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# ZIMBABWE LAW REVIEW

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**M. Gwisai, K. Hodzi, L. Madhuku, D. Matyszak, Prof. W. Ncube**

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# THE ZIMBABWE LAW REVIEW

1999 VOLUME 16

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## THE LAND QUESTION IN ZIMBABWE : CAN INDIAN JURISPRUDENCE PROVIDE THE ANSWERS?

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### INTRODUCTION

This paper examines first, the nature of the land issue and how it was dealt with in the Lancaster House Agreement of December 1979<sup>1</sup> which gave Zimbabwe its independence. Furthermore, the goals of the government's National Land Policy will be outlined. In this regard, the amendment to the Constitution to achieve the realisation of those objectives will be examined. Finally, an analysis will be made of the possible challenges that could be made to the constitutional amendments and relevant provisions of the Land Acquisition Act of 1992.<sup>2</sup> The jurisprudence from India dealing with amendments to constitutional provisions guaranteeing an owner's right to property will be discussed and suggestions made on how the issue could be approached in Zimbabwe. India has been selected for illustration because India emerged from British colonial rule (like Zimbabwe) with a dichotomy of extremely rich and propertied classes and the pathetically poor and backward classes. It will be demonstrated that the problems of constitutional interpretation likely to arise reflect the crisis of trying to balance individual private rights to property and the public interest in land reorganisation ostensibly aimed at redressing past colonial imbalances.

The land grievance was born out of colonial legislation such as the Land Apportionment Act of 1930<sup>3</sup> which resulted in the forced alienation of land from indigenous Africans to white settlers. Land was inequitably divided between a population of about 4 000 000 blacks and 250 000 whites. The land was divided between African areas or "the native reserves" and European areas, with the former being predominantly barren and sandy regions least suited for agricultural production. By 1931 whites held 50% of the land under freehold title, while the state held approximately 23% of the land, small-scale (black) farm areas held 5% and the Communal Areas held 22% of the land.<sup>4</sup> However, by 1965 private farmers held 45% of the land while Communal Areas held 40% with black small-scale farmers holding less than 3% of the land.<sup>5</sup> To aggravate the situation, in terms of the Land Apportionment Act,<sup>6</sup> no African was allowed to acquire, lease or occupy land in a European

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I gratefully acknowledge Dr Lovemore Madhuku of the Department of Public Law, University of Zimbabwe, for his helpful comments on the initial draft of this article. However, the views expressed in the article are mine.

1. The Constitution which resulted from the Agreement is contained in Volume 1, p 3 of the *Statute Law of Zimbabwe* (Revised Edition) 1996.
2. Chapter 20:10.
3. This Act was replaced by the Land Tenure Act in 1969, but land tenure remained racially segregated.
4. Moyo S, "The Land Question" in Mandaza I. (ed), *Zimbabwe, The Political Economy of Transition* (Codesria, Dakar, 1986) p 168.
5. *Ibid.*
6. Section 42.

area as doing so constituted a criminal offence. The exceptions were African employees whose presence on such land was necessitated by their employment, or Africans occupying land for educational, religious or other purposes acceptable to the authorities.

The issue of land is significant because over 70% of the country's population lives directly off the land and the agricultural sector contributes substantially to the economy.<sup>7</sup> The land grievance was to occupy a major part of the politics of Rhodesia and still remains a burning issue to this day.<sup>8</sup> To underscore the importance attached to the land question, a National Land Policy was adopted by Government in 1990<sup>9</sup> to facilitate the government's acquisition of land for resettlement purposes, first, by amending the property provision of the Constitution and then enacting the Land Acquisition Act.<sup>10</sup>

It is added that the Constitution of 1980 was a compromise reached hastily in order to end the war. More specifically, the agreement on property rights was grudgingly accepted by the Patriotic Front only after pledges by Britain to subsidise the costs of the resettlement programme.<sup>11</sup> The Lancaster House Agreement lasted for ten years and as a result the government's hands were tied till it expired on 18 April 1990. It is submitted that the error of history is that the land question should have been dealt with at the constitutional talks at Lancaster and not addressed through the device of a sunset clause. The entrenched provisions could only achieve their protective purposes while they lasted. The net effect of the clauses was merely to delay the implementation of objectives that remained embedded on the political agenda of the nationalist negotiators. Not surprisingly, the question of land acquisition was resuscitated prominently in 1990. The issue is currently a bone of contention.

A Constitutional Review Commission was recently appointed by Government to draw up a new Constitution for Zimbabwe.<sup>12</sup> It is hoped that the Commission will give careful consideration to the property clause and how to protect existing property rights and to balance those rights against the public interest in land resettlement. In other jurisdictions, like Germany, not all provisions of the Constitution are amendable. For example, amendments which change the very substance of the Constitution, namely, the federal system and concept of the democratic rule of law and separation of powers, are inadmissible.<sup>13</sup> Perhaps, the time has now come for the Constitution which is being developed to follow this example. This is a much better approach rather than leaving the protection of fundamental rights to judicial activism and ingenuity.

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7. Moyo S., "Land Tenure Issues in Zimbabwe in the 1990s" Unpublished paper prepared for the Forestry Commission of Zimbabwe in January 1992.

8. The Constitution of Zimbabwe-Rhodesia of 1979 never addressed the land issue. In fact, it restricted compulsory acquisition of land for resettlement purposes to land not "substantially" used for agriculture in the 5 years preceding the acquisition, and required that the highest market value for such land in that period be paid as compensation. This was difficult to achieve as almost all the land in white hands was commercial farm land.

9. The timing of the policy is explained by the fact that existing property rights were guaranteed for 10 years of the Constitution coming into force in 1980.

10. This replaced the first post-independence land tenure legislation, the Land Acquisition Act of 1985.

11. Coldham S, "The Land Acquisition Act, 1992 of Zimbabwe" (1993) *Journal of African Law*.

12. This Commission was established in terms of Presidential Proclamation No. 6 of 1999.

13. Article 79, section 3 as read with Articles 1 and 20 of the German Basic Law (which is the Constitution). See also, Article 131 of the Namibian Constitution which does not permit an amendment or repeal of any section of Bill of Rights which "diminishes or detracts from the fundamental rights and freedoms".

## THE PROPERTY CLAUSE OF THE CONSTITUTION

The property protection provision of the Constitution,<sup>14</sup> though different from what it was soon after Lancaster, still provides that no property of any description or interest or right in property shall be compulsorily acquired except under the authority of law. The original agreement was that if property has to be acquired under any expropriation law, the "acquiring authority" had *inter alia*, "to pay promptly adequate compensation" for the acquisition.<sup>15</sup> In addition, such compensation was remittable abroad.<sup>16</sup>

It is to be expected that because the land grievance was not adequately addressed in the Constitution, once the entrenched provisions expired the issue resurfaced with all its vigour. The then Minister of Lands, Agriculture and Rural Resettlement, when introducing the Land Acquisition Bill on 12 March 1992, made it clear that its objective was to redress historical inequities in land distribution and to take account of current national and international socio-economic realities.<sup>17</sup>

The first post-independence land tenure legislation, the Land Acquisition Act of 1985, was limited in its scope since it provided that, only under-utilised land which was required for resettlement or other public purposes could be acquired compulsorily.<sup>18</sup> Because compensation has to be adequate and promptly paid for the ten years that this arrangement lasted, severe constraints were placed on the government's land policy. In fact, the government ended up paying extremely high and speculative prices for property compulsorily acquired.<sup>19</sup>

In the light of the historical alienation of land and the shortcomings of the Lancaster House Agreement, the magnitude of the constitutional amendment to enhance the land policy came as no surprise. The process started in 1990 with the amendment of the property clause of the Constitution, the objective being:

- to enable the government to acquire any land, including utilised land, for resettlement purposes;
- to require "fair" compensation to be paid "within a reasonable time"; and
- to abolish the right to remit compensation out of the country.<sup>20</sup>

The essential change was the compensation formula which shifted from "adequate" to "fair" compensation. Whether the adoption of the formulation "fair" will have any practical significance is yet to be seen. This subject is more fully addressed in the following sections. Perhaps, there would have been less cause for concern if matters had been left at this. However, the amendment went further and attempts to preclude judicial determination of

14. Section 16 (1).

15. As expressed in section 16(1)(c) of the original Constitution.

16. Section 16 (5) (a).

17. *Zimbabwe Parliamentary Debates*, Vol. 18, No. 61, Columns 4413 and 4418.

18. Section 3 (1)(a)(iii).

19. Hlatshwayo B., "The Legal Framework for Compulsory Acquisition of Land, Land Use, Planning and Tenure Systems in Zimbabwe" Unpublished paper presented at the Association of District Councils Seminar in Harare on 16-17 March 1993. See also, Hlatshwayo B, "Land Expropriation Laws in Zimbabwe and their Compatibility with International Legal Norms" 1993-4 *Zimbabwe Law Review* (Vol 11) 41 at p. 45 *et seq.*

20. See Section 6 of the Constitution of Zimbabwe Amendment (No. 11) Act 30 of 1990.

whether compensation is indeed fair. This is bound to create problems in that awards may become arbitrary if the fairness thereof is not subject to independent scrutiny. It will be demonstrated in sections below that there is ample scope for judicial review of the fairness of compensation in terms of settled administrative law principles.

## THE LAND ACQUISITION ACT OF 1992

To provide a statutory basis for land acquisition in terms of the constitutional amendment, the Land Acquisition Act of 1992 was passed which essentially carried the same provisions as its predecessor. The only notable difference was that the government's right of first refusal as regards rural land was removed. However, certain provisions of the Act need to be highlighted as they may be a potential source of litigation.

### Acquisition of Rural Land

In terms of the Act,<sup>21</sup> the Minister of Lands and Water Resources, may acquire rural land for resettlement, environmental conservation and/or other public purposes. When doing so, the Minister is required to specify the purpose for which the acquisition is intended, the acquiring authority and the period (not exceeding ten years) within which it is intended to acquire the land.<sup>22</sup>

While the Act gives an owner of designated land the right to object to the Minister regarding the designation,<sup>23</sup> the Minister nonetheless has absolute discretion whether to confirm, revoke or amend the designation notice, and his decision is final.<sup>24</sup> It is curious that the designation, according to the Act, does not affect the rights of the owner to use and occupy the land.<sup>25</sup> Nevertheless, he may not sell, lease or otherwise dispose of his land without the permission of the Minister,<sup>26</sup> and the Act specifically voids any purported sale, lease or other disposal of the land.<sup>27</sup> However, the Act provides that where the Minister's consent is withheld, the owner may ask the acquiring authority to acquire the land in which event it must take immediate steps to do so.<sup>28</sup>

In 1994, a judgement was rendered by the High Court on whether designation constitutes compulsory acquisition to the extent that it places a substantial burden on the owner's use.<sup>29</sup> It was ruled that designation does not amount to acquisition. The Supreme Court in an appeal by the disgruntled landowners agreed with the High Court.<sup>30</sup>

With respect to designated rural land, the compensation procedure is as follows:

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21. Section 12 (1).

22. Section 12 (2).

23. Section 13 (1).

24. Section 13 (3).

25. Section 15 (2)(a).

26. Section 14 (1).

27. Section 14 (5).

28. Section 14 (4).

29. *Alistair Davies and Others v Minister of Lands, Agriculture and Water Development* H-H-185-94.

30. *Davies and Others v Minister of Land, Agriculture and Water Development* 1996 (1) ZLR 681 (S).

A Compensation Committee is established whose function is to determine the compensation payable in respect of the acquisition.<sup>31</sup>

A designated valuation officer will prepare a preliminary assessment of the compensation payable and forward it to the Compensation Committee.<sup>32</sup>

The compensation must be fair.<sup>33</sup> It must be arrived at by the assessment principles in the Act,<sup>34</sup> (and First Schedule) and ministerial guidelines complying with the assessment principles<sup>35</sup> and other relevant considerations.<sup>36</sup>

If a claimant or acquiring authority is not satisfied with the assessment of compensation, such aggrieved party may refer the assessment to the Administrative Court for review of the Compensation Committee's decision.<sup>37</sup> However, the court may not set aside the assessment unless satisfied that the Committee did not observe any of the principles prescribed.<sup>38</sup>

The Minister is also authorised to fix the form and manner in which compensation is paid, and the period over which it is paid, but at least half must be paid at the time of acquisition, at least half of the remainder within two years and the balance over five years.<sup>39</sup>

### The Scope for Judicial Review

It appears that under this procedure, although there is scope for judicial intervention, the role of the judiciary has been narrowly circumscribed. Limiting the court's role to an enquiry of whether the principles prescribed were followed may, on the face of it, mean that the court has no independent discretion. Nevertheless, with an ingenious court that investigation could extend to an enquiry into the fairness of the compensation, more so, since the Compensation Committee must be guided in its assessment by other relevant considerations. As such, it should be possible for the court to examine what extra considerations may have influenced the decision of the committee apart from the principles laid down, and whether the committee was justified in so doing. If certain relevant factors, as directed by section 21, were not considered, the court could set aside the assessment. At any rate, it is trite law that a court will set aside decisions of a grossly unreasonable nature — i.e. which are so grossly unreasonable that they could only have been arrived at *mala fide*, through ulterior motive or failure of the decision-maker to apply its mind to the decision it has to make.<sup>40</sup> In addition, a decision can be set aside if the facts relating to the exercise of the discretion were not reasonably capable of supporting the action taken.<sup>41</sup>

31. Section 17 (1) and (3).

32. Section 18 (1).

33. Section 16 (a).

34. Section 19 (1) and First Schedule.

35. Section 19 (3).

36. Section 21.

37. Section 23 (2).

38. Proviso to section 23 (4).

39. Section 19 (5).

40. *Kaplan v Salisbury Liquor Licencing Court* 1951 (4) SA 223 (SR). See also, *Kambasha Bros v Thompson NO and Anor* 1970 (2) RLR 97; *Archipelago Ltd v Liquor Licencing Board* 1986(1) ZLR 146 (HC).

41. See, *Minister of Home Affairs v Austin and Harper* 1986 (1) ZLR 240 (SC), 1986 (4) SA 281 (ZSC).



In this regard, Indian cases may become relevant since, in *Vajravelu v Special Deputy Collector*<sup>42</sup> a constitutional amendment had removed the power of the court to enquire into the adequacy of compensation. Nevertheless, Subba Rao CJ, delivering judgement for the Indian Supreme Court, ruled that although the adequacy of compensation was non-justiciable, the court retained the power to enquire into the relevance of the principles according to which the legislation provided for compensation. It seems that there is sufficient scope for the court to set aside an assessment which, from its own perception, is unfair.

Yet another encouraging aspect is that an appeal lies to the Supreme Court in terms of the Administrative Court Act (Chapter 7:01).<sup>43</sup> This opportunity, if properly utilised, may lead to the development of a useful body of case law. What is perplexing, though, is the Minister's absolute discretion to confirm, revoke or amend the designation notice and the finality of his decision. This provision, on the face of it, appears to foreclose judicial involvement. However, it is hoped that the Minister's decision would be informed by objective considerations, since the Minister is empowered to make investigations and afford the complainant an opportunity to make further representations.<sup>44</sup> In any event, there is judicial authority for the proposition that the formulation "any such order or decision shall be final" does not bar review since it makes the decision final only on the facts and not on the law.<sup>45</sup>

### Acquisition of Land Other than Rural Land

Land other than rural land may be more problematic because, if such land is to be compulsorily acquired, it must be reasonably necessary in the interests of defence, public order, public morality, public health, town and country planning or for a purpose beneficial to the public generally or a section thereof.<sup>46</sup>

The procedure for acquisition of this category of land is as follows:

A preliminary notice is published in the Government Gazette and served on the owner of the land to be acquired and other interested persons.<sup>47</sup>

The expropriatee may lodge a written objection to acquire the rest of the property if a part-appropriation would render the remainder unsuitable for the purpose it was being or would have been used.<sup>48</sup>

42. AIR 1965 SC 1017. See also *PV Mudaliar v Special Deputy Collector* 1965 (1) SCR 614.

43. Section 19.

44. Section 13(2) of Land Acquisition Act.

45. *R v Medical Appeal Tribunal, Ex parte Gilmore* [1975] 1QB 575 (CA). See also, *Anisimic v Foreign Compensation Committee* [1969] 2 AC 223 (HL). At home, the issue was sealed by Chief Justice Gubbay who in *Davies v Others supra* at p. 693 F-H said:

"... the finality of the Minister's decision does not oust the control of the High Court over administrative action by judicial review. See section 26 of the High Court Act [Chapter 7:06]. If the designee is able to establish one of the grounds of illegality, irrationality or procedural impropriety, he will succeed in having the decision set aside or corrected."

46. Land Acquisition Act section 3(1)(a). See also section 16 (1)(b) of the Constitution which is to similar effect.

47. Section 5.

48. Section 6.

While the notice subsists (for a year at most) the land may not be subdivided, disposed of or have permanent improvements made on it without the written consent of the acquiring authority.<sup>49</sup>

In the event of an objection, the acquiring authority must apply to the Administrative Court for an order authorising or confirming the acquisition.<sup>50</sup> If the order is granted, the title of the acquiring authority will be registered against the property.<sup>51</sup>

"Fair and reasonable compensation"<sup>52</sup> then has to be paid within a reasonable time from such registration, which is effected once a copy of the Court order is lodged with the Registrar of Deeds.<sup>53</sup> Such compensation will be assessed with due regard to:  
 the appropriatee's right to be compensated for his land;  
 the general public interest in the acquisition of the land; and  
 the value of the land, paying attention to its nature, location and quality and any other relevant factors.<sup>54</sup>

If there is no agreement on the claimant's right to compensation or the amount of compensation payable, either party may refer the issue to the Administrative Court.<sup>55</sup>

This catalogue has been given to provide a background for a discussion of the role the courts are likely to play in this scheme of things.

### ANTICIPATED CONSTITUTIONAL PROBLEMS

Because the Land Acquisition Act has provided for different methods of calculating compensation for designated rural land and any other land, constitutional problems may arise. Academic comment has noted that compensation for the former may be challenged on the basis that it does not satisfy the "fair" compensation "within a reasonable time" criterion, because a higher standard has been set for "any other land".<sup>56</sup> The question to be asked is what is the real difference between designated rural land and non-designated land or even non-designated rural land which calls for different compensation methods? If designation has the valid legislative objective of orderly resettlement of landless people at a reasonable cost, then that objective cannot be greater or less simply because the land is either rural or other land. There is no inherent quality in rural land or non-rural land which justifies the application of differential valuation methods.

In this regard, the Indian case of *Kameshwar Singh v Province of Bihar*<sup>57</sup> offers some interesting insights. The dispute in that case centred around Article 31 (4) of the Indian Constitution

49. Section 5 (8).

50. Section 7 (1).

51. Section 10.

52. It is noted that the construction in the Act differs from the one in the Constitution as it simply says "fair compensation".

53. In terms of Section 8, where there is no objection, an acquiring order will be lodged with the Registrar of Deeds for registration to be effected.

54. Section 20 (2).

55. Section 24 (2).

56. Hlatshwayo, "The Legal Framework of Compulsory Acquisition of Land" *supra*. However, the author noted in a later article, "Land Expropriation Laws in Zimbabwe" at p. 49 that "the differentiation *per se* can be justified in terms of both municipal and international law". He then referred, as authority for this proposition, to *Commissioner of Taxes v CW (Pvt) Ltd* 1990 52 SATC 77 at p. 85 which ruled that if the differentiation is related to the achievement of a valid legislative objective and all persons similarly circumstanced are treated alike then it can be justified. It will be shown that no possible justification can be found.

57. AIR 1950 392.

which protected legislation aimed at abolishing the *zamindar* system from the scope of Article 31 (1). The Patna High Court relied on the equality clause in Article 14 to invalidate legislation providing for a graded system of compensation for land expropriated from the *zamindars*. This kind of legislation included the Bihar Land Reforms Act which provided for payment of compensation on a sliding scale — the greater the extent of the land holding expropriated, the smaller the amount of compensation per acre. The ruling activated and marked the beginning of a long drawn conflict between the judiciary and the legislature. The response of Parliament came in the form of the First Amendment of the Constitution, which expressly excluded *zamindari* abolition and state acquisition of agricultural estates from the protection of Articles 14, 19 and 31 of the Constitution. Notwithstanding these amendments, in *State of Bihar v Kameshwar Singh*,<sup>58</sup> the Supreme Court rejected the constitutionality of the Bihar Land Reforms Act describing it as law which authorised confiscation under the guise of acquisition of property. To overturn this decision, the legislature passed the Seventh Amendment which gave an expanded meaning to “estate” to cover all land holdings.

It appears section 13(3) and the proviso to section 23(4) of the Land Acquisition Act have been bolstered by sections 16(1)(f) of the Constitution which may be interpreted as foreclosing judicial review. This section removes the right of a claimant to approach the courts for the determination of any question relating to compensation in cases “where the property concerned is land.” And, section 16(2) goes further to provide that a law providing for compulsory acquisition of land “shall not be called into question by any court on the grounds that the compensation provided by the law is not fair”. In my view, it should be possible for the courts to investigate the question of whether a designation is, objectively speaking, “reasonably necessary” for the purpose it has been made. If it is not rationally connected to any of the purposes mentioned in the Land Acquisition Act, it is submitted that the court can (and should) invalidate it.<sup>59</sup> An example of an acquisition with no rational connection to the stipulated statutory purposes is one motivated by political vindictiveness. The courts should have no difficulty in nullifying it. As previously noted, a court can set aside a compensation assessment if the statutory principles and relevant factors were not observed by a Compensation Committee. It is submitted that the legislature could never have intended a situation to arise where, regardless of whether the Compensation Committee has followed the law or not, or has been irrational, that its assessment would nonetheless escape judicial scrutiny. They might well have set no criteria to guide it if its decisions were beyond question. At any rate, a court of law could not possibly rule that compensation provided by a particular legislation is not fair in the abstract. It is from the practical application of the compensation provision that a court is able to determine whether or not the decision-maker acted *ultra vires*, was biased or acted rationally. Therefore, the purported foreclosure of judicial scrutiny is more illusory than real.

The basis of the provision for compensation within a reasonable time is that, if a system of staggered payments was not provided for, then lack of financial resources would

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58. AIR 1952 SC 252.

59. For the concept of “rational connection” see, *The Queen v Oakes* Supreme Court of Canada, [1986] 1SCR 103: (1986) 26 DLR (4<sup>th</sup>) 200. See also, *Commissioner of Taxes v CW (Pot) Ltd supra*.

compromise the National Land Policy.<sup>60</sup> It is envisaged that little difficulty will be encountered with the concept of “reasonableness” in as-much-as this concept is well developed in the realm of private law such as contract. General guidance may, therefore, be sought from this field of law, in particular, such cases as *Putco Ltd v TV and Radio Guarantee Co (Pty) Ltd*.<sup>61</sup>

Another area of potential controversy is the new requirement of “fair and reasonable compensation” instead of the previous one of “adequate compensation”. The case of *May and Others v Reserve Bank of Zimbabwe*,<sup>62</sup> decided by a divided court, although dealing with the previous “adequate compensation” provision may, nevertheless, provide a helpful starting point. In this case, Dumbutshena CJ equated adequate compensation to a payment of the market value for the property.

However, in a separate concurring opinion McNally JA warned that:

The market price, however, may not be the appropriate basis for determining compensation. The particular circumstances of each case may dictate some other measure. Compensation is a matter of equity, and of being fair both to the person expropriated and to the general public for whose sake the expropriation is undertaken, and from whose pockets, by way of taxation, the price ultimately comes.<sup>63</sup>

The McNally formulation seems to imply that depending on the circumstances of the case under consideration “adequate compensation” and “fair compensation” may mean the same thing. Each case would therefore have to be judged on its own peculiarities. Presumably, the fact that the government relies mainly on taxes for its revenues and that the compensation will be funded from these revenues will be a decisive consideration.

It may also be helpful to look at *CW v Commissioner of Taxes*.<sup>64</sup> In this case, the proviso to the Capital Gains Act providing exemptions exclusively for those who did not contest their compensation payments was held to be unconstitutional, as it deprived the claimant “adequate compensation”, which was held to be the full money equivalent of the expropriated property.<sup>65</sup> It is submitted that the McNally formulation in *May’s* case (*supra*) is preferable from a practical point of view as it is not unduly rigid and allows public interest considerations to come into play in the assessment process. The court might also have to look at how the problem was addressed in other jurisdictions with the formulation “adequate”, “fair”, “equitable” or “appropriate” and even “full compensation”.<sup>66</sup>

It is generally accepted that whether compensation is qualified as adequate, full, just, fair, reasonable, appropriate or some other description tells very little about accounting for the value of the property expropriated, since a degree of attitudinal subjectivity on the part of the presiding judge is inevitable.<sup>67</sup> Thus, it could be said that depending on the judicial

60. *Zimbabwe Parliamentary Debates supra* Columns 4438 and 4439 (Minister of Lands).

61. 1985 (4) SA 809 (AD).

62. 1986 (3) SA 107 (ZSC).

63. At p 124 H-H-I.

64. 1990 (2) SA 245 (ZSC).

65. At p. 264 A-C.

66. For a discussion of how the issue was resolved in other countries, see Eisenberg J.A., “Different Constitutional Formulations of Compensation Clauses” (1993) 4 SAJHR 414 and the cases discussed.

67. Murphy J. “Compensation for Expropriation in International Law” (1993) 110 SALJ at p. 82.

officer, what is fair compensation may not meet the expectations of the expropriatee in every case. For instance, in *James v United Kingdom*,<sup>68</sup> it was noted that:

Legitimate objectives of public interest such as pursued in measures of economic reform or measures designed to achieve a greater social justice may call for less than reimbursement of full market value.

This observation is particularly relevant to acquisitions motivated by resettlement or other public interest considerations. With a judge whose sympathies lie with the government's objective of redressing colonial land tenure inequities, the public interest might very well override the private individualistic expectations.<sup>69</sup>

It is interesting that the Government perceived fair compensation as being "to compensate fully for the value of permanent improvements (only) rather than to pay for the land itself".<sup>70</sup> However, this does not appear to meet the criterion of fair compensation and seems inconsistent with the provisions of section 6 of the First Schedule which envisage compensating for the land itself. The Minister's attitude therefore remains disturbing, particularly with respect to designated rural land, because he is charged with the task of issuing guidelines to the Compensation Committee. If such guidelines are based on the premise of non-compensation for the land "itself" then the potential for litigation looms large. It is most likely that any assessment based on guidelines which do not provide for compensation for land would be nullified by the courts for failing to consider statutory and/or relevant considerations.

What is clear, however, is that the Land Acquisition Act and the constitutional amendments have introduced a crisis of values in Zimbabwe. There are the rights of private individuals to the security of their land juxtaposed against the competing public interest in equitable redistribution of land. A balance must therefore be struck between these divergent interests.

68. (1986) 8 EHRR 125.

69. For example, in *Alistair Davies v Minister of Lands, Agriculture and Water Development supra* (at pp. 18-20 of the cyclostyled judgement), Chidyausiku J. (as he then was) made the following comments: "But the fact of the matter is that the facts that make land acquisition for resettlement a matter of public interest in Zimbabwe are so obvious that even the blind can see them. These facts make the resettlement of people a legitimate public interest. In my view anybody who has lived in Zimbabwe long enough needs no affidavit to know the following facts which are common knowledge, which make acquisition of land for resettlement imperative for public interest, these are: once upon a time the land in Zimbabwe belonged to the African people of this country. By some means, foul or fair, depending on who you are in Zimbabwe, about half that land ended up in the hands of a very small minority of Zimbabweans of European descent. The other half remained in the hands of the large majority who were Africans. . . It is also common knowledge that when the Africans lost half their land to the Europeans they were paid nothing by way of compensation. . . It is in an effort to reconcile and meet these conflicting expectations and demands that Government has embarked on a programme to acquire land for resettlement and designation is part of the process. There is no doubt that such a programme is in the public interest." It is predictable, therefore, what attitude to amount of compensation a judge like Chidyausiku JP would take in the light of the sentiments expressed above.

70. *Zimbabwe Parliamentary Debates supra* at column 4446.

## THE INDIAN EXPERIENCE AND THE CONSTITUTIONALITY OF CONSTITUTIONAL AMENDMENTS

In opening the 1991 Legal Year in Harare, Chief Justice Gubbay said, *inter alia*,

The amendment to the Constitution is likely to engender a belief in those persons whose land may be acquired that the express right to be paid "fair" compensation is nothing but an empty handed gesture. But it must not . . . be assumed, that an affirmative vote of one hundred members will enable Parliament to pass a constitutional bill which goes on the extent of damaging or destroying the very foundation or structure of the Constitution. A Constitution stands on certain fundamental principles which are its structural pillars. If these pillars are demolished or even damaged the constitutional edifice will fall. There is an implied limitation on the [amending] powers which preclude Parliament from abrogating or changing the identity of the Constitution or any of its basic features.<sup>71</sup>

Consequently, the clear message is that any law which has that effect will be pronounced invalid by the judiciary. A change to the Constitution is permissible if consistent with its basic objective and if the Constitution is able to survive such change without loss of its identity — its basic structure must always remain intact. A change is impermissible if it abrogates or emasculates the pivotal or fundamental features of the Constitution. As already noted, in Germany, the Constitution has addressed the problem by prohibiting any amendments which have the effect of undermining the very basis of constitutional and democratic governance.

Although the Chief Justice has expressed an inclination towards invalidating the constitutional amendments, this could be interpreted to mean that he will stand sentinel over the sanctity of private property, a development which is not unique to Zimbabwe. This was the approach adopted by the Indian Supreme Court in *Golak Nath v State of Punjab*<sup>72</sup> and *Kesavananda v State of Kerala*<sup>73</sup> where the court had to consider the scope of the powers of Parliament to amend the Constitution. In *Golak Nath's* case a majority of seven to six judges held that fundamental rights, including the right to property, were absolutely sovereign, and that not even a two thirds majority of Parliament, exercising its power to amend the constitution under Article 368 had authority to infringe fundamental rights. Accordingly, the court held that any constitutional amendment purporting to repeal or even restrict a fundamental right was invalid.

Subsequently, in *Kesavananda*, before a full bench of 13 judges, on the amending power of the legislature, a majority of seven judges held that the relevant amending provision did not allow Parliament to abrogate the basic features of the Constitution. The majority rejected the distinction between essential and non-essential features of the Constitution and suggested that Article 368 extended to the entire Constitution. Although the validity of the constitutional amendment was upheld, the court emphatically stated that it retained the right to review all constitutional amendments in terms of their compatibility with the core of the Constitution.

71. This speech is reproduced in the *Legal Forum* Vol. 3 (March 1991) at pp. 6-8.

72. AIR 1967, 1643.

73. AIR 1973, SC 1461.

The danger, though, should the Zimbabwean judiciary follow the Indian example, is that it might be viewed as an attempt to protect existing distributions of ownership at the expense of public interest values underpinning the Land Acquisition Act and the constitutional amendments designed to pave the way for land redistribution. Then, the same vicious circle of one amendment followed by another could be repeated as happened in India. It is therefore hoped that the Constitutional Commission will address this in the constitutional document itself to pre-empt the problems indicated above.

For Zimbabwe (and, it is suggested South Africa as well), the issue has to be approached with caution, given the land tenure history of both countries. In this respect, it is instructive to consider the following helpful remarks by Judge Didcott:

What a bill of rights cannot afford to do here . . . is to protect private property with such zeal that it entrenches privilege. A major problem which any future South African Government is bound to face will be the problem of poverty, of its alleviation and of the need for the country's wealth to be shared most equitably.<sup>74</sup>

Therefore, a judge deciding on issues which are so politically charged, might have to heed this warning. In any event, the Zimbabwean Constitution has no hierarchy of rights and no right can be said to be superior to the other. Nor is there a hierarchy of provisions. The Constitution provides that it is the supreme law of the country and any law inconsistent with it shall be void to the extent of such inconsistency.<sup>75</sup> The approach advocated by Judge Gubbay in his 1991 speech is therefore fallacious and must fail in the light of the non existence of a hierarchy of provisions in our Constitution.

## THE SOCIAL JUSTICE APPROACH

It is intriguing to note that India's Supreme Court under Chief Justice Bhagwati underwent a substantive transformation. There was a marked shift from the previous judicial protection of private property to enhancing the cause of governmental social engineering programmes. According to him, the court ". . . had become a sentinel of the interests of the propertied classes rather than a protector of the rights of the poor and under-privileged".<sup>76</sup>

For instance, in *SP Gupta v Union of India*,<sup>77</sup> he declared:

[O]ur Constitution is not a non-aligned rational charter. It is a document of social revolution which casts an obligation on every instrumentality including the judiciary . . . to transform the *status quo ante* into a new human order in which justice, social, economic and political will inform all institutions of national life and there will be equality of status and opportunity for all. The judiciary has therefore a socio-economic destination and a creative function . . . Where the contest is between those who are socially or economically unequal, the judicial process may prove disastrous from the point of view of social justice, if the Judge adopts a merely passive or negative role and does not adopt a positive and creative approach.<sup>78</sup>

74. Didcott, "The Practical Workings of a Bill of Rights" in van der Westhuisen J.V. and Viljoen H.P. (eds) *Menseregtchandves vir Suid Africa* (1988) at p. 60. The same views were expressed by Chaskalson M., "The Problem with Property: Thoughts on the Constitutional Protection of Property in the United States and Commonwealth" (1993) 9 *SAJHR* 388 at p. 389.

75. Section 3.

76. Bhagwati, "Public Interest Litigation" (1986) *The Commonwealth Lawyer* 61 at p. 65.

77. AIR 1982 SC 149.

78. At pp. 196-7.

However, the court may find it difficult to draw the line between the judicial role and the parliamentary or executive one, and this is what eventually happened in India. For example, in *State of Himachal Pradesh v Sharma*,<sup>79</sup> the court conceded that: "... the High Court may not take any further action and [must] leave it to the judgement of the priorities and initiative both of the executive and legislature to pursue the matter".<sup>80</sup>

Indeed, Judge Gubbay may find it nebulous to reconcile his "essential features doctrine" remarks with the socialistic views he earlier expressed in *Chawanda v Zinnat Insurance Co. Ltd*,<sup>81</sup> in the following terms:

... the expectations among people all over the world, and particularly in developing countries, are rising, and the judicial process has a vital role to play in moulding and developing the process of social change. The Judiciary can and must operate the law so as to fulfil the necessary role of effecting such development. It sometimes happens that the goal of social and economic change is reached more quickly through legal development by the Judiciary than by the Legislature.<sup>82</sup>

It would appear that the learned judge is not prepared to take this proposition the full distance when confronted with the conflict between the rights to property and the public interest in land redistribution. Perhaps, a way out of this predicament is to interpret a Constitution which embodies constitutional guarantees for private property rights with due regard to the broader social picture and not simply consider the protection of individual interests.<sup>83</sup> Yet another view is that a judicial distance from politics is ideally accomplished by a constitutional review process which essentially limits the task of judges to an evaluation of the means rather than the ends of government policy.<sup>84</sup> These approaches are preferable as they do not result in the judiciary performing executive and/or legislative functions, eroding the separation of powers doctrine in the process.

## THE SOUTH AFRICAN APPROACH

Perhaps, South Africa has been more cautious in addressing the issue, realising from its history and the divided nature of its society that there was a need to mitigate the impact and dimension of any potential confrontation. The Interim Constitution, therefore specifically provided for affirmative action. The relevant provision qualifying the general prohibition against discrimination, was worded as follows:

This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.

79. (1986) 2SCC 68.

80. At p. 82.

81. 1990 (2) ZLR 143 (SC).

82. At p. 154 B-C. For a criticism of the Chief Justice's proposed approach see, Hlatshwayo B., "Judicial Activism and Development — Warning Signals from Zimbabwe" 1991-2 *Zimbabwe Law Review* 4 at pp. 11-12. The author was more cynical in observing that no sooner had the learned judge "waxed lyrical" than he was confronted with a legislative attempt to fulfil the expectations of a majority of the landless in the form of the Eleventh Amendment to the Constitution and he had to retreat hastily.

83. van der Walt A.J., "Notes on the Interpretation of the Property Clause in the New Constitution" 1994 (57) *THRHR* 181 at p. 189.

84. Murphy J., "Property Rights in the New Constitution: An Analytical Framework" (1993) *Journal of Contemporary Roman-Dutch Law* 623 at p. 631.



Every person or community dispossessed of rights in land before the commencement of this Constitution under any law . . . shall be entitled to claim restitution of such rights.<sup>85</sup>

Thus, it may be noted that the South African Constitution has to a great extent already pre-empted legislation such as the Land Acquisition Act of Zimbabwe which is designed to redress the inequities of historical land tenure patterns. It may be speculated, therefore, that less problems will be encountered in South Africa when land reorganisation gains impetus.

While it is helpful to refer to foreign jurisprudence, it should be remembered that the South African Constitution provides for "agreed compensation", failing which, "just and equitable" compensation as determined by the courts.<sup>86</sup> Nevertheless, the constitutional criteria of considering all relevant factors, including the use to which the property is being put, the history of acquisition,<sup>87</sup> its market value, the value of the investments in it by those affected and the interests of those affected seems more or less the same under Zimbabwe's "fair and reasonable" compensation provision. Developments in Zimbabwe on acquisition of land for resettlement should, therefore, be viewed with interest in South Africa.

## CONCLUSION

Zimbabwe's land issue is certainly a controversial matter with a potential for much litigation. The South African land question is not likely to present itself as monstrously as in Zimbabwe since constitutional yardsticks have been included in the Bill of Rights chapter in the form of the limitation clause, the affirmative action provisions and basic values which run throughout the Constitution.

Historical realities have been allowed to play a role in the consideration of compensation, in conjunction with factors like market value and value of the investments to those affected. Moreover, the formulation "all relevant factors" adopted in the property clause appears to accommodate public interest considerations, even the fact that such payment is ultimately a charge on the taxpayer and that in social engineering expropriations the community at large is the beneficiary.

It is submitted that this approach should have been adopted at the Lancaster House Conference rather than the device of a sunset clause. Nevertheless, it is hoped that the provision relating to "other relevant considerations" in the Land Acquisition Act will be interpreted to include historical considerations. It would also seem that the requirement that the designation of land be reasonably necessary in the national interest will preclude politically motivated acquisitions. The courts can (and should) in fact decide on whether the acquisition is reasonably necessary to serve any of the specified purposes before going into the issue of fairness of the compensation.

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85. Section 8(3). The new Constitution carries substantially the same provision (Section 9) by stating that to achieve equality "legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken".

86. Section 25.

87. The factors were adverted to by Chidyausiku J. in the *Alistair Davies* case *supra*.

There also appears to be scope for creatively using Indian jurisprudence and administrative law principles to decide upon land disputes without necessarily dealing with the more vexing question of constitutionality of constitutional amendments. Such an approach is desirable considering the political and racial dimensions of the land question. While the Indian experience may be a point of reference in the search for answers to balance the private property-public interest equation, the Constitutional Review Commission should now face the conflict of expectations crisis and fashion a Constitution that is going to achieve equitable land redistribution and minimise litigation over land.

In fact, since it is generally accepted that land reform is the foremost method of redressing historic inequities imposed by colonialism, the balancing process should be performed by those who wield political power and decide on the policies of the nation in consultation with those likely to be affected by those policies, the stakeholders. The issue must now not be left to judicial law-making, the Constitution must face it head-on. In fact, the exact ability of the courts to change values and behaviour (especially bureaucratic behaviour) is uncertain.<sup>88</sup> It is doubtful that courts are the appropriate vehicle for solving policy questions such as how land should be equitably re-organised to redress historical inequities based on race.

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88. In this regard, Moffat J, "Judicial Review and Environmental Policy: Lessons for Canada from the United States" *Canadian Public Administration* Vol. 37, No. 1 (Spring) 140 at p. 152 observed that: "by enhancing administrative responsiveness to public pressure on a case-by-case basis, judicial review inhibits comprehensive policy planning . . . court-imposed formal requirements can constrain the analyst from adopting a flexible approach to promoting efficient decision-making".



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