report to include all persons identified within it to have an interest, the traditional authority and the District Assembly. Also, the Land Act extends this list to include all interested members of the public.³⁹ This provision is novel and allows for inclusion of interest holders in the land and guarantees the transparency of the process. The Land Policy document recommended that the obligation to consult ought to include an obligation on the part of the Government to provide any information to stakeholders in advance of the consultation.⁴⁰

Another laudable initiative introduced by the Act is that it empowers entities which hold the allodial title to land to compulsorily acquire bare or farm land which is the subject of a usufructuary interest within the area covered by the allodial title.⁴¹ The compulsory takeover of such land must be for the purpose of expanding a town or settlement and for serving the communal interest of persons who are beneficiaries of the allodial interest. When the holder of an allodial title decides to exercise this power, two things must be done before the acquisition. First, one must ensure that prompt, fair and adequate compensation is paid to the holders of the usufructuary interest, which compensation shall be at least forty percent of the plots of land or market value of the land to be taken.⁴² Second, one must provide to the holder of the usufructuary interest a suitable alternative land, where that is possible.⁴³

This novel initiative is a welcome development. Perhaps, the Act's recognition of the power of the holder of the allodial title to compulsorily acquire land was a direct reaction to the decision of the Supreme Court in *Pastor Yaw Boateng v Kojo Manu*.⁴⁴ In that case, the Supreme Court held that in this era of the constitutional entrenchment of the fundamental right to own property, a stool could not, for purposes of the development of the town or community, take over land belonging to an individual or family or even stool land possessed or owned by any citizen or family of the stool, without the consent of the owner or the one in possession. Indeed, the net effect of this decision was that private rights to property could arrest the community's right to development. The Land Act therefore sought to

³⁵ Land Act, 2020, (Act 1036) section 259(1)(a).

³⁶ Land Act, 2020, (Act 1036) section 259(1)(c).

³⁷ Land Act, 2020, (Act 1036) section 261.

³⁸ Land Act, 2020, (Act 1036) section 244.

³⁹ Land Act, 2020, (Act 1036) section 245.

⁴⁰ Duncan J (2013) *et al*, 'The Land Bill (Draft 3): Analysis and Policy Recommendations' Land Access and Tenure Security Project' at 25.

⁴¹ Land Act, 2020, (Act 1036) section 50(21).

⁴² Land Act, 2020, (Act 1036) section 50(22) (a).

⁴³ Land Act, 2020, (Act 1036) section 50(22) (b).

⁴⁴ *Boateng (No 2) v. Manu (No 2) & Anor* [2007-2008] SCGLR 1117.

arrest this mischief and to empower allodial title holders to be able to take land compulsorily for developmental purposes, subject only to certain procedural prerequisites.

The most serious shortcoming of this arrangement, however, arises in instances where the holder of the allodial is an individual. Judicial dicta suggest that an individual may be an allodial interest holder.⁴⁵ In line with this, the Land Act anticipates the possibility of an individual being an allodial interest holder.⁴⁶ One question that arises, then, is whether an individual who is a holder of an allodial interest in any land can compulsorily acquire any land for the purposes envisaged by the Act. Another question is whether an individual who is a holder of the allodial title can withhold consent to acquisition when the land is needed for any of the purposes listed by the Act.

It seems that the drafters of the Act never took this into consideration, and perhaps focused their attention on allodial titles held by an entity other than an individual.

Furthermore, the Land Act brings within its ambit the regulation of acquisition of land by the Government through purchase or gift. The Land Act permits the State to enter into a purchasing agreement with any landowner whose land is required for public purposes.⁴⁷ In this context, the State enters into the land purchasing agreement as any other private party would do. With regard to the acquisition by gift, the State is permitted to accept land as gift where the donor specifies the purpose for the gift to be used.⁴⁸ It is important to stress that the purpose for the gift ought not to be contrary to law and public policy. Where the purchase or gift is completed, the State is required to publish the transaction in a Gazette and this notice is deemed to be conclusive proof of acquisition.⁴⁹ The Lands Commission is also required to prepare and publish standard practice guidelines for such transactions.⁵⁰

Finally, the Land Act sets a period within which the decision to compulsorily acquire the land lapses. The law sets a two-year period within which the State must take all the necessary steps to complete the acquisition. According to section 240(2) of the Land Act, a declaration of land intended for compulsory acquisition ceases to be effective upon the expiry of two years after the date of the publication in the Gazette, so long as the procedure for acquisition remains unconcluded. The lawmaker anticipates that there may be circumstances which could affect the ability of the State to complete the entire process within the time. Hence, it creates a window for the Lands Commission to apply to the Court for an extension of the period to complete the transaction. The Court before whom an application for an extension of time is brought has the power to extend the period for a maximum duration of a year. This timeline prevents the abuse of the power of eminent domain by the State.

4. Conclusion

It has been demonstrated that the Land Act has introduced many novel inventions aimed at forestalling the challenges characterizing the compulsory acquisition of property. Notwithstanding the potential of the Land Act to achieve this objective, a huge problem remains. The laws on compulsory acquisition are prospective in their effect, and do not apply to lands compulsorily acquired before the Constitution and the Land Act came into force.⁵¹ Thus, what I term the grandfather problems of compulsory acquisition may not necessarily be phased out by the provisions of the Act.

The surest way of addressing these challenges is to resort to the administrative power of the State. The following administrative steps are necessary for addressing these challenges. Firstly, in the case of lands that were compulsorily acquired and have not been utilized, and for which no compensation was paid, the State may divest itself of title in those lands so that ownership reverts to the pre-acquisition owners. Secondly, given that many compulsorily acquired lands have been encroached upon, the State may have to regularize the titles of encroachers. It is noteworthy that lands that have been compulsorily acquired remain State lands, as the rights of pre-acquisition owners have been

⁴⁵ *Nyaasemhwe v Afibiyesan* [1977] 2 GLR 452.

⁴⁶ Land Act, 2020, (Act 1036), section 2(b).

⁴⁷ Land Act, 2020, (Act 1036), section 234(1).

⁴⁸ Land Act, 2020, (Act 1036), section 234(2).

⁴⁹ Land Act, 2020, (Act 1036), section 234(4).

⁵⁰ Land Act, 2020, (Act 1036), section 234 (3).

⁵¹ See the decisions of the Supreme Court in *Nii Kpobi Tetey Tsuru v Attorney-General (La Wireless Case)* [2010] SCGLR 904, *Ellis v Attorney-General* [2000] SCGLR 24, and *Okudzeto Ablakwa and Another v Attorney-General and Another* [2012] 2 SCGLR 845.

extinguished.⁵² Accordingly, it is not beyond the power of the State, and indeed that is the wisest course of action, to transfer interests in such lands to other persons. If the State fails to adopt these administrative actions, it may well be the case that the challenges created by compulsory acquisitions carried out prior to the coming into force of the Constitution and the Land Act will forever remain in the land sector.



⁵² See *Nii Nortey Omaboe III v Attorney-General and Another* [2005- 2006] SCGLR 579.