Post Independence Land Reform In Zimbabwe

CONTROVERSIES AND IMPACT ON THE ECONOMY

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POST-INDEPENDENCE LAND REFORM IN ZIMBABWE:

Controversies and Impact on the Economy

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Introduction

The "land question" in Zimbabwe, particularly, the dimensions it took with the land occupations which began on 16 February 2000, demonstrates beyond any shadow of doubt, the intractable link between law and politics. Does law follow politics? Or is it the reverse? On one view, law plays second fiddle to the deep-seated political convictions of society. In other words, law merely reflects, or is a mere record of, the political wishes of its authors. It cannot stand in the way of political choices because, according to this view, ruling politicians simply transform their choices into law.

On the other hand, there is the view that law has a force of its own, it being a set of rules in conformity with ideal values and principles, which direct societal processes including the conduct of politics. Politicians do not have an unlimited power to make law: they may only decree as law, those rules which are in line with certain fundamental principles of justice and fairness.

Both views are misleading. The first grants politicians "blank cheques" in the law-making process and fails to acknowledge that almost every society places restrictions on the power of politicians to make law. The second is unrealistic. It implies that, law is necessarily just and fair and that there exists an ideal set of principles and values which are acceptable to all persons and to which all law must conform. This is not the case. Law may be just or unjust and what is fair to one group of persons may be unfair to another.

Yet, these two opposing views on the relationship between law and politics have dominated the land question in Zimbabwe since 1890. The groups wielding political power at any one time have always favoured the first view, namely that law must follow the dictates of politics. Predictably, groups not wielding political power have always argued for the other view of law – law must reflect certain fundamental values of justice and fairness and that these should act as a check on the power of

politicians to make law. Thus from 1890 to 1980, the ruling white elite had no qualms passing such unjust and draconian pieces of legislation as the Land Apportionment Act, 1930; the Native Land Husbandry Act, 1951 and a host of other expropriation laws without any regard to fundamental values of justice and fairness. The law was required to follow the dictates of the ruling politicians. The black majority relied on the other view of law not only to oppose colonial land laws but also to justify its resort to an armed struggle to remove those laws.

After independence in 1980, political power changed hands. The new ruling elite took the first ten years of independence to consolidate its political hegemony and as soon as this was assured, it took the same approach as its erstwhile colonial oppressors: law follows politics. It amended the constitution in 1990 and passed the Land Acquisition Act, 1992 amid opposition from those who were now relying on the other view of law. In the year 2000, it went further to decree, in the supreme law of the land (the constitution), that no compensation was payable for agricultural land acquired for resettlement purposes. The opposition to these latest legal developments is on the same basis as before, namely that such laws are unfair and unjust.

These introductory remarks are intended to provide a broad framework within which to understand the legal framework of the land reform process in Zimbabwe. The point being made, and which will emerge clearly from this chapter, is that the legal framework of land reform is, almost in its entirety, the putting into legal form of the political and economic interests of the ruling elite. It is not based on some ideal notions of what is desirable or fair or just. It is a tragedy that this has been the case since 1890. This chapter will examine the law – politics relationship in the context of the land question in four periods corresponding to the four main phases on the land issue in Zimbabwe: (i) 1890-1980 (ii) 1980-1990 (iii) 1990-2000 and (iv) 2000 to date.

Colonial land laws: 1890-1980

Colonial land laws created the current land question. The law was used as an instrument of dispossession. No sooner did the colonial regime impose its political dominance over Africans than it began to alienate land from them and allocate it to white settlers. The legal basis for this alienation proceeded as follows: the British, who in 1888 claimed that the territory was its "sphere of influence" decided to colonise Zimbabwe via the device of a private company and on 29 October 1889 granted a Royal Charter to Cecil John Rhodes' British South African Company ("BSA Company"). The Royal Charter became the first "constitution" of Zimbabwe. It authorised the B.S.A Company to occupy the territory and establish and exercise governmental authority over it. More fundamentally, Article 24 of the Charter authorised the company to alienate land and make land grants to white settlers. This provision became the legal basis for land grabbing by white settlers from 1890 to 1894.

In 1894, after the defeat of Lobengula in the 1893 Anglo-Ndebele war, the British promulgated the 1894 Matebeleland-Order-in-Council. This effectively became the second "constitution" of Zimbabwe. Section 49 of the Order-in-Council provided for the establishment of a Land Commission whose function was to assign land and

cattle to the Africans. It is this Land Commission which created the first two "native" reserves in Matebeleland: Gwayi and Shangani. Africans being dispossessed of fertile land were forced into the reserves which were roundly condemned as not suitable for human habitation[33] (Phimister, 1988) Yet, all land outside the reserves remained available for allocation to white settlers.

The Africans reacted to this dispossession by waging an armed uprising in 1896 - the first Chimurenga. This was ruthlessly crushed and ended with a massive defeat of the Africans in 1897. This defeat led to the third "constitution" of Zimbabwe, the 1898 Southern Rhodesia Order-in-Council. This new constitution was enacted against the background of a huge demand for land by Africans as all "the best land in the country was, in the first days of the occupation, alienated to syndicates and private individuals (Palley, 1966)." The constitution responded to this by providing in its section 81 that the BSA Company was "from time to time to assign to the natives inhabiting Southern Rhodesia land sufficient for their occupation."

It must be noted that the starting premise of this provision was that Africans had no legal right to land outside that assigned to them. The 1894 Order-in-Council had only provided for reserves in Matebeleland. The 1898 Order extended the system of reserves to the whole country. Significantly, however, there was no private ownership of land by Africans in the reserves. Ownership of land in the reserves vested in the B.S.A. Company.[34]

Thus, as at the end of 1898, three main categories of land existed: (i) land privately owned by individual white settlers who had title deeds, (ii) "native" reserves set aside for Africans but owned by the B.S.A Company as a representative of the state and (iii) "unalienated" land. The question which arose in the period immediately after 1898 and went unanswered until 1914 was; who owned "unalienated" land? This question was raised notwithstanding the fact that the so-called "unalienated" land was occupied and used by Africans. Due to the contending interests of the white settlers, the B.S.A Company and the Africans, this question was referred, in the famous case of In re Southern Rhodesia[35] to the Judicial Committee of the Privy Council, which was the highest court in the British Empire. The court held that unalienated land was not owned by the Africans[36] but by the British Crown which acquired it by conquest. This ruling sealed the fate of the Africans by giving the final legal approval to the dispossession that began in 1890. At the same time, it endorsed private ownership of land by the new group of white landowners.

The cumulative effect of the legal instruments we have examined so far was that by 1914 Africans only had some rights of occupation and use of land in the reserves. Inevitably, the huge demand for land by Africans forced the British government to appoint a Native Reserve Commission in 1914. Its mission was to recommend a final allocation of land as reserves. The recommendations of the Commission, with very minor variations, were enacted into law as the Southern Rhodesian Order-in-Council 1920 and this gave finality to boundaries of areas assigned as reserves.

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[33] The Ndebeles described them as "cemeteries not homes".

[34] See the Southern Rhodesia Native Regulations, 1898.

[35] 1919 AC 211

[36] It was of the view that Africans of Southern Rhodesia did not have the concept of private ownership of land.

While it was clear by 1920 that any demand for land by Africans had to be referred to the reserves, this did not stop the quest for land. Africans soon turned to a legal loophole which had not been closed since 1890. In both the 1894 and 1898 Orders-in-Council, Africans were not precluded from purchasing land anywhere outside the reserves. In theory, an African could, like his/her white counterpart, purchase land from the state or from another landowner with freehold title. In practice, however, Africans neither had the means, nor were they allowed to purchase land and by 1920 only a very tiny minority of Africans had exploited this legal loophole and owned private land (Moyana, 2002). Fearing that this loophole could eventually lead to more Africans purchasing land and taking it away from the market of the white settlers, the later vigorously campaigned for land segregation. This meant that land had to be demarcated into 'European' and 'African' land and no Africans would be allowed to purchase land in European areas. The fears were underscored by one white settler in the following words:

> *"There is no room for doubt that within a few years the more enlightened native will be demanding the right to purchase land and with our present law – equal rights for black and white – the demand must be conceded (Moyana, 2002)."*

A Lands Commission was appointed in 1925 to examine the issue of land segregation and its recommendations led to the enactment of the notorious Land Apportionment Act, 1930.[37] This Act put into law racial segregation in land ownership and use. Land was divided into a 'white area' (for the exclusive use and purchase by whites), native reserves (for Africans) and a new category called "native purchase areas" (where Africans could purchase land). In terms of the Act, about 51% of the land in the country was allocated to whites while just about 30% went to "native reserves" and "native purchase areas" put together.

The net effect of this Act was to prohibit Africans from acquiring and owning land while providing adequate scope for white settlers to own and purchase land. The new category of "native purchase areas" was very limited in scope and only "suitable" Africans were allowed to purchase land. While earlier laws were mainly concerned with dispossession, this Act came to close any legally viable route that Africans could have taken to repossession of land.

The Land Apportionment Act was buttressed later by the Native Land Husbandry Act, 1951 which sought to regulate the use of land in the reserves through allocations and control of arable and grazing portions to households.

Although the Land Apportionment Act, 1930 was amended several times and eventually replaced by the Land Tenure Act, 1969, there was no change in substance and the latter Act continued with racial land segregation until 1980. Thus at independence, the best and bulk of the land remained in the hands of white commercial farmers while the black majority inhabited the reserves (then called Tribal Trust Land) with a few of them in the purchase areas.

[37] Act No. 30 of 1930

Legal Framework of Land Reform in the First Decade of Independence: 1980-1990

The colonial land ownership pattern described in the preceding paragraphs remained intact up to and including on, independence day on 18 April 1980. The Lancaster House Constitution which came into force on that day provided a legal framework which preserved that *status quo* and, through the device of protecting private property rights, made it difficult to redistribute land to the landless majority. This constitutional framework determined the nature and extent of land reform in the first ten years of independence. Before examining the details of that legal framework, it is apposite to ask and answer the following question: how did it come about that the nationalist leaders under the leadership of Robert Mugabe and Joshua Nkomo accepted a constitutional framework which preserved white settler privileges and restricted the options for land reform?

Different persons may provide different answers to this question but the better view appears clear. It is that they lacked the political muscle to ensure a different framework. Real political power at the Lancaster House Conference lay with the British government whose avowed aim was to preserve white settler privileges. The framework which eventually appeared in the constitution was derived, almost verbatim, from the proposals put forward by the British government. Proposals by the Mugabe-Nkomo delegation (the "Patriotic Front") were rejected, notwithstanding the spirited arguments which accompanied the proposals. Tshuma aptly captures the arguments between the British and the Patriotic Front in the following passage:

> "In fact, the British proposals singled out land and proposed that only under-utilised land could be acquired compulsorily for settlement for agricultural purposes. The PF objected to the British proposals because of the restrictions they imposed on land acquisition. First, it argued that the proposal to entrench the Declaration of Rights for a period of ten years placed intolerable restrictions on the sovereignty of the Parliament of Zimbabwe and that it granted a veto to the minority. Second, it argued that the British proposals on the freedom from deprivation of private property would defeat the basic objective of the struggle in Zimbabwe which was the recovery of the land of which people were dispossessed without compensation; and that the government of the Republic of Zimbabwe would have to deal with the land problem and therefore must have the right to acquire any land in the public interest and to pay compensation at its discretion. Third, it argued that the British proposals would convert the freedom from deprivation of property into a right to retain privilege and perpetuate injustice. Finally, it argued that the proposal on the remittability of compensation paid for land to any country, was quite iniquitous; accorded the wealthy a privilege which is normally accorded foreigners; and could have disastrous consequences for the economy.
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> In response to the PF objections, Lord Carrington argued that the provisions concerning land struck a fair balance between the protection of private property and the legitimate desire of the government to spread land ownership; that the government of the day would be able to acquire under-utilised agricultural land for settlement against the

payment of adequate compensation; and that the principle of compensation for those who are deprived of their land was an established one and had parallels in other independence constitutions. More important, he suggested that an independent government would be ale to appeal to the international community for help in funding land acquisition for agricultural settlement *(Tshuma, 1997)."*

There is a radical view which suggests that in fact, the nationalist leaders never intended to alter, in a substantive way, the land patterns which existed at independence and were therefore contended with the British proposals. That view is expressed by Astrow who characterizes the nationalist leadership as "petit bourgeoisie" and thus, by definition, only interested in the transfer of political power without changing the capitalist system of production which depended on the preservation of the productive white commercial farms. He says:
"Particularly instructive is an examination of the nationalist factions' pronouncements concerning the land question. Such an analysis quickly reveals that imperialism had very little to fear from an African nationalist take-over of political power. Fundamental to the maintenance of European privilege in Zimbabwe was the denial of land to Africans. This could be isolated as the single most important problem facing all Africans. The first task of any nationalist group which came to power would be to resolve the widespread landlessness, the deteriorating agricultural production in the Purchase Areas and the TTLs, and to deal with the white farms. The starting point for any fundamental transformation of Zimbabwean society would require the nationalization of all land and its redistribution to the peasantry. After all, the development of agriculture along capitalist lines was a central factor in the landlessness of many peasants and the deteriorating conditions in the countryside.

> *What did the nationalist groups have to offer the African masses? Very little. The majority focused their attention on abandoned farms or underutilized land,... Invariably, the white farms were to be left intact – provided they were reasonably productive. Some land redistribution would have to take place, a reality that all sides had eventually come to accept. The question was, to what extent would redistribution of land be necessary to redress African grievances and how this would be carried out. The African nationalists, for the most part, were satisfied with minimal change" (*Astrow, 1983) .

Be that as it may, the dominant political and economic interests at Lancaster House ensured that the legal framework incorporated in the Constitution preserved a land ownership pattern that protected while privileges. This is how the legal framework was structured. The Constitution contained a justifiable Bill of Rights.[38] Section 16 of the Constitution, as part of the Bill of Rights, protected private property by prohibiting compulsory acquisition except on very strict grounds. These grounds included that the acquisition had to be under the authority of a law which provided for (i) prompt and adequate compensation and (ii) confirmation of every contested acquisition by the High Court or some other court.

[38]In such a Bill of Rights, each of the rights enumerated therein is enforceable in a court of law.

More fundamentally, only underutilised land could be compulsorily acquired for settlement for agricultural purposes.[39] Three points need to be made to illustrate the restrictions imposed on land reform by the Lancaster House Constitution. First, productive farms which were not under-utilised could not be acquired at all for settlement for agricultural purposes, however desirable the acquisition may have been in a particular case. It was a complete defence, and therefore a permanent bar to compulsory acquisition, for a landowner to prove that his/her land was not under-utilised. Secondly, notwithstanding that the land being acquired was under-utilised, compensation had to be paid "promptly" and in an "adequate" measure. Although not strictly accurate, the concept of "prompt and adequate" compensation is the equivalent of compensation based on a "willing seller, willing buyer" measure. Thirdly, these provisions were entrenched, and so could not be amended for the first tens years except with a 100% majority of members of the House of Assembly.[40] This was an impossibility given that the same constitution reserved 20 seats for whites in the House of Assembly.[41]

The constitutional scheme severely limited the scope of any land reform based on compulsory acquisition. It did not affect government's purchase of land on the free market and so the option of a land reform based on a market-driven purchasing of land by government remained open. In practice, this option did not exist and the only available route was that of compulsorily acquiring under-utilised land.

The constitution did not necessarily make it easy to acquire under-utilised land. In accordance with the dictates of the rule of law, every acquisition had to be in accordance with a law that complied with certain minimum requirements specified in the constitution. This meant that there had to be an Act of Parliament dealing with land acquisition. From 1980 to 1985, no new Act on land acquisition was enacted. The state relied on an Act which had been passed by the Muzorewa regime in 1979. The Act was the Land Acquisition Act, 1979.[42]

It is significant to note that the new government had no urgency in enacting a new piece of legislation governing land acquisition. This must have arisen from the realisation that the restrictions imposed by the constitution did not give much room for manoeuvre. It also reflected a deliberate policy to honour the spirit of the Lancaster House Constitution. There is merit in the view that in adopting the 1979 Land Acquisition Act, the new government tied its hands even more restrictively than was the case under the constitution. Section 16 of the constitution required "prompt and adequate" compensation for compulsorily acquired land. It did not define this level of compensation and never used the expression "willing seller, willing-buyer". As the courts were later to confirm[43] "prompt and adequate" compensation was not necessarily the equivalent of compensation on the "willing seller, willing buyer" level. Yet, the 1979 Act specifically required compensation on a willing seller, willing buyer basis. It provided as follows:

> "In assessing compensation, the court shall... assess compensation for the land, materials or interest or right in land, as the case maybe, on the

[39] See section 16(1)(b) of the Lancaster House Constitution.
[40] See section 52(4) of the Lancaster House Constitution
[41] See section 38(1)(b) of the Lancaster House Constitution
[42] Act No. 15 of 1979, which came into force on 1 June 1979.
[43] See *May & Ors v Reserve Bank of Zimbabwe*, discussed below

> market value thereof, which shall be taken to be the highest amount which the land, together with any improvements thereon at the date of the acquisition...would have realised if sold on the open market by a willing seller to a willing buyer..."[44]

The other aspect on which the 1979 Act imposed a further restriction than the constitution was in respect of under-utilised land. The constitution did not define "under-utilised land." The 1979 Act did so and regarded land as under-utilised if it had "not been substantially put tc use... for a continuous period of at least five years immediately prior to the date of application for the order" of acquisition.[45] Thus, land which had been under-utilised for less than five years was not regarded as under-utilised despite the fact that the constitution simply referred to "under-utilised" land.

In 1985, the first post-independence Land Acquisition Act was enacted.[46] It repealed the 1979 Act and widened the scope for land acquisition. First, it abandoned the express reference to the "willing seller, willing buyer" criterion in the assessment of compensation and defined the adequate compensation required by the constitution as being that which was "fair and reasonable".[47] This was a critical departure from the 1979 Act. A "fair and reasonable" compensation may, depending on the circumstances of a given case, be less than the market value of the land as regard also had to be taken of the "general public interest in the acquisition of land." The Supreme Court, in the case of May & Ors v Reserve Bank of Zimbabwe [48] confirmed this approach and held that "adequate compensation" was not the same thing as the market value of the land on the willing buyer, willing seller basis. It could be less than the market value if the justice of the case required such lesser value.

Secondly, the 1985 Act re-defined under-utilised land. It abandoned the five-year requirement in the 1979 Act and instead left the matter entirely in the hands of the court. However, the court had to consider a variety of factors before deciding whether or not the land could be regarded as under-utilised. The period of under-utilisation, which the Act reduced from five to three years, was merely one of the factors to be considered. The effect of this was that even land which had only been under-utilised for a period shorter than three years could be declared under-utilised and therefore eligible for compulsory acquisition.

Thirdly, the Act introduced the novel idea of a "right of first refusal" in respect of rural land.[49] Under the relevant provisions, it compelled every seller of rural land to first make an offer of sale to the Minister. The latter had three options: either to accept the offer and pay for the land the price demanded by the owner or accept the offer of land but propose to pay a price lower than that offered by the owner or not to accept the offer and issue the owner with a "certificate of no present interest".

Where the Minister proposed to pay a price lower than that offered by the owner, the latter was entitled to reject the Ministers proposal, in which case the Minister could

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[44] See section 28(2)(a) of the 1979 Act.
[45] See section 21 (5) of the 1979 Act
[46] See Act No. 21 of 1985
[47] See section 22 of the 1985 Act
[48] 1985 (2) ZLR 358(SC)
[49] See section 5-7 of the 1985 Act

acquire the land compulsorily. It is submitted that this power to acquire the land compulsorily was only legally valid in respect of under-utilised land. This shows the limitations of the provisions on the "right of first refusal". Fourthly, the Act created a new category of land called "derelict land" which could be acquired without compensation.[50] It set up a Derelict Lands Board[51] which was tasked to determine whether or not any land was derelict and to declare land as derelict. In principle, derelict land was land that was deemed to have been abandoned and therefore without an owner. Arguably, Section 16 of the constitution protected land that had an owner and so the acquisition of derelict land was not restricted by the constitution. This was an ingenious circumvention of the restrictions imposed by the Lancaster House Constitution. In practice, it is doubtful whether any significant proportion of land was acquired under the provisions relating to derelict land.

It is clear from the above that the first decade of independence (1980-1990) saw very little land reform owing largely to the restrictions imposed by the law. However, the law was merely responding to the dictates of the political elite. While it is true that the British used their power at Lancaster to impose a legal regime that protected the land interests of the white commercial farmers, it is also true that the new political leadership lacked the political will to embark on a vigorous land reform process. This latter point explains why the new rulers were contented with using the 1979 Land Acquisition Act for the first five years and only bringing in a new law in 1985. The political leadership did not exploit the generous interpretation which the courts ascribed to the concept of "prompt and adequate" compensation.

Legal Framework of Land Reform: 1990-2000

Like the preceding two phases, this phase began with a new constitutional dispensation. On 18 April 1990, the ten-year period of entrenchment of the Bill of Rights came to an end. Instead of the 100% majority required to amend the Bill of Rights in the first ten years, a two-thirds majority sufficed. As the ruling ZANU(PF) commanded more than a two-thirds majority in Parliament, it now had the power to amend the constitutional provisions relating to land.

On the political front, by the close of the first decade of independence, land had emerged as a key political issue. This was mainly due to growing peasant disillusionment with the half-hearted and almost negligible pace of land reform in the 1980-1990 period. The Mugabe regime blamed its failure to deliver on land on the restrictive legal framework of Lancaster House. It therefore promised a radical reform process. The situation was compounded by the emergence in 1989 of a new and vibrant political party, the Zimbabwe Unity Movement (ZUM) led by Edgar Tekere. ZUM contested the 1990 parliamentary and presidential elections and ZANU(PF) used the land issue as a rallying point for support.

Given the foregoing, it was inevitable that the constitution had to be amended to accommodate the new thrust on land reform. Section 16 of the Constitution was duly amended by the Constitution of Zimbabwe Amendment (No. 11) Act, 1990.[52] The Act came into force on 17 April 1991. It demolished the Lancaster House framework through three main features. First, it subjected all land, and not just

[50] See section 38 of the 1985 Act.
[51] See section 27 of the 1985 Act
[52] Act No. 30 of 1990

under-utilised land, to the regime of compulsory acquisition. This meant that even productive farms were henceforth liable for acquisition if the state so wished. Secondly, it replaced the "prompt and adequate" measure of compensation with "fair compensation" within a "reasonable time". In general, "fair compensation" is less than the market value determined from a willing buyer-willing seller standpoint and is a more flexible yardstick. Thirdly, it ousted the courts from calling into question the fairness or otherwise of any compensation formula to be provided by law.

This amendment had far reaching consequences: any piece of land, however productive, could be compulsorily acquired at less than market-value compensation. The law providing for such levels of compensation could not be questioned in the courts. Tshuma aptly summarises the obvious reaction to this radical amendment as follows:

> "Not surprisingly, the provisions of amendment regarding compulsory land acquisition were subjected to criticism by the agrarian bourgeoisie, their allies and the judiciary. At the centre of the criticism was the provision that the law which would lay down the principles upon which compensation is payable could not be called into question by any court on the grounds that the compensation was not fair. In the context of the structural adjustment programme those opposed to the amendment suggested that it would scare away foreign investors. They also questioned its constitutionality and argued that it violated the rule of law."[53]

The reference to the judiciary in the above passage is mainly to the unprecedented speech delivered by Chief Justice Gubbay at the opening of the 1991 legal year wherein he criticised the amendment as "destroying the very foundation or structure of the constitution" and doubted the competence of Parliament to pass such an amendment.[54] These remarks had no legal basis and served only to strain the relationship between the judiciary and the executive. President Mugabe made a public response to this and advised the Chief Justice and other judges who were unhappy with laws passed by Parliament to resign.[55]

Once a new constitutional framework had been put in place, it had to be followed by a new Act of Parliament implementing the principles set out in the constitution. Thus, the Land Acquisition Act, 1992 was enacted.[56] It replaced the 1985 Act and put in place a machinery of land acquisition consistent with the new constitutional position. It was fiercely opposed by white commercial farmers, mainly through the Commercial Farmers Union.

The 1992 Act followed its predecessors on aspects relating to the procedures for acquisition of land, namely the publication of a preliminary notice in the Government Gazette, followed by serving the notice on the owner of the property and allowing time for objections including referring unresolved objections to the Administrative Court.

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[53] Tshuma, op cit. p126.
[54] See Legal Forum Vol 3 No. 1, 1991
[55] See The Herald, 18 January 1991
[56] Act No. 3 of 1992

The Act brought into being a new approach of "designating" rural land as a prelude to acquisition[57]. The act of designation involved an area or piece of rural land being earmarked for acquisition within a period not exceeding ten years from the date of the notice.[58] Thus, designation was merely an act of communicating to the owner and the public, the intention of the state to acquire, in the future, the specified piece of rural land. Designation did not affect the rights of the owner to use and occupy the land.[59] Its main legal effect was to prohibit the sale, lease or disposal of the land in question without the prior written permission of the Minister.[60] The justification was that it facilitated the "acquisition of land in large blocks suitable for the implementation of the resettlement programme, and that it would facilitate planning for both the government and the farmers since the land that the government intended to acquire would be clearly identified and demarcated such that prospective farmers would know where to invest".[61]

A substantial portion of the Act was devoted to the issue of "fair compensation" which had been brought about by the new constitutional framework. The Act made a distinction between "designated rural land" and "land other than designated rural land". In both cases, the state had a duty to pay fair compensation.[62] The difference was in the assessment of the compensation and the time period within which it was payable. Regarding designated rural land, the Act prescribed principles, which had to be adhered to in the assessment of the compensation. Any loss arising out of the acquisition process itself was to be disregarded. The principles were designed to give sufficient flexibility to the state to make an affordable assessment. Thus, while the value of land was one of the factors to be taken into account, compensation was not necessarily for loss of land. Government was allowed to make payments in instalments provided the full amount was paid within five years[63]. It could also make payment in bonds or other securities issued by itself[64]. The only challenge permissible in respect of compensation for designated rural land was that centred on non-observance of prescribed principles by the compensation committee[65]. Such a challenge could only be brought as a review in the Administrative Court.

Regarding "land other hand designated rural land", the Act created an assessment process which leaned in favour of the land owner. The compensation payable was for loss of the land plus any loss arising out of the acquisition process.[66] There was no provision for the state to pay the compensation in instalments. Compensation was to be paid "within a reasonable time", which, in the circumstances, meant a period much less than the five years allowable for designated rural land. Land owners were given the right to challenge the amount of compensation payable in the Administrative court.[67]

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[57] See Part IV of the Act
[58] See Section 12 of the Act
[59] See Section 15 of the Act
[60] See Section 14 of the Act
[61] See Tshuma, op.cit p.129
[62] See Section 16
[63] See Section 19 of the Act.
[64] Ibid
[65] Section 23 of the Act
[66] See section 20
[67] Section 24

The legal framework created by the new constitutional provisions and the new Land Acquisition Act, 1992 became the basis for the land reform process in this period. However, owing to fierce opposition to this legal framework, the next few years were to witness unending legal battles. On the one hand, the government sought to close any loopholes in the law which could have been used by white commercial farmers to undermine the effectiveness of the new law. On the other, white commercial farmers resorted to challenging the constitutionality of the new law in the courts.

Within a year of the enactment of the Land Acquisition Act, 1992, a second constitutional amendment affecting land was enacted. This was contained in Constitution of Zimbabwe Amendment (No.12) Act, 1993.[68] The main effect of this amendment in relation to land was that it amended section 18 and made the right to the "protection of the law" and the entitlement "to be afforded a fair hearing within a reasonable time by an independent and impartial court" to be overridden by other provisions of the constitution. This meant that provisions of the Land Acquisition Act, 1992 ousting the jurisdiction of the courts in matters of fair compensation for acquired land could not be challenged on the basis of a breach of section 18.

A third constitutional amendment followed before the end of 1993. This was the Constitution of Zimbabwe Amendment (No.13) Act, 1993.[69] This amendment was meant to make it clear that it was only in respect of land that the courts could not question the compensation payable. The right to approach the courts on any question relating to compensation was still available in respect of the compulsory acquisition of any other property.[70]

The first challenge by white commercial farmers came before the High Court in July 1994 in the case of Davies and Ors v Minister of Lands, Agriculture and Water Development[71]. The applicant was a white commercial farmer whose land had been designated in terms of section 12 (1) of the Land Acquisition Act, 1992. He brought this application on behalf of himself and several other farmers whose land had also been designated. The order sought from the High Court was a declaration that the process of designation of rural land as provided for in the Land Acquisition Act, 1992 was unconstitutional on the basis that it amounted to acquisition of land without compensation. This argument was rejected by the High Court (per Chidyausiku J)(as he then was) and the application was dismissed. The basis of the rejection was that designation of land in terms of the Act was merely a control measure by the state and not acquisition. The land owner lost nothing while the state gained nothing by the designation of the land. Accordingly, the landowner had no right to receive compensation when his/her land was designated.

Commercial farmers were not happy with this ruling. They appealed against it to the Supreme Court. This appeal was their second challenge to the Land Acquisition Act. The appeal was heard in May 1996 by a full bench of the Supreme Court.[72] The full bench was presided over by Chief Justice Gubbay, who, in 1991 had made an unprecedented public statement against the legal framework of land acquisition.

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[68] Act No. 4 of 1993
[69] Act No. 9 of 1993
[70] See section 16 (1)(f) of the constitution introduced by Amendment No. 13
[71] 1994 (2) ZLR 294 (H)
[72] See Davies & Ors v Minister of Lands, Agriculture & Water Development 1996 (1) ZLR 681 (S)

However, notwithstanding this fact, the five judges of the Supreme Court were unanimous in their rejection of the farmers' arguments. The crux of the ruling was that compulsory acquisition of property signifies a transfer of property or any interest or right therein to the state in the sense of parting with ownership or possession to the state. This was not the case with designation of rural land. In the words of Gubbay CJ:

> "It seems to me beyond argument that designation had deprived the appellants of the exclusive or absolute right to sell, lease or otherwise dispose of their rural land. Certainly, the acquiring authority has not acquired the right of which the appellants have been deprived. For the fact of designation does not transfer the right to the acquiring authority to sell, lease or otherwise dispose of the rural land.
>
> In sum, it is my view that there has been no compulsory acquisition of the appellants' rural lands or interest or right therein, by the action of the Minister in designating them. There has been a deprivation of the right of the appellants freely to sell, lease or otherwise dispose of their rural lands to whosoever they wish. But that right has not passed to the acquiring authority. Compulsory acquisition at the stage of designation does not occur, even though designation may be a prelude thereto"[73].

This decision dealt a decisive blow to white commercial farmers who had hoped that the courts would eventually come to their rescue. More fundamentally it demonstrated the readiness of the courts to support the thrust of the land reform process. However, the government remained distrustful of the courts and proceeded to make a further amendment to the constitution to remove any avenues that could have been used in a future court challenge. The amendment was contained in the Constitution of Zimbabwe Amendment (No.14) Act, 1996[74]. In terms of the new amendment, section 11 of the constitution was repealed and replaced by a provision which was merely a preamble. The reason for this repeal was that in the Davies case, farmers had, in addition to section 16, also relied on section 11 to argue against designated land and the Supreme Court, relying on its precedent in In re Munhumeso [75] seemed to have accepted that that section could be a basis for asserting fundamental rights. Fearing such possible resort to section 11, the later was repealed and replaced by a clear preamble.

The Law and Land Reform: 2000 to date

It would appear that notwithstanding the radical legal changes implemented in the period between 1990 and 2000, the pace of land reform remained slow and its results continued to be largely negligible. Owing to the deteriorating economic situation, opposition to the ruling party increased in intensity. At the end of 1997 and in the early phase of 1998, the Zimbabwe Congress of Trade Unions (ZCTU) succeeded, through demonstrations and stay-aways, to mobilise the urban population to resist a controversial "war veterans levy" – a proposed tax meant to pay gratuities for veterans of the liberation struggle. Government bowed to the pressure and scrapped the proposed tax. At the beginning of 1999, government also

[73] At page 692D-E
[74] Act No. 14 of 1996
[75] 1994(1) ZLR 49 (S)

bowed to pressure from the National Constitutional Assembly (NCA), which had been advocating for constitutional reform since its formation in May 1997, and reluctantly embarked on a constitutional reform process. In September of the same year, a new opposition political party, the Movement for Democratic Change (MDC) was launched. It had visible and widespread support. The high watermark of ZANU(PF)'s loss of grip on power was in February 2000 when the electorate voted convincingly against the government's Draft Constitution.

These developments showed the ruling party's waning support base which was a contrast from the rapidly expanding urban support base for the opposition. In this context, ZANU(PF) had to devise a survival strategy and Mugabe picked on land. The use of the land issue had one significant difference from the previous periods. This time, the opposition and civic society had to be portrayed as opponents of land reform who were being sponsored by Britain and the western allies to preserve white privileges. ZANU(PF) had to be portrayed as the only movement that had a genuine commitment to land reform. This entailed an approach which was so radical as to fit the description of "revolutionary", and to depict any critic, however moderate the criticism as "counter-revolutionary". This is why this particular phase of the land reform process was described as the "Third Chimurenga".

Pursuant to this political strategy, the rejection of the government's Draft Constitution in the referendum of February 2000, was characterised as a conspiracy against land reform and on 16 February 2000, the first forceful land occupation by war veterans took place. These forceful occupations were to become the main feature of the post-2000 land reform process.

The role of law in the context of the new approach to land reform is a graphic tale of the limited capacity of law as a vehicle for resolution of disputes over the control of such a vital resource as land. Purely as a matter of political expediency, the Mugabe regime adopted contradictory positions regarding the legal framework. On the one hand, it pursued a rigorous process of enacting new laws principally through amending the Constitution and the Land Acquisition Act in a bid to give the new land reform policy a legal foundation. Yet, on the other hand, it preached that the land question was a "political and not legal matter" and condoned, and in some cases encouraged, clear breaches of the law purportedly in furtherance of resolving the land question.

A development which brought fundamental legal changes in the post-2000 period was the amendment of the constitution to authorise land acquisition without paying compensation. This amendment came in the form of the Constitution of Zimbabwe Amendment (No.16) Act, 2000.[76] The amendment was taken verbatim from Clause 57 of the Draft Constitution which had been rejected in the referendum. The perceived political benefit accruing to ZANU(PF) in enacting, as law, a provision which had been part of a rejected proposal was that ZANU(PF) would be seen as a party that rescued the people from the conspiracy against land reform by those who opposed the Draft Constitution.

[76] Act No. 5 of 2000

The new law amended section 16 of the constitution by inserting a new provision whose contents are so politically loaded that it is difficult to discuss them without reproducing the relevant parts in full. The inserted section 16A (1) provides as follows:

> *"16A Agricultural land acquired for resettlement*
>
> *(1) In regard to the compulsory acquisition of agricultural land for the resettlement of people in accordance with a programme of land reform, the following factors shall be regarded as of ultimate and overriding importance –*
>
> *(a) under colonial domination the people of Zimbabwe were unjustifiably dispossessed of their land and other resources without compensation;*
>
> *(b) the people consequently took up arms in order to regain their land and political sovereignty, and this ultimately resulted in the Independence of Zimbabwe in 1980;*
>
> *(c) the people of Zimbabwe must be enabled to reassert their rights and regain ownership of their land;*
>
> *and accordingly-*
>
> *(i) the former colonial power has an obligation to pay compensation for agricultural land compulsorily acquired for resettlement, through an adequate fund established for the purpose; and*
>
> *(ii) if the former colonial power fails to pay compensation through such a fund, the Government of Zimbabwe has no obligation to pay compensation for agricultural land compulsorily acquired for resettlement."*

Stripped to its basic point, this amendment bluntly authorised compulsory acquisition of agricultural land without compensation. Bearing in mind that for the first twenty years of independence, land reform had proceeded on the assumption that compensation was mandatory, the difference being only over the proper measure of that compensation, this amendment represented a fundamental departure from previous approaches. It even went further than what the Patriotic Front had proposed at the Lancaster House Conference in 1979 where the proposal was to pay compensation at the "discretion of the government".[77]

The following points are worth noting about this amendment. First, section 16A only applies to "agricultural land for resettlement" and does not cover land falling outside this category. This means that where land falling outside this category is compulsorily acquired, the state is obliged to pay fair compensation. The issue of "no obligation to pay compensation" only arises in respect of "agricultural land compulsorily acquired for resettlement". Secondly, should the "adequate fund" referred to in the section be established, the obligation to pay compensation is automatic in terms of section 16(1)(e). However, the measure of that compensation, notwithstanding the availability of an "adequate fund" appears to be "fair compensation within a reasonable time" and not "prompt and adequate"

[77] See Tshuma, op.cit p.39

compensation. The factors to be taken into account in assessing the fairness of the compensation are specified in section 16A(2).
Thirdly, the provision ousting the jurisdiction of the courts in compensation matters was repealed. Accordingly, where compensation is payable (such as where the land is not agricultural land) the courts can now declare unconstitutional any law which does not provide for fair compensation.

The new constitutional position led to amendments to the Land Acquisition Act, 1992. A substantial portion of amendments to the latter Act did not arise from the need to make the Act conform to the constitution but were designed to remove what the government press termed "bottlenecks" in the acquisition process. Essentially, this meant removing all procedural safeguards against abuse of state authority in the acquisition process. This also included making amendments as a response to the reaction of white commercial farmers. Many amendments are explicable on this latter basis. Further, as many amendments were a response to what government perceived as a concerted effort by white commercial farmers to frustrate land reform, the amendment process was piece-meal to the extent that the Act has been amended at least once every year since 2000. An outline of the various amendments shows a deeply contested land reform process.

The first amendments were enacted in 2000 under the Land Acquisition Amendment Act, 2000.[78] These introduced several changes, the most significant of which were to incorporate the new position of "no obligation to pay compensation" and to facilitate the so-called "fast-track resettlement programme" by repealing all provisions relating to designation of rural land. Regarding the issue of compensation, the 2000 amendments incorporated the principle of "no obligation to pay compensation" in the absence of an "adequate fund" by providing in section 29C that:

> "In respect of the acquisition of agricultural land required for resettlement purposes, compensation shall only be payable for improvements on or to the land."

Notwithstanding the fact that compensation was only payable for "improvements" and not for the land, the Act retained the provisions which applied in respect to designated rural land. Thus, government was allowed to pay in instalments up to a period of five years and to use as a medium of payment, bonds or other securities.[79] For purposes of facilitating the fast-track resettlement programme, provisions on designating land as a prelude to acquisition were repealed. In addition, the preliminary notice of acquisition was now to be served only on the owner and the holder of a registered real right. In the 1992 Act, the notice was also required to be served on "any other person who it appears to the acquiring authority may suffer loss or deprivation of rights by such acquisition".[80] In the same Act, a preliminary notice of intention to acquire land automatically lapsed after one year if there was no acquisition.[81] This was considered as one of the "bottlenecks" and the 2000 amendments repealed this position and made a preliminary notice valid for an

[78] Act No. 15 of 2000
[79] See section 29 C(3)
[80] See section 5(1)(b) of the 1992 Act
[81] See section 5(4) of the 1992 Act

indefinite period and could only be terminated either by withdrawal or acquisition of the land in question.

In 2001, further amendments were made via the Land Acquisition Amendment Act, 2001[82]. These amendments were designed to condone government's failure to observe the time-limits imposed by the Act. For example it allowed government to re-issue preliminary notices in respect of the same land where they had lapsed.[83] In response to a ruling by the Supreme Court that the indefinite period was unconstitutional,[84] the 2001 amendments reduced the period of validity to two years.

In 2002, yet another set of amendments were enacted. The first were contained in the Land Acquisition Amendment Act 2002[85]. The main provision of the first 2002 amendments related to the eviction of owners of land which had been compulsorily acquired. This was in response to landowners who were considered to be resisting the land reform process by refusing to vacate their farms. In terms of the amendments, once an order of acquisition has been made under section 8, the making of the order itself is deemed to be a notice to the owner to "cease to occupy, hold or use that land forty-five days after the date of service of the order".[86] The owner was allowed to remain in occupation of his/her "living quarters on that land" for a period of not more than ninety days.[87]

The second amendments were contained in the Land Acquisition Amendment (No.2) Act, 2002[88] and were meant to reverse certain unfavourable decisions from the courts. Some farmers had started challenging acquisitions on the basis that the land thereof was not suitable for settlement for agricultural purposes. A new provision was inserted into the Act providing that as long as the acquiring authority has stated that the acquisition is for resettlement for agricultural purposes, then "it shall be presumed that the land is suitable for resettlement for agricultural purposes."[89] The High Court had also ruled that failure to serve notice on bondholders invalidated an acquisition order. A new provision was inserted to render the judgment ineffective by allowing government to serve subsequent orders in substitution of the invalid orders and thus still proceed with acquisition.[90]

While the above survey shows a spirited resort to the enactments of legal instruments as a basis for the new approach to land reform, this was merely half of the picture. The other half was that the government condoned breaches of the existing law in furtherance of the political objectives driving the land reform process. The later picture emerges clearly from a survey of the interplay between law and politics in the government's response to land occupations.

The immediate response of white commercial farmers to land occupations was to resort to the courts, it having been clear under the existing law that the occupations

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[82] Act No. 14 of 2001
[83] See section 9 inserted by the 2001 Act
[84] See Commercial Farmers Union v minister of Lands 2000 (2) ZLR 469 (S).
[85] Act No. 6 of 2002
[86] See section 9 as substituted by section 3 of the 2000 Act
[87] Ibid
[88] Act No. 10 of 2002
[89] See section (4a) inserted by Act No. of 2002
[90] See section 9(2) of the Act as inserted by Act No.10 of 2003

were unlawful. On 17 March 2000, exactly a month after the first farm occupations, the High Court (Garwe J) in the case of Commercial Farmers Union v Commissioner of Police[91] issued an order, to which the state consented, in the following terms:

> *"1. Every occupation of any property listed in the schedule hereto or any other commercial farm or ranch in Zimbabwe that has been occupied since 16 February 2000 in pursuit of any claim to a right to occupy that property as part of the demonstrations instigated, promoted or encouraged by any person, is hereby declared unlawful.*
>
> *2. All persons who have taken up occupation of any commercial farm or ranch in Zimbabwe since 16 February 2000 in pursuit of any claim to a right to occupy that property as part of the recent demonstrations instigated, promoted or encouraged by any person shall vacate such land within 24 hours of the making of this order."*

What is most significant about this court order is that it declared farm occupations "unlawful". The state accepted that the occupations were "unlawful". However the Commissioner of Police did not enforce the order and decided to go back to the court seeking to be excused from enforcing it. The application by the Commissioner of Police was heard by Chinhengo J on 10 April 2000, after some 23 days of not enforcing the previous order.[92] The application by the Commissioner of Police was the beginning of the arguments which were to be used to disobey court orders. He cited lack of resources to enforce the order. More fundamentally, he raised a purely political argument: that enforcing the order would lead to public disoder as the persons involved were prepared to resist the police in furtherance of their quest for land. In other words, the police were of the view that it was not politically right to enforce the law! The affidavit by the Police Commissioner summed up the position:

"Also to be anticipated is what the reaction might be countrywide when news of police intervention in one place reaches the other invaded farms not enjoying police protection. In their assessment, police intervention in one place will apocalyptically provide the match stick that will ignite this beautiful country of ours into a bloody conflagration. In their painstaking consideration of the question of enforcement of the order the police have looked over the edge of the cliff, over the brink and they see nothing but an abyss if police intervene. Police feel enforcement of the order will render the law and order situation worse than it is at the present moment. .... Police contention is that the land question is a complex, involved, divisive problem which is better resolved in the political arena."[93]

This argument was emphatically rejected by the court, which took the position that law is law regardless of its content and effect. The court reiterated that the farm occupations were illegal and as such the Commissioner of Police had a public duty under section 18(1) of the Constitution to enforce the law. In an indirect way, the judge pleaded with the government to note that if there were laws it did not like, it should change them rather than leave them as part of the law but refusing to enforce them. This is the indirect but apposite statement by Chinhengo J:

> *"In independent Zimbabwe, the law should no longer be viewed as being made for us, rather it must be viewed as our law. We have the sovereign right*

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[91] Case No. HC 3544-2000

[92] See Commissioner of Police v Commercial Farmers Union 2000 (1) ZLR 503 (H)

[93] Quoted in Commissioner of Police v Commercial Farmers Union p515 –516.

to enact new laws and repeal old laws which we find to be incompatible with the national interest."[94]

For a government that had gone to great lengths in passing a constitutional amendment in 2000 and enacting four Land Acquisition Amendment Acts within a space of three years, it was very much aware of what it had to do if it wanted to legalise the land occupations. Defiance of its own laws which it had power to change was simply a political strategy of wanting to be seen to be fighting against certain forces opposed to progress in Zimbabwe. These forces were portrayed as including the opposition and civic society. In accordance with that political strategy, even the above judgment by Chinhengo J was not enforced despite the fact that it is the Commissioner of Police himself who approached the court. Why approach the courts if one is not interested in what they say? The answer is that this was a calculated strategy to whip emotions around the land question for the benefit of the ruling party.

The idea was to undermine the judiciary in the eyes of the public. Chenjerai Hunzvi, the leader of the war veterans, underscored the point as follows:

> *"We are not afraid of the High Court ... this country belongs to us and we will take it whether they want it or not. The judges must resign. Their days are numbered as I am talking to you. I am telling you what the comrades want not what the law says (Sithole & Ruswa, 2003)."*

The commercial farmers, having won in the High Court but continuing to lose on the ground, decided to approach the Supreme Court with an application based on breach of the constitution. The application was heard on 6 and 7 November 2000 and judgment delivered on 21 December 2000. In that case, Commercial Farmers Union v Minister of Lands and Others[95], the applicant farmers sought to have the government stopped from continuing with acquiring land for resettlement until it complied with previous court orders. This was a tall order for the Supreme Court, for it was being asked to confront the government and order it to follow its own law.

The Supreme Court had no difficulty in ruling that the manner in which the government was conducting the land reform exercise was unlawful. In a strong statement, it proclaimed:

> *"The rule of law in the commercial farming areas has been overthrown"*[96]

It also criticized the so-called "Fast Track Land Reform Programme" saying it did not meet the constitutional requirement of a "programme of land reform". When it came to the remedy, the Supreme Court developed cold feet. It ordered the government to comply with the orders issued by the previous courts, but refused to give an immediate order restraining the government from continuing with land acquisition. It gave the government six months to continue with land acquisitions even though it considered the acquisitions as unlawful for failure to satisfy the constitution. However, after the expiry of the six months, the government was ordered to follow the law.

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[94] At p.524H-525A

[95] 2000(2) ZLR 469 (S)

[96] At p.479E

Whatever justifications may be given for this order, the matter of fact is that the Supreme Court was succumbing to the political pressures that had been built around the land question. It was a huge success for ZANU (PF) strategists. From the perspective of many legal theorists, the order was not surprising: law follows politics. However, from a strict legal perspective, the Supreme Court itself acted unlawfully. A court of law has no jurisdiction to order that which is against the law. In acting the way it did, the Supreme Court demonstrated the limitations of law in the face of a regime determined to act in its own way, whatever the legal position.

The Supreme Court judgment gave government a major reprieve. Purporting to be "restoring" the rule of law; it enacted the Rural Land Occupiers (Protection from Eviction) Act, 2001.[97] The purpose of this Act was to legalise all land occupations which took place from 16 February 2000 to 1st March 2001. Any person occupying rural land as at 1st March 2001 was given the status of a "protected occupier" and could not be evicted.

In this way, the government responded in a crude manner to the pleas by the judiciary for it not to disobey its own laws but to change them if it did not like them. In issuing the pleas, the courts had been naïve: in the period after 2000, the government had shown its preparedness to pass, as law, any rule, however objectionable, as long as that was in its political interests.

Armed with this new Act, the government itself went back to the Supreme Court, which it had now reconstituted, seeking an order that the rule of law had now been restored. The matter was heard in September 2001 and was presided over by the new Chief Justice Chidyausiku. In that case, The Minister of Lands, Agriculture and Rural Resettlement & Others v The Commercial Farmers Union[98], by a majority of four judges against one, the Supreme Court ruled that the land acquisition programme was now lawful as government had restored the rule of law. It upheld the Rural Land Occupiers (Protection from Eviction) Act, 2001 as constitutional. It also ruled that the government now had a "land reform programme" in compliance with the constitution.
This Supreme Court judgment put a final nail to the numerous court applications challenging the land reform programme itself and gave government an almost unlimited scope for pursuing its land policies. However, the judgment did not silence critics who have said the land reform process in the post-2000 period continues to be contrary to the "rule of law". Some brief remarks on this issue are necessary and will be combined with concluding remarks.

Concluding Remarks: Rule of Law and the Land Question

The issue of the "rule of law" is problematic but in the context of the land reform process in Zimbabwe, it is not difficult to illustrate. The narrow version of the rule of law is that the state must derive its authority from law and all its actions must be in accordance with a prescribed law. Under this narrow version, the content of that law is irrelevant. A state which passes unjust laws and complies with them is acting in compliance with the rule of law.

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97 Act No. 13 of 2001.
98 Supreme Court judgment No. SC111/2001.

The broad view of the rule of law goes further to examine the nature of the law in question. Its starting point is the same as the narrow view, namely that the state must always act in accordance with a prescribed law. However, it is not sufficient for the state merely to act in accordance with a prescribed law; the law in question must be just or fair or in accordance with acceptable notions of fairness and justice. Compliance with an unjust law is not adherence to the "rule of law". The rule of law means adherence to fair, just and generally acceptable laws.

On the narrow view of the rule of law, there is no doubt that the land occupations of 2000 and the refusal of the government to enforce court orders were contrary to the rule of law. This is because both actions were not in accordance with the law as it stood and this is the basis upon which the courts ruled that the rule of law had been "overthrown". It is also on the same basis that they ruled that it had been "restored".

Since the Gubbay Supreme Court found the rule of law to have been "overthrown" while the Chidyausiku Supreme Court proclaimed it to have been "restored", there are many who may share the notion that these two courts have different conceptions of the rule of law. Far from it. Both espoused the narrow version.

The Gubbay Supreme Court did not question the fairness or otherwise of section 16A of the constitution which was brought by Amendment No.16. It merely said that that section required a "programme of land reform" which it found not to exist and therefore ruled the land reform to be unlawful. The Gubbay Supreme Court reveals its notion of the rule of law as follows:

> *"Of course, it is fundamentally true that the land issue is a political question. It is equally true that the political method of resolving that question is by enacting laws. The Government has done so. It has then failed to obey its own law. That is the point at which, with respect, the Attorney-General and the Commissioner have gone astray. The courts are doing no more than to insist that the state complies with the law. The procedures under the Land Acquisition Act have been flouted. The Act was not made by the courts. It was made by the state".*[99]

In conceding that there are such things as political questions which the state can resolve by merely putting them into legal form and that the courts do not make law, the Gubbay Supreme Court was espousing the narrow version of the rule of law. The only basis upon which the Gubbay Supreme Court ruled against the land reform process was that the government was not following its own laws. The Gubbay Court was never called upon to decide whether or not the land reform process was in "accordance with the rule of law" in the broad sense. The court would have clearly declined an invitation to do so, given the above remarks.

Chidyausiku CJ in the Supreme Court case of Ministry of Lands, Agricultural and Rural Resettlement v Commercial Farmers Union where he found the rule of law to

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99 At p.483F-G.

have been "restored" was espousing the narrow view. The Constitution of Zimbabwe Amendment (No.16) Act, 2000 makes it clear that agricultural land for resettlement may be acquired without compensation. That constitutional amendment was properly enacted. The same applies to various Land Acquisition Amendment Acts passed after 2000. The government also enacted the Rural Land Occupiers(Protection from Eviction) Act,2001 which legalised farm occupations. This latter Act was ruled to be in accordance with the constitution. Under the narrow view of the rule of law, as long as the government is acting in accordance with a prescribed law, then the rule of law is in place, regardless of the content of that law.

It should be clear that under the narrow view of the rule of law, the only issue regarding the land reform process is a question of fact: is the government now following its own laws? If the answer is yes, then the land reform process is in accordance with the rule of law, whether or not the laws being followed are unfair, unjust or contrary to international standards.

The narrow view of the rule of law must be disregarded in favour of the broad view. The problem with the broad view of the rule of law is that there is no agreement among reasonable persons as to what constitutes a "fair or just law". This is why under the broad view, the land question in Zimbabwe may continue to raise debate on the rule of law. Is it fair or just not to pay compensation for land which was originally acquired through colonial conquest? Different persons may have different views on this question.

Under the broad view of the rule of law, one would have to decide whether the various laws passed by government conform to acceptable notions of fairness or justice. These laws include the constitution itself. For example, a question to be asked is: does section 16A of the Constitution of Zimbabwe conform to acceptable standards of justice? Generally, such a question is not for a court of law. It must be answered in the political arena It is legitimate, in a matter such as land, for differences to emerge over this aspect and this Chapter will not delve into the ideological issues and differences. For purposes of demonstrating how the debate should be conducted, it should suffice to say that the refusal by the government to pay "adequate compensation" for agricultural land acquired for resettlement is not inherently unjust and therefore not contrary to the rule of law under the broad view. But the ridiculous provisions requiring a farmer to stop farming activities, whatever the stage of cultivation, within 45 days of an acquisition order and to leave any residence on the farm within 90 days, are clearly contrary to acceptable notions of fairness or justice and therefore not in accordance with the rule of law in the broad sense.

What is the ultimate conclusion? The land question in Zimbabwe shows that law is a very effective instrument of political expediency. Both the colonial and post-colonial states have used law to fashion land ownership in a manner most suitable for the vested political interests of the ruling elite. Whether or not those vested political interests were influenced by economic and other considerations is irrelevant.

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