

EXPROPRIATION: A COMPARATIVE STUDY OF THE JURISPRUDENCE OF GHANA, NAMIBIA SOUTH
AFRICA AND ZIMBABWE

SAMUEL AMOO, UNIVERSITY OF NAMIBIA

ABSTRACT: EXPROPRIATION

In a speech marking the formal opening of the Accra conference on legal education and of the Ghana law school, the late Dr. Kwame Nkrumah emphasised the need for the identification of the legal system with the ethos of the society:

There is a ringing challenge to African lawyers today. African law in Africa was declared foreign law for the convenience of colonial administration, which found the administration of justice cumbersome by reason of the vast variations in local and tribal custom. African law had to be proved in court by experts, but no law can be foreign to its own land and country, and African lawyers, particularly in the independent African states must quickly find a way to reverse this judicial travesty.

The law must fight its way forward in the general reconstructions of African action and thought and help to remould the generally distorted African picture in all other fields of life. This is not an easy task, for African lawyers will have to do effective research into the basic concepts of African law, clothe such concepts with living reality and give the African a legal standard upon which African legal history in its various compartments could be hopefully built up. Law does not operate in a vacuum. Its importance must be related to the overall importance of the people, that is to say, the state.¹

1 INTRODUCTION

1.1 State Sovereignty and Developmemnt

One of the essential elements of statehood is the occupation of a territorial area within which a state's law operates. Over this area, supreme authority is vested in the state. Hence, there arises the concept of territorial sovereignty which signifies that within this territorial domain jurisdiction is exercised by the state over persons and property to the exclusion of other states.

In general terms, the origin of expropriation can be traced to state sovereignty by virtue of which the state is empowered to exercise the right of expropriation over private

¹K. Nkrumah (1962) 6 *Journal of African Law* 105

property in the public interest. This state sovereignty vests the control of the natural resources in the state.

Under international law, nationalisation of private property by the state or expropriation is allowed, but subject to the condition that nationalisation or expropriation is effected in the public interest and subject to payment of compensation. The UN Resolution on Permanent Sovereignty over Natural Resources, 1962, which was adopted in the case of *Texaco v Libya*², provides that:

Nationalisation, expropriation or requisition shall be based on grounds or reasons of public utility, security, or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation in accordance with the rules in force in the state taking such measures in the exercise of its sovereignty and in accordance with international law. In any such case where the question of compensation gives rise to a controversy, the national jurisdiction of the state taking such measures shall be exhausted.

1.2 **The Doctrine of Eminent Domain**

Under the doctrine of eminent domain, the state is given the power to expropriate private property for infrastructural development or public utility such as the construction of bridges railways, roads etc.

Therefore, traditionally, under the doctrine of eminent domain the power of the state to expropriate is limited. The eminent domain concept is incorporated in municipal legislation but there is no uniformity in these pieces of legislation in terms of the purpose of expropriation. There are two models. In the first model the power to expropriate is limited to infrastructural development. In the second model, however, the purpose for expropriation is formulated in an open textured manner, generally in terms of public interest, and in most cases no precise definition is given of what constitutes public interest.

² 1977 53 ILR 389

What constitutes public interest, however, is not defined under international law and is therefore, subject to municipal laws of a particular jurisdiction.

1.3 Procedural Requirements and the Protection of the Rights of the Individual and the Determination of Compensation

Since expropriation involves the deprivation of the right of the individual, it is important that procedural mechanisms and requirements are put in place to prevent any potential abuse of the power to expropriate. Mere substantive rules are not enough; procedural rules are equally important. The procedure involved in the process of expropriation therefore becomes a legal requirement in the sense that it is aimed at ensuring procedural justice, transparency, recognition of the rule of law and the protection of individual rights.

The details of the procedure may vary from jurisdiction to jurisdiction, and stipulated in the relevant legislation, but the most important criterion is that of compliance with the principles of natural justice and reciprocity. This will imply that the individual whose property is to be expropriated is involved, to a certain degree, in the expropriation process and given a fair hearing not only with regard to the amount of compensation but also with regard to the decision concerning expropriation as such is necessary to reduce the possibility of corruption, the irregular promotion of individual interests and the arbitrary use of state power.

The paper aims at a comparative study of the laws in selected jurisdictions on eminent domain or public interest, the determination of compensation and the procedural mechanisms employed in the process of the exercise of the power by the State and the protection of the fundamental rights of the individual whose property is earmarked for expropriation.

2. Definition

2.1 Definition

Expropriation may be defined as the power of the state to compulsorily but lawfully, and for reasons deemed to be in the public interest, acquire ownership or some of the powers contained in ownership in respect of property to the extent that the owner is deprived of the power to use or alienate his or her property in the manner that he or she may wish to do. Expropriation constitutes a limitation on the right of ownership.

Silberberg³ defines expropriation as follows.

“Expropriation in the strict sense means that the owner is deprived of his right of ownership in his property which then becomes vested in the state or some other public authority or corporation authorized by the state to acquire ownership of the property. In the wider sense expropriation includes measures less than the deprivation of ownership, for instance temporary acquisition of the thing for a particular purpose...”

2.2 State Sovereignty and the Doctrine of Eminent Domain

2.2.1 The Doctrine of Eminent Domain under Municipal Laws of Selected Jurisdictions

One of the essential elements of statehood is the occupation of a territorial area within which state law operates. Over this area supreme authority is vested in the state. Hence there arises the concept of territorial sovereignty which signifies that within this territorial domain jurisdiction is exercised by the state over persons and property to the exclusion of other states.⁴

In general terms, the origin of expropriation can be traced to state sovereignty by virtue of which the state is empowered to exercise the rights of sovereignty over its natural resources (including the power to expropriate). With regard to the exercise of state sovereignty over land, the particular land tenure system of a state is a product of the political and economic ideology of the society. The legal framework may be taken as an expression of that ideology defining the rights and duties in relation to land and the procedure for its acquisition, use and procedure. In the context of land expropriation, however, international law prescribes certain norms. In the Namibian context the legal authority to expropriate is provided for in article 16(2) of the Namibian Constitution. The article empowers the state, or any competent body or organization authorized by law, to expropriate property in the public interest subject to the payment of just compensation.

As stated earlier, the power given to the state to expropriate private property in the public interest is derived from state sovereignty which vests the control of the natural resources in the state. Under the doctrine of eminent domain, the state is given the power to expropriate private property for infrastructural development or public utility such as the construction of bridges railways, roads etc.

³ DG Kleyn et al. Silberberg and Schoeman`s *The Law of Property* 3rd ed (1992) 316

*SK Amoo in Manfred O Hinz et al. *The Constitution at Work: 10 Years of Namibian Nationhood* University of South Africa, Pretoria (2002) 256-267

⁴ Shearer *Starke's introduction to international law* 11 ed, London (1994) 144

HM Seervai⁵ discussing articles. 19(1)(f) and 31 of the Indian Constitution which deal with the right of citizens to acquire, hold and dispose of movable and immovable property, points out that the sovereignty of the state involves three elements, namely the power to tax, “police power” and “power of eminent domain”. The author further refers to the definition of ‘police power’ as “the inherent power of a government to exercise reasonable control over person and property within its jurisdiction in the interest of general security, health, safety, morals and welfare, except where legally prohibited (as by constitutional provision)”. The accepted definition for ‘eminent domain’ is “the power of the sovereign to take property for public use without the owner’s consent upon making just compensation”. The distinction between the exercise of the state’s police power and its power of eminent domain is similar to South African expropriation law.⁶ This distinction between the state’s police power and its power of eminent domain is also found in the property jurisprudence of Namibia specifically under articles 16 and 100 of the Namibian Constitution. Articles 16(1) and 100 can be compared to the state’s police powers and Art 16(2) to its powers of eminent domain.

Traditionally, under the doctrine of eminent domain the power of the state to expropriate is limited. The eminent domain concept was incorporated in legislation but there was no uniformity in these pieces of legislation in terms of the purpose of expropriation. There were two models. In the first model the power to expropriate was limited to infrastructural development. In the second model, however, the purpose for expropriation was formulated in an open textured manner, generally in terms of public interest, and in most cases no precise definition was given of what constitutes public interest.

Under international law, nationalisation of private property by the state or expropriation is allowed, but subject to the condition that nationalisation or expropriation is effected in the public interest and subject to payment of compensation. What constitutes public interest, however, is not defined under international law and is therefore subject to municipal laws of a particular jurisdiction. The UN Resolution on Permanent Sovereignty over Natural Resources, 1962, which was adopted in the case of *Texaco v Libya*⁷, provides that:

Nationalisation, expropriation or requisition shall be based on grounds or reasons of public utility, security, or the national interest which are recognized as overriding purely individual or

⁵ *Constitutional Law of India* 3rd ed, Vol.11, pa. 14.24

⁶ See in this regard: Davis, Cheadle and Haysom: Fundamentals Rights in the Constitution: 243

⁷ 1977 53 ILR 389

private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation in accordance with the rules in force in the state taking such measures in the exercise of its sovereignty and in accordance with international law. In any such case where the question of compensation gives rise to a controversy, the national jurisdiction of the state taking such measures shall be exhausted.

But , as Dunning puts it:

The relationship between the state and the development process has an important bearing on the purpose limitation in the law of eminent domain. In the past, the public purpose doctrine has meant that the state could only take property by eminent domain where that property was needed for “public” activities. Compulsory acquisition was limited to traditional state activities – such as defence, highways, and education. But the modern African government seeking active economic development acts in all spheres. The state either engages directly in production or takes important action to enable private persons to produce and develop. When the state has a dominant and rapidly increased production, any productive purpose becomes a public purpose.⁸

2.2.2 Namibia

As mentioned earlier, the traditional concept of public interest as contemplated within the context of eminent domain, includes infrastructural development and public utility.

The provisions of the Namibian Constitution relating to the power of the state to compulsorily acquire private property are provided for under article 16.⁹ The purpose limitation in the eminent domain clause is an entrenched provision. Article 100 of the Namibian Constitution vests sovereign ownership of the natural resources of Namibia in the state.¹⁰ Article 16, however, acknowledges private ownership but empowers the state to compulsorily acquire private property in the public interest subject to the payment of just compensation. Article 16 further states that an Act of Parliament should be promulgated for the exercise of the power of

⁸ Dunning “Law and economic development in Africa: The law of eminent domain” (1968) 68 *Columbia Law Review* 1286. Kaarst & Rosenn *Law and development in Latin America* University of California Press, ch 31298-1299

⁹ Art 16 of the Namibian Constitution provides as follows: “(1) All persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their heirs or legatees: provided that Parliament may by legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens. (2) The state or a competent body or organ authorized by law may expropriate property in the public interest subject to the payment of just compensation, in accordance with requirements and procedures to be determined by Act of Parliament.”

¹⁰ Art 100 of the Namibian Constitution states that land, water and natural resources below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia belong to the state if they are not otherwise lawfully owned.

expropriation. The article does not define “public interest”. In the premise, therefore, the determination and definition of “public interest” lie within the subjective jurisdiction of the state. It is a legal requirement falling within the sphere of political definition.

Since the constitution leaves the definition of public interest undefined and open textured, the attempts at definitions are found in a particular piece of legislation. Currently in Namibia, depending on the relevant portfolio, pieces of legislation have been promulgated to empower the state or an appropriate authority to expropriate private property for various purposes.

In the context of the constitutional and political history of Namibia, land resettlement and agrarian reform will legitimately come within the definition of public interest. It is in this context that one can see the justification for the promulgation of the Agricultural (Commercial) Land Reform Act 6 of 1995. In this Act public interest has been defined to include agricultural and resettlement purposes in the context of the government’s land reform and poverty alleviation programme.

The purpose of the Act is to provide for the acquisition of agricultural land by the state for the purpose of land reform and for the allocation of such land to Namibian citizens who do not own or otherwise have the use of any or of adequate agricultural land.

The Agricultural (Commercial) Land Reform Act 6 of 1995 regulates the purchase and redistribution of privately owned farms. The relevant sections of the Act in respect of acquiring agricultural land and expropriation of such land are section 14, providing for the purchasing of agricultural land by the state on a willing buyer willing seller basis, and section 20, providing for expropriation of such land and requirements therefor.

The Act also provides for the appointment, composition, powers and duties of the Land Reform Advisory Commission. The technical commission on commercial farm land was mandated to investigate the entire land tenure situation in Namibia and make recommendations as far as *absentee foreigners* are concerned.

The Act was promulgated as the legislative tool for the implementation of the Government’s land reform programme. In the context of legislative restrictions on the right of ownership, the Act imposes dual restrictions. The first type of restriction entails the pre-emptive right the so-called, *willing buyer willing seller* option granted to the Minister, in terms of section 17(3), and the second type of restriction arises from the Minister’s power to expropriate agricultural land for the purposes of land reform, resettlement of the landless and poverty alleviation in terms of

section 14 but subject to the requirements and procedures provided in sections 14 and 20. These requirements include the payment of compensation and the public interest provision.

The Act gives the Minister two options: the power to acquire land on the basis of willing buyer willing seller option or compulsory acquisition. Section 14 of the Act grants the Minister the general authority to acquire, out of moneys appropriated by Parliament for that purpose, agricultural land for implementation of land reform and resettlement policies. It is therefore clear that expropriation is not the only option; it is the last option.¹¹ Section 14(2) provides as follows:

The Minister shall under this subsection acquire:

- (a) any agricultural land offered for sale to the Minister in terms of section 17(4) whether or not the offer is subsequently withdrawn;*
- (b) any agricultural land which has been acquired by a foreign national, or by a nominee owner on behalf of or in the interest or in the interest of a foreign national, in contravention of section 58 or 59; or*
- (c) any agricultural land which the minister considers to be appropriate for the purposes contemplated in that subsection classified as under-utilized and in terms of subsection (3);*
- (d) any agricultural land or portion or portions of such land classified as excessive land in terms of subsection (3); or*
- (e) any agricultural land acquired by a foreign national, or by a nominee owner on behalf or in the interest of a foreign national, in contravention of section 58 or 59.*

These provisions have been amended by virtue of sec. 2(b) of Act 14 of 2003 as follows:

(1) The Minister may under subsection (1) acquire-

(2) (a) any agricultural land offered for sale to the Minister in terms of section 17 (4), whether or not the offer is subsequently withdrawn;

(b) any agricultural land which has been acquired by a foreign national, or by a nominee owner on behalf or in the interest of a foreign national, in contravention of section 58 or 59; or

¹¹ See s 20(1) of the Agricultural (Commercial) Land Reform Act 6 of 1995

(c) any agricultural land which the Minister considers to be appropriate for the purposes contemplated in that subsection.

These requirements appear to accord with international standards. In *Texaco v. Libya*¹² it was held that nationalisation of property by the state or expropriation is allowed, but subject to the condition that nationalisation or expropriation is done in the public interest, subject to payment of just compensation. Similar provisions are to be found in the 1962 UN General Assembly Resolution on Permanent Sovereignty over Natural Resources, which states *inter alia* that expropriation shall be based on grounds for or reasons of public utility, security or the national interest which are recognised as overriding purely individual and private interests.

The State's power to expropriate agricultural land which is exercised by the Minister under the Act to advance the Government's land reform and poverty alleviation programme, was considered by the court in the *Gunther Kessl v Ministry of Lands and Resettlement and Others*¹³ case, which was described as a "test case" by Muller J. In this case the applicants applied for an order to review and set aside the decision of the Ministry of Lands and Resettlement to expropriate certain farms belonging to the applicants in the Otjozondjupa Region of the Republic of Namibia. The applicants initially conceded that the Government of the Republic of Namibia has the right to expropriate farms under certain conditions and therefore only two main issues needed to be considered by the court. Firstly, the question whether the *audi alteram partem* principle was relevant in expropriation cases such as those before the court and, secondly, whether the procedure that was followed in all these three cases before the court was in conformity with the law.

As stated earlier, since the Act in principle imposes restrictions on the constitutional right of ownership, the court reiterated the principle that an act or statute that provides for actions that may infringe fundamental rights should be interpreted restrictively in such a manner as to place the least possible burden on subjects or to restrict their rights as little as possible. The rights of the public should be properly balanced against those of subjects by adhering to the requirement of "public interest" in article 16(2) and the provisions of section 14 of the Act.

¹² (1977) 53 ILR 389

¹³ 2008(1) NR 167(HC)

On the issue of the relevance of the *audi alteram partem* principle in expropriation cases such as those under consideration, the court held that article 16 (2) is not a self-contained or “walled-in ” provision, excluding the application of the *audi alteram partem*¹⁴ principle which was therefore held to be applicable. In the context of the Act the exercise of the powers of expropriation granted to the Minister was therefore subject to the provisions of article 18 of the Namibian Constitution and the common law grounds for review of administrative discretion.¹⁵ In terms of the said article the Minister may only act within the limits of his statutory discretion and should apply his mind to the requirements of the enabling Act. In order to expropriate land, it must be done within the provisions of the Act and involves a double-barrel process, namely, firstly, in terms of section 14 and then, in terms of section 20. This provision is peremptory and must be complied with *before* the Minister takes a decision. Furthermore, the court held that under the provisions of section 20(6) the Commission is obliged to consider the interests of the persons employed and lawfully residing on the land and the families of such person’s residing with them. This factor becomes a variable in the determination of what constitutes public interest¹⁶

The Land Reform Advisory Commission established under section 2 of the Act is mandated to make recommendations to the Minister or advise the Minister in relation to any power conferred upon the Minister by the Act. The court held that such consultation between the Minister and the Commission was a prerequisite before embarking upon the section 20 expropriation process, and that such consultation should take place at the section 14 stage when a determination as to whether there was a willing buyer and willing seller must be made and *before* the Minister decides to purchase a particular a particular farm. The requirements of this provision go beyond a mere consultation; they demand genuine consultation.

¹⁴ The decision in *West Air Aviation and Others v Airports Company Limited and Another* 2001 NR 256 (HC) in respect of [applicability of the audi alteram partem](#) principle was confirmed.

¹⁵ *Immigration Selection Board v Frank* 2001 NR 107 (SC)

¹⁶ See also *Aonin Fishing (Pty) v Ministry of Fisheries and Marine Resources* 1998 NR 47

Under the authority granted by these provisions and other relevant laws, the Minister on behalf of the government to date, has acquired 461 000 hectares of land, including 22 605 hectares which were donated. Total Government expenditure is N\$ 52 451 355, 79 for the purchase of 79 farms and it must be emphasized that all these farms were purchased on a willing buyer, willing seller basis. During the NDP1 the government spent N\$ 45 921 168, 79, and a total number of 22 083 people were resettled. It is, however, now estimated that about 34 000 Namibians have been settled through the government's resettlement programme,¹⁷ and the Ministry intends acquiring an additional 360 000 hectares of land in the next five years and approximately 1 080 people will be resettled.

The criteria used by the Ministry for the selection of people to be resettled are embodied in the Government Resettlement Policy. The policy places people to be resettled into three categories. The first group consists of Bushmen, and any landless former disadvantaged Namibian; the second group consists of landless livestock owners; and the third group comprises people with income but who do not own any land. The resettlement programme aims at improving the living standards of the previously disadvantaged Namibians. Therefore, the resettlement schemes are not restricted to the provision of land for only agrarian purposes. The resettlement schemes have a broader social agenda. They include provision of training facilities and housing. People who are resettled hold the land under leasehold titles of 99 years.

The power to expropriate privately owned farms is the other option granted to the Ministry by the Act. Under section 20¹⁸ in terms of which the Minister, acting on the recommendation of the commission, and the owner of the property are unable to negotiate the sale of the property by mutual agreement, the Ministry may provide for the condition that the exercise of the power to expropriate be subject to the payment of compensation.

2.2.3 Ghana

The Ghanaian Constitution guarantees the right to property and ownership of property. Under article 18 (1) every person has the right to own property either alone or in association with

¹⁷ As stated in *The Namibian* (30 August 2000)

¹⁸ S 20 provides as follows: "(1) Where the Minister decides to acquire any property for the purposes of section 14(1) and the Minister, acting on the recommendation of the Commission, and the owner of such property are unable to negotiate the sale of such property by mutual agreement, or the whereabouts of the owner of such property cannot be ascertained after diligent inquiry, the Minister may, subject to the payment of compensation in accordance with provisions of this Act, expropriate such property for such purpose".

others. Article 20(1) provides that no property of any description or interest in or right over any property shall be compulsorily taken possession of or acquired by the State unless the following conditions are satisfied-

- (a) The taking of the possession or acquisition is necessary in the interest of defence, public safety, public order public morality public health town and country planning or the development or utilization of property in such a manner as to promote the public benefit; and
- (b) The necessity for the acquisition is clearly stated and is such as to provide reasonable justification for causing any hardship that may result to any person who has an interest in or right over the property

The constitution under subsection 2 mandates that compulsory acquisition of property by the State shall only be made under a law which makes provision for the prompt payment of fair and adequate compensation and a right of access to the High Court by any person who has an interest in or right over the property whether direct or on appeal from any other authority, for the determination of his interest or right and the amount of compensation to which he is entitled. The Constitution furthermore, places an obligation on the State by prescribing that where the compulsory acquisition duly authorized by the State results in displacement of any inhabitants, the State is under obligation to provide a suitable alternative land to the affected inhabitants with due regard for their economic well-being and social and cultural values. The Constitution clearly provides that any property which is compulsorily acquired in the public interest shall be used only in the public interest for which it was acquired. Where the property is not used in the public interest, the affected individual or owner of the property immediately before the compulsory acquisition shall be given the first option for acquiring the property. Upon such re-acquisition he or she shall refund the whole or part of the compensation paid to him or her or such other amount as is commensurate with the value of the property at the time of the re-acquisition.

2.2.4 South Africa

The South African Constitution contains grounds for expropriation which are also more elaborate and specific, as compared to the Namibian provisions, and include the traditional grounds of eminent domain. Under the South African Constitution section 25 (4)(a) states that property may be expropriated for a public purpose or in the interest of the public and section 25(4)(a) explains that the public interest includes the nation's commitment to land reform to bring about equitable access to all South AFRICA'S natural resources. The public purpose requirement can be interpreted in at least three different ways : very narrowly to restrict expropriations to actual public use; slightly wider to include almost any public benefits that

exceed actual public use ; or very widely to include almost any purpose that is vaguely beneficial to the public weal. The public purpose requirement in section 25(2) has a double function, namely to control the justification and authority for expropriations in the way that constitutional property clauses usually do, and further to ensure that this normal function of the property clause does not impede or frustrate expropriations that form part of land and other similar reforms to which the Constitution commits itself ¹⁹

The South African constitutional provision gives the South African government the power to acquire land for land resettlement and reform. Apart from the constitutional provisions pertaining to compensation the Restriction of Land Rights Act 22 of 1994 provides for the restitution of rights to land for persons or communities dispossessed of such rights after 19 June 1913 as a result of past racially discriminatory laws or practices. For the purpose of claiming restitution this Act also established the Land Claims Court.

2.2.5 Zambia

In Zambia, as in Namibia, the colonial government divided land, into state land trust and reserves. The law applicable to state land was the English land law. All land in the reserves and trust areas was held under customary land law. This division was effected by the Northern Rhodesia Order in Council of 1924. This proclamation was followed by the enactment of the Public Lands Acquisition Ordinance of 1929, which applied only to state land. Under section 53 of the Public Land Acquisition Ordinance of 1929, the Governor was empowered “to acquire any lands required for any public purpose for an estate in fee simple, or for a term of years as he may think proper, paying such consideration or compensation as may be agreed upon or determined under the provisions of the Ordinance”.²⁰

After independence, however, the Zambian government felt that the then existing legislation relating to land had certain inadequacies located specifically in the provisions of clause 18 of the Constitution. Clause 18 provided for compensation in the event of expropriation, but compensation had to be paid and certain conditions had to be satisfied. The circumstances, under which compulsory acquisition could be allowed, came generally within the scope of the orthodox definition of the right of eminent domain. These circumstances were substantially identical to those given under section 53 of the Northern Rhodesia Public Lands Acquisition

¹⁹ AJ van der Walt 245 *Constitutional Property Law*

²⁰ The definition of “public purpose” included the following: “Any land (1) for the exclusive use of the Government or Federal Government or for general public use; (2) for or in connection with sanitary improvements of any kind including reclamations; (3) for or in connection with the laying out of any new municipality, township in Government station or the extension or improvements of any existing municipality, township or Government station; (4) for obtaining control over land contiguous to, or required for or in connection with any port, airport, railways, roads, or other public works of convenience, constructed or about to be undertaken by the Government or Federal Government”.

Ordinance of 1929, which after independence became known as the Public Lands Acquisition Act.

In addition to these conditions, it was provided that the Government had to pay adequate compensation immediately after expropriation, and provision had to be made for the guarantee of the remittance of money outside the country free from any deduction, charge or tax made or levied in respect of its remission.

This clause was entrenched and could only be repealed by referendum. In 1969 a referendum was held to amend clause 18 of the independence Constitution. It was argued that since the existing laws of expropriation embodied in clause 18 of the Constitution and the Public Lands Acquisition Act were designed to serve the economic interests of the colonial government and were therefore obsolete as a result of the shift in emphasis of economic planning towards rapid development and state participation, the existing laws of expropriation had to be repealed.

The government made it an objective of the new Public Lands Acquisition Act²¹ to eliminate a society of powerful landlords on the one hand and tenants and workers on the other hand. The Act denied the right of compensation in respect of undeveloped or unutilized land except for unexhausted improvements. Even for unexhausted improvements no compensation was payable if the land was unutilized land belonging to an absentee landowner. In addition, it is interesting to note that the power to acquire land was not restricted only to cases where it was needed for public purpose. In fact, “public purpose” was eliminated from the Act. Section 3 of the Act reads as follows:

Subject to the provisions of the Act, the President may, whenever he is of the opinion that it is desirable or expedient in the interest of the Republic so to do, compulsorily acquire any property of any description..

This provision was more liberal than the provision of the earlier Act. For “public purpose” the latter Act substitutes “interests of the Republic”²² which is not defined in the Act and which is determined only at the discretion of the President.

2.2.6 Zimbabwe

In Zimbabwe the land question was one of the issues that had to be settled at the Lancaster House Conference. The Lancaster House Constitution that brought an end to colonial rule in

²¹ Public Lands Acquisition Act cap 296 of The Laws of Zambia

²² *Ibid* s 3

Rhodesia under part III had an enshrined provision that protected fundamental rights to private property and restricted the right of the state to compulsorily acquire land for agriculture or resettlement. Any compulsory acquisition had to be accompanied by prompt and adequate compensation²³ and it was negotiated and agreed that the British government had to make funds available for that purpose. The circumstances under which the state could compulsorily acquire property in the public interest were clearly defined in the Constitution. Property could not be compulsorily acquired except under the authority of law and only after reasonable notice of the intention to acquire the property has been given to any person owning the property or who will be affected by such acquisition.²⁴ The purposes for which land could be compulsorily acquired included the interests of defence, public safety, public morality, public health and town and country planning. Land acquired in this manner should be used for a purpose beneficial to the public generally or a section thereof. The provision further specified that under-utilized land could only be acquired for the settlement of land for agricultural purposes.²⁵ The entrenched provision, including the provision that reserved twenty seats for whites, could not be amended before ten years after the implementation of the Constitution.

In 1990 the Constitution, including section 16, was amended to give the state more power to remove some of the restrictive provisions and to give the state more leverage in its authority to compulsorily acquire property for agricultural and resettlement purposes. This amendment affected the requirements relating to payment of compensation. The amendment required that compensation be paid, but that the compensation had to be “fair” and be made available “within a reasonable time”. The amendment implied that “fair compensation” is necessarily less than adequate compensation, which is market related, and that the state would be in a better position to acquire land since it will not be compelled to pay “promptly” but within a “reasonable time”.

The amendment was followed by the Lands Acquisition Act of 1992. Section 3 of the Act empowers the President to compulsorily acquire any land, where:

- (1) the acquisition is reasonably necessary in the interest of the defence, public safety, town and country planning or the utilization for that or any other property for a purpose beneficial to the public generally or to any section of the public;*
- (2) any rural land where the acquisition is reasonably necessary for the utilization of that purpose or any other land –*

²³ See s 11(c) of the Constitution of Zimbabwe.

²⁴ See s 16(1)(a) and also Tshuma & Makamure *Land policy in Zimbabwe: The Legal Framework* Harare (1990)

²⁵ See s 16(1)(b) of the Public Lands Acquisition Act cap 296 of The Laws of Zambia

- (i) *for resettlement for agriculture or other purpose; or*
- (ii) *for purpose of land reorganization; and*
- (iii) *for the relocation of persons dispossessed in consequence of the utilization of land for a purpose referred in sub paragraph (i) and (ii).*

The new Lands Acquisition Act provided for compensation, but for fair compensation within a reasonable time, and it also brought in the concept of deprivation.²⁶

After the referendum that rejected the draft constitution, the constitutional provisions relating to land acquisition were amended to include some of the provisions of the draft constitution.²⁷ The amended law makes provision for compensation, but compensation is not automatic. It gives the government the power to compulsorily acquire agriculture land for the resettlement of people in accordance with the programme of land reform. This position is informed by the principles that are also reiterated in the 2013 Constitution²⁸ that with due regard to the fact that the people of Zimbabwe, as a consequence of colonialism, were unjustifiably dispossessed of their land and other resources without compensation, and consequently took up arms to regain their land and political sovereignty and, therefore, must be enabled to reassert their rights and gain ownership of their land, the Act²⁹ imposes on the former colonial power the obligation to pay compensation for agricultural land compulsorily acquired for resettlement through a fund established for that purpose. Therefore, if the former colonial power fails to pay compensation through such fund, the government of Zimbabwe has no obligation to pay compensation for agricultural land, compulsorily acquired for resettlement. Furthermore, the amended provision states that even where compensation is to be paid, the following factors must be taken into account in the assessment of any compensation that may be payable:

(a) the history of the ownership, use and occupation of the land;

(b) the price paid for the land when it was last acquired;

²⁶ In the case of *Davies v Minister of Lands, Agriculture and Water Development* 1996 (9) BCLR 1209 (ZS), the Supreme Court of Zimbabwe in its interpretation of s 11(c) of the Land Acquisition Act, chap 20: 10 (Zimbabwe) drew a distinction between an acquisition and deprivation and held that s 11(c) did not afford protection against deprivation of property by the State where the act of deprivation fell short of compulsory acquisition or expropriation. It further held that no compensation was required for a deprivation of rights in property and that it was not every deprivation which amounted to a compulsory acquisition of property. Nor did every deprivation require that compensation be paid.

²⁷ See s 3 of the Constitution of Zimbabwe Amendment Act 16 of 2000

²⁸ Article 72(7) of the Constitution of Zimbabwe Amendment Act No 20) of 2013

²⁹ See 16(A) as amended by s 3 of the Constitution of Zimbabwe Amendment Act 16 of 2000

- (c) the cost or value of improvements on the land;
- (d) the current use to which the land and any improvements on it are being put;
- (e) any investment which the state or the acquiring authority may have made which improved or enhanced the value of the land and any improvements on it;
- (f) the resources available to the acquiring authority in implementing the programme of land reform;³⁰
- (g) any financial constraints that necessitate the payment of compensation in installments over a period of time; and
- (h) any other relevant factor that may be specified in an Act of Parliament.³¹

In 2005 the Constitutional Amendment Act 17 was promulgated. It introduced further amendments to the Constitution. Firstly, the right of persons aggrieved by the government's land policy to have recourse to the courts when their land had been acquired under section 18 of the constitution was removed. It effectively ousted judicial jurisdiction from determining land acquisition disputes. Secondly, two other clauses legitimized prior and current land acquisition without compensation. These were *ex post facto* provisions which were to apply retrospectively, in order to accord legality to illegally acquired/occupied farms. The changes were designed to legitimize the activities during the FTLRP(The Fast Track Land Reform Programme), which were then illegal under law. These amendments were challenged before the regional court, the Southern African Development Community Tribunal (SADC TRIBUNAL). In the case of *Mike Campbell(Pyt) Ltd et al v Republic of Zimbabwe* the Tribunal ruled that the white farmers had been racially discriminated against in the execution of the land reform programme and that this conduct of the by the Government of the Republic of Zimbabwe was in violation of SADC principles. It also ruled that the farmers were entitled to compensation for the loss of their land. However, the Zimbabwean Government refused to pay compensation for the land, arguing that the obligation to pay compensation to the farmers rested on the British government, in its capacity as the former colonial power.³²

The property provisions of the 2013 Constitution³³ separated property rights strictly so-called from agricultural land.³⁴ Whereas property rights are couched in traditional terms that are

³⁰ [2008] SADCT 2.

³¹ S 16(A)(2) of the Constitution of Zimbabwe as amended by the Constitution of Zimbabwe Amendment Act 16 of 2000.

³² See section 16A of the Constitution of Zimbabwe and 72(7) of the Constitution of Zimbabwe Amendment Act no 20 of 2013

³³ Constitution of Zimbabwe Amendment Act No 20 of 2013

³⁴ Sections 71 and 72

protected and justiciable, the provisions relating to agricultural land do not have such provisions. The provisions governing property rights hold that no person may be compulsorily deprived of their property rights unless (1) they are given reasonable notice, (2) they are paid fair and adequate compensation (3) the acquiring authority applies to the courts to confirm the acquisition if it is contested. If the court does not confirm the acquisition, a person may apply to the court for the prompt return of their property. It also allows a person to challenge in a court of law the legality of the acquisition, the amount of compensation as well as ask for prompt compensation.³⁵ These rights do not apply to agricultural land.³⁶ Under the provisions of

³⁵ **71 Property rights**

- (1) "Property" means property of any description and any right or interest in property.
- (2) Subject to section 72, every person has the right, in any part of Zimbabwe, to acquire, hold, occupy, use, transfer, hypothecate, lease or dispose of all forms of property, either individually or in association with others.
- (3) Subject to this section and to section 72, no person may be compulsorily deprived of their property except where the following conditions are satisfied –
 - (a) the deprivation is in terms of a law of general application;
 - (b) the deprivation is necessary for any of the following reasons-
 - (i) in the interests of defence, public safety, public order, public morality, public health or town and country planning; or
 - (ii) in order to develop or use that or any other property for a purpose beneficial to the community;
 - (c) the law requires the acquiring authority-
 - (i) to give reasonable notice of the intention to acquire the property to everyone whose interest or right in the property would be affected by the acquisition;
 - (ii) to pay fair and adequate compensation for the acquisition before acquiring the property or within a reasonable time after the acquisition; and
 - (iii) if the acquisition is contested, to apply to a competent court before acquiring the property, or not later than thirty days after the acquisition, for an order confirming the acquisition;
 - (d) the law entitles any person whose property has been acquired to apply to a competent court for the prompt return of the property if the court does not confirm the acquisition; and
 - (e) the law entitles any claimant for compensation to apply to a competent court for the determination of-
 - (i) the existence, nature and value of their interest in the property concerned;
 - (ii) the legality of the deprivation; and
 - (iii) the amount of compensation to which they are entitled;

and to apply to the court for an order directing the prompt payment of any compensation.

³⁶ **72 Rights to agricultural land**

- (1) In this section "agricultural land" means land used or suitable for agriculture, that is to say for horticultural, viticulture, forestry or aquaculture or for any purpose of husbandry, including –
 - (a) the keeping or breeding of livestock, game, poultry, animals or bees; or
 - (b) grazing of livestock or game;

but does not include Communal Land or land within boundaries of an urban local authority or within a township established under a law relating to town and country planning or as defined in a law relating to land survey;

"land" includes anything permanently attached to or growing on land;

"piece of agricultural land" means a piece of agricultural land registered as a separate piece of land in a Deeds Registry.

section 72, the State may acquire agricultural land for a public purpose which includes resettlement. As the acquiring authority, the State must publish a notice in the *Gazette* identifying the land that is being compulsorily acquired. It also provides that the State will acquire full title in the land with effect from the date of publication of the notice. The existing title deed will be endorsed and cancelled immediately, vesting the title to the land in the state. The mere publication of the notice completes the process of acquisition. As compared to the Constitutions of other jurisdictions discussed above, persons aggrieved by the compulsory acquisition are not entitled to compensation. Compensation is payable only for improvements.

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- (2) Where agricultural land, or any right or interest in such land, is required for a public purpose, including-
- (a) Settlement for agricultural or other purposes;
 - (b) Land reorganization, forestry, environmental conservation or the utilisation of wildlife or their natural resources; or
 - (c) The relocation of persons dispossessed as the result of the utilisation of land for a purpose referred to in paragraph (a) or (b);

the land, right or interest may be compulsorily acquired by the State by notice published in the *Gazette* identifying the land, right or interest, whereupon the land, right or interest vests in the State with full title with effect from the date of publication from the notice.

- (3) Where agricultural land, or any right or interest in such land, is compulsorily acquired for a purpose referred to in subsection (2)-
- (a) Subject to section 295 (1) and (2), no compensation is payable in respect of its acquisition, except for improvements effected on it before its acquisition;
 - (b) No person may apply to court for the determination of any question relating to compensation, except for compensation for improvement effected on the land before its acquisition, and no court may entertain any such application; and
 - (c) The acquisition may not be challenged on the ground that it was discriminatory in contravention of section 56.
- (6) An act of parliament may make it an offence for any person, without lawful authority, to possess or occupy agricultural land referred to in this section or other State land.
- (7) 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 may 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 re-assert 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.
- (8) This section applies without prejudice to the obligation of the former colonial power to pay compensation for land referred to in this section that has been acquired for resettlement purposes.

There is no right of access to the courts for the determination of any question relating to acquisition, except for compensation for improvements. The acquisition cannot be challenged on the ground that it was discriminatory. These provisions thus grant constitutional legitimacy to the provisions of the previous constitution that were struck down by the SADC TRIBUNAL for being discriminatory and in violation of international norms and the rule of law.

3 Consequences of expropriation and land resettlement

3.1 Protection of the rights of the individual: Procedural Requirements and the Protection of the Rights of the Individual and the Determination of Compensation

3.1.1 Procedural Requirements and Protection of the rights of the individual

The individual's right to own property and the protection of that right are recognized as fundamental rights of the individual under international law. This right can be found in most constitutions and international conventions. Article 17 of the Universal Declaration of 1948 provides that everyone has the right to own property alone as well as in association with others; and no one may be arbitrarily deprived of property. In terms of article 5(d)(v) of The International Convention on the Elimination of all Forms of Racial Discrimination, state parties undertake to eliminate racial discrimination in all forms and to guarantee the right of everyone to own property alone as well as in association with others.³⁷ The protection of this right is contained in various provisions such as substantive law provisions; provisions for the payment of compensation; procedural requirements to guarantee the application of the rules of administrative justice in the exercise of the powers of expropriation; and procedural mechanisms meant to safeguard against the abuse of the power to expropriate.

Since this right is recognized as a fundamental right, in most jurisdictions, the right is enshrined and guaranteed by the Constitution and therefore the power to deprive the individual of this right can only be granted by the law on justifiable grounds. It is for this reason that in earlier constitutions the right to expropriate could only be justified on grounds of public utility and was subjected to the purpose limitation in the eminent domain clause. The determination of what constitutes public utility is a political one and therefore, the individual might not be competent to make any pronouncement on the validity of that decision. But the individual must be

³⁷ See also art 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950; Art 23 of the American Declaration of the Rights and Duties of Man of 1948; Art 21 of the American Convention on Human Rights of 1969; and Art 14 of the African Charter on Human and People's Rights of 1981

involved in the process of deciding what property must be subject to expropriation, for example, the individual must be given the opportunity to suggest alternative land equally suitable for expropriation under the public utility justification.

In most Southern African countries that achieved independence through liberation wars, it is common knowledge that colonial land policies and land tenure systems constituted the major causes for the liberation struggles. Therefore, at the time of independence governments had to embark on land reform and resettlement programmes to correct the injustices of the past. In the context of the laws of expropriation the traditional public utility rationale for expropriation was found wanting. The orthodox grounds for expropriation had to be expanded to accommodate resettlement and agrarian reform. In Namibia, for example, land resettlement and agrarian reform have come under the domain of public interest within the context of the provision of article 16 and the government can therefore exercise the powers of expropriation for its resettlement and agrarian reform schemes. Confronted with such onerous provisions justifying the deprivation of his or her rights, the individual can only be assured of equity and justice if the right to compensation is assured.

Since expropriation involves the deprivation of the right of the individual, it is important that procedural mechanisms and requirements are put in place to prevent any potential abuse of the power to expropriate. Mere substantive rules are not enough; procedural rules are equally important. The procedure involved in the process of expropriation therefore becomes a legal requirement in the sense that it is aimed at ensuring procedural justice, transparency, recognition of the rule of law and the protection of individual rights.

The details of the procedure may vary from jurisdiction to jurisdiction, and stipulated in the relevant legislation, but the most important criterion is that of compliance with the principles of natural justice and reciprocity. For example, this will imply that the individual whose property is to be expropriated is involved, to a certain degree, in the expropriation process and given a fair hearing not only with regard to the amount of compensation but also with regard to the decision concerning expropriation as such is necessary to reduce the possibility of corruption, the irregular promotion of individual interests and the arbitrary use of state power. Article 16(2) of the Namibian Constitution clearly stipulates that the power to expropriate can only be exercised following the promulgation of an Act of Parliament. Therefore, the power becomes statutory and discretionary in nature and must be exercised subject to the provisions of article 18 of the Namibian Constitution which enjoins administrative officials to comply with the principles of natural justice in the execution of administrative and executive powers. This was

confirmed in the *Gunther Kessl and Others v Ministry of Lands and Resettlement*³⁸ case by Muller, J. where he held that article 16 of the Namibian Constitution does not stand alone. This means, therefore, that the requirements of article 18 are applicable to the exercise of the powers of expropriation granted to the Minister by the Agricultural (Commercial Land) Reform Act 6 of 1995 and that the conduct of the administrative official, the Minister, must be fair and reasonable, as well as legitimate. The ultimate objective is to ensure that the power to expropriate is not abused. These procedural rules are meant to ensure that in the exercise of the power of expropriation the individual is protected through the due process of law. Under the Namibian Constitution the exercise of this power will be subjected to the provisions of article 18 of the Constitution, which demand the application of the principles of natural justice. The Agricultural (Commercial) Land Reform Act has provisions to that effect. It also contains provisions to ensure that the power to expropriate is not concentrated in the hands of only one person. The power is exercised in consultation with the Land Reform Advisory Commission and as mentioned earlier, the determination of the amount of compensation, in the event of a disagreement, is subject to the jurisdiction of the Lands Tribunal, which is established under section 63 of the Act.

The two requirements of article 18 are, firstly, that the principle of natural justice must be satisfied in order to ensure some involvement of the owner whose property is to be considered for expropriation and, secondly, that the said owner must be given a fair hearing. This should apply not only in the context of assessing the amount of compensation, but also in the decision to expropriate the property concerned. As stated by Muller, J in *Gunther Kessl and Others v Ministry of Lands and Resettlement*³⁹ before the Minister can take a decision to expropriate, he is duty-bound to apply the principle of *audi alteram partem*. It implies that he must afford the landowner an opportunity to be heard in order to persuade him or her that he should not take the decision to expropriate his property. Subjecting the Executive's power of expropriation to the concept of reciprocity implies justifiability of rights and judicial review of powers of expropriation.

3.1.2 General Application of Limitation Provisions

Since expropriation amounts to deprivation of one of the fundamental rights provided for by Chapter 3 of the Namibian Constitution (article 16(1)), any legislation purporting to vest the power of expropriation in the state or an organ of state must be of general application in compliance with the provisions of article 22 of the Namibian Constitution. In terms of article 22, limitation of any fundamental right or freedom is only lawful if it is provided for in legislation; if

³⁸ supra

³⁹ supra

the limitation is generally applicable; and not aimed at a particular individual. The latter two requirements were confirmed in the case of *Cultura 2000 and Another v Government of the Republic of Namibia and Others*⁴⁰ with regard to article 22(a).

3.1.3 The Role of the Judiciary

Property rights, land reform and protection of individual rights represent prototypical or classic illustration of the relationship between the three branches of government and more specifically the extent that judiciary can fetter executive powers or powers of Government. These constitutional provisions discussed above can only be meaningful and represent a protection of the rights of the individual only where there is a strong, impartial and independent judiciary that can put restraint on the exercise of legislative and executive powers. This was one of the concerns of the Lancaster House. The Namibian Judiciary in its relatively short span of existence has demonstrated the resolve of its independence from the other branches of government in interpreting the constitution in the purposive manner to uphold the fundamental principles of the Constitution, especially in the area of property rights and land reform. The same can be said of the South African judiciary, especially the Constitutional Court. The history of the post-independence Zimbabwean judiciary demonstrates an example of a judiciary that can be induced to transform from being a liberal protector of human rights to one that is distinctly pro-government in so far as the land reform exercise is concerned. (the post 2000 Supreme Court starting from the externally induced resignation of Chief Justice Gubbay)

3.2 the Determination of Compensation

Expropriation also involves deprivation of the rights of the individual and more especially his entitlements of ownership, and therefore, both in law and on grounds of equity, the individual must be compensated for his loss. This is a principle recognized under international law as stated in the case of *Texaco v Libya*⁴¹. Most municipal laws authorizing the state to expropriate private property incorporate the right to compensation in the relevant laws. However, the contentious issue has been the determination of the amount of compensation. Under international law compensation has to be prompt, adequate and effective. This standard is commonly referred to as the Hull doctrine, which is accredited and named after the United States Secretary of State Cordell Hull, who in reliance of the prevailing international norm, wrote his famous letter to the Mexican Government asking Mexico for 'prompt, adequate and effective compensation for the expropriated land of United States nationals. The Hull formula has been translated to mean that compensation should be paid in a currency that can be readily used, reflecting the full value of the expropriated property and incorporating future lost profits

⁴⁰ 1992 NR 110 (HC); 1993 NR 328(SC); 1993 (2) SA 12 (NHC). This principle was also affirmed in the case of *Gunther Kessl v Ministry of Lands and Resettlement and Others* 2008(1)NR 167

⁴¹ above

and interest, if payment is not effected within a reasonable time after expropriation. This criterion does not, however, find automatic translation and incorporation into the provisions of the municipal legislation which falls under the domain and jurisdiction of the Government of the day.

In Namibia, section 25 of the Agricultural (Commercial) Land Reform Act 5 of 1995 provides for variables to be taken into consideration for the determination of compensation. These include the current value of the property and improvements made by the state.

Section 25(1) of the South African Constitution of 1996 gives and protects the rights of the individual to own property. However, section 25(2) empowers the state to expropriate property provided that it is done

- in terms of a law of general application;
- for a public purpose or in the public interest; and
- subject to compensation determined in the prescribed manner.

The spirit of these provisions is reflected by section 25(3) in terms of which the compensation and the time and manner of payment must be just and equitable and must reflect an equitable balance between the public interest and the interest of those individuals affected by the expropriation. However, notwithstanding this spirit of the compensation provision section 25(3) specifically provides that when compensation is being assessed regard must be had for all relevant circumstances, including -

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

The significance of these factors in the Zimbabwean and South African Constitutions is that in assessing the amount of compensation the court will not only have to use the market value of the property but will have to take these specified factors into consideration.

The payment of compensation is one of the requirements in customary international law for the validity of the power to expropriate private property by a sovereign state. This right to expropriate is within the competence of a sovereign state but the compensation requirement imposes a legal restriction on this competence.⁴² In the *Texaco v Libya*⁴³ case the requirement that was adopted as a rule of public international law is that the expropriating sovereign state must pay “prompt, adequate and effective compensation”. The 1962 Resolution on Permanent Sovereignty over Natural Resources also makes provision for the payment of compensation. It provides that in case of expropriation, “the owner shall be paid appropriate compensation”.

In *Texaco v Libya*⁴⁴ case it was further stated that the standard of “appropriate compensation” in the resolution “codifies positive principles”, but there is no one uniform standard for the quantum of compensation under municipal law. The expropriation laws of Zambia, Zimbabwe, Namibia and South Africa all make provision for the payment of compensation. In the case of Zambia, the Government was required to pay “adequate compensation” and in the case of Zimbabwe, the Lancaster House Constitution provided for the payment of “prompt and adequate” compensation. This was amended to “fair compensation” but only for improvements. The South African Constitution makes provision for the payment of “just and equitable” compensation and stipulates factors⁴⁵ that must be considered in the assessment of compensation. Article 16(2) of the Namibian Constitution *inter alia* provides that the state may expropriate property “subject to the payment of just compensation”. One is therefore obliged to come to the conclusion that the amount of compensation is a political decision within the competence of the government of the day. If this is accepted as a valid conclusion, this matter must be justiciable. The jurisdiction of the courts in this matter must not be ousted.

The Namibian Agricultural (Commercial) Land Reform Act 6 of 1995⁴⁶ empowers the Minister, upon the recommendation of the Land Reform Advisory Commission, to offer the owner concerned, in the appropriation notice, the amount of compensation for the property which is being expropriated. In assessing the amount of compensation, the Act stipulates under section 25(5)(a) and (b) that the Minister must take into consideration the enhancement of the value of the property in consequence of the use thereof and the improvements made after the date of notice on or to the property in question, provided that the amount does not exceed the aggregate of the amount which the land would have realized if sold on the date of notice on open market by a willing seller to a willing buyer and an amount to compensate any actual

⁴² In some jurisdictions such as Zimbabwe, South Africa and the USA, the distinction is drawn between expropriation of property and deprivation of property. The former involves the payment of compensation, but deprivation has been held not to involve the payment of compensation. In America, expropriation falls under eminent domain and deprivation is known as police power.

⁴³ (1977) 53 ILR 389

⁴⁴ Ibid

⁴⁵ See s 25(1), (2) and (3) of the South African Constitution

⁴⁶ See s 23 and 25

financial loss caused by the expropriation.⁴⁷ The Act also provides that if the parties fail to reach an agreement regarding the amount of compensation, compensation is to be determined by the Lands Tribunal on the application of any party, and resettlement to be effected by arbitration in terms of the Arbitration Act 42 of 1965.⁴⁸ The Act is silent on the individual's right of appeal to the courts but it does not specifically oust this right either.

(3.3) Social and economic consequences of expropriation

The decision to expropriate is a political one but it has some legal, economic and social implications that impact not only on the individual but also on the budget of the nation. In Zimbabwe, for example, it was reported in the *The Herald* of 21 August 2000 that over 240 000 farm workers were likely to lose their jobs after the conclusion of the acquisition of over 3 000 commercial farms for resettlement. The paper added, however, that the government intended resettling these farm workers. Furthermore, it must be noted that expropriation without compensation erodes the confidence that the banks have in title deeds. It reduces title deeds to mere pieces of paper.

4 Conclusion

Under international law, states have a sovereign right over their natural resources. Public international law also recognizes the individual's right to property. The problem that could result from these potentially conflicting rights could be resolved by the application of the principle that the right of the community overrides the right of the individual. On this premise,

the power of the state to extinguish the individual's right to property could only be justified on grounds of public utility, and where expropriation is justified on grounds of public utility, the individual must be compensated for the deprivation of his or her rights. The demands of natural justice and equity enjoin the expropriating authority to comply with the principles of natural justice since in essence the right to expropriate is discretionary.

In most Southern African countries that achieved independence through liberation wars, it is common knowledge that colonial land policies and land tenure systems constituted the major causes for the liberation struggles. Therefore, at the time of independence governments had to embark on land reform and resettlement programmes to correct the injustices of the past. In

⁴⁷ See s 25(1)(a)(i) and (ii)

⁴⁸ See s 27(1), (2) and (3)

the context of the laws of expropriation the traditional public utility rationale for expropriation was found wanting. The orthodox grounds for expropriation had to be expanded to accommodate resettlement and agrarian reform. In Namibia, for example, land resettlement and agrarian reform have come under the domain of public interest within the context of the provision of article 16 and the government can therefore exercise the powers of expropriation for its resettlement and agrarian reform schemes. Confronted with such onerous provisions justifying the deprivation of his or her rights, the individual can only be assured of equity and justice if the right to have redress before a competent court is assured. But the protection of the rights of the individual requires the existence of an independent judiciary that is able to fetter the exercise of discretionary powers given to Government.