Expropriation: Comparing the Namibian position with those of Zimbabwe and South Africa in respect of the requirements of 'just compensation' and 'public interest'.

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SCHEDULE A

I the undersigned, hereby declare that the work contained in this dissertation for the purpose of obtaining my degree of LLB is my own original work and that I have not used any other sources than those listed in the bibliography and quoted in the references.

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I, SK Amoo hereby certify that the research and writing of this dissertation was carried out under my supervision.

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Chapter outline Page

Chapter 1: INTRODUCTION

1.1 Orientation of the Study

Under the apartheid regime prior to independence, only white people could have land ownership or land titles and only they had legal rights thereto. The majority of the rest of the population which were blacks were only entitled to possess land in terms of customary laws. The current position is that land privately owned in the commercial sector belongs mostly to whites.[1] On independence it became clear that the imbalances in the distribution of land could not be redressed without government intervention. Hence, the Constitution of the Republic of Namibia[2], which is our supreme law, in Article 16(1) protects the fundamental right of property owners in post-colonial Namibia. However, Article 16(2) gives the Government the right to expropriate land in certain circumstances and upon certain conditions. Furthermore, Parliament enacted the Agricultural (Commercial) Land Reform Act 6 of 1995, which not only allows Government to expropriate land but provides for the requirements and procedures to 'legally' expropriate land. Our Constitution also stipulates in article 144 that expropriation must be consistent with the norms of international law. The justification for the process is that of public interest and payment of compensation, which form its main elements.

1.2 Statement of the Problem

Drafters of the Constitution included the right to own private property by virtue of Article 16(1) and the process of expropriation (provided for in article 2) is a limitation on this right. The elements for expropriation include "public interest" and "just compensation". However, the problem arises as to what the term public interest means and who determines this definition and whether or not these principles are instituted and recognized fairly and equitably. Furthermore, the issue arises whether compensation is sufficient and/or fair justifying the loss of one's privately owned land.

[1] Amoo, SK. 2009. *Constitutional Property Rights and Land Reform in Namibia.* Available at http://www.juridicas.unam.mx/wccl/ponencias/16/278.pdf; last accessed on 14 April 2011.
[2] 1990

1.3 Objectives of the Study

The objective of this dissertation is to try and address as well as understand the following issues: (a) What is the purpose and process of expropriation? (b) Who will benefit from the act of expropriation and who will not? (c) What the term public interest entails. (d) Whether compensation is a justification for the act of expropriation. And (e) How the position in Namibia can be compared to South Africa and Zimbabwe. The ultimate aim is to be able to come to a reasonable conclusion as to whether or not the act of expropriation is executed in 'the public's interest' and subject to payment of just compensation as compared to the foreign jurisdictions mentioned above.

1.4 Historical Perspective / Brief Background

From earliest times, African countries including South Africa, Zimbabwe and Namibia fell prey to colonizers who 'stole' the land belonging to the indigenous people of those areas, for their own personal gain and profit. Although the Germans colonized Namibia and seized land belonging to the blacks, most other countries were ruled by Britain which similarly exploited their lands and resettled their people to less desirable territories and kept the rich lands for themselves. Upon these countries achieving independence, the main priority became land resettlement which until today remains a major challenge.

One year after Namibia gained independence, the Government, supported by the opposition parties, conducted a national consultation on the land question which led to a National Conference on Land Reform and the land question. The Conference was held in Windhoek from the 25th of June to the 1st of July 1991. The objective of the conference was to achieve a consensus on the major issues and to make recommendations to government on a policy of land reform and a programme of action for the implementation of the necessary changes. The conference amongst other things came up with the resolution that expropriation of land was necessary for resettlement purposes. These resolutions acted as the guideline for how legislation developed and was formulated in Namibia.[3] Land laws of Namibia thus entail that there is no absolute right to private ownership of land in Namibia as the State has

[3] Mwilima, N. 2004. *Farm Workers and Land Reform in Namibia.* Windhoek: Labour Resource and Research Institute, p 2.

the power to expropriate the property in accordance with the procedures laid down by an act of parliament, and has therefore the right to interfere with an individuals' right to own property.[4]

Similarly South Africa and Zimbabwe had to establish ways in which to equalise the imbalance and what has been achieved up to date will be dealt with in this dissertation as well as an exploration of what the term expropriation denotes under those foreign jurisdictions.

"Expropriation may briefly be defined as the right given to the state, as the proper authority, to compulsory acquire property for reasons related to 'public interest' to the extent that the owner is not at liberty to use the property or to alienate this property in the manner he/she so wishes."[5] Expropriation therefore constitutes a limitation on the rights of ownership. The state power to expropriate is derived from the common law principle of eminent domain. This common law principle traditionally gives the state the power to expropriate private property for specific public related activities like construction of railways, roads and other public utilities which has been incorporated into the South African Constitution. Over the years however, this common law principle of public domain has been incorporated in legislation and constitutions of various jurisdictions. Although the state has the power to expropriate in the interest of the public, the term however has not been defined comprehensively.[6]

Similarly, under international law, nationalism of private property by the state (expropriation) is allowed subject to the condition that the power to expropriate is exercised in the 'public's interest' and subject to the payment of 'compensation'.[7] What constitutes public interest however is also not defined in international law and is therefore subject to the interpretation of a particular jurisdiction which may be incorporated into municipal laws. Under the Namibian Constitution article 16(2) the state is given the power to expropriate property in the public's interest but here again the definition of public interest is not provided for by the Constitution. Public interest is therefore a legal requirement but within the sphere of political definition. The

[4] *Ibid.*
[5] Amoo, SK. 2009. *Constitutional Property Rights and Land Reform in Namibia.* Available at http://www.juridicas.unam.mx/wccl/ponencias/16/278.pdf; last accessed on 14 April 2011.
[6] *Ibid*.
[7] *Ibid.*

normal trend is to have an open ended definition to give the state the power to determine what amounts to public interest taking into consideration the prevailing condition of society. In the Namibian context public interest has been defined to include land reform and resettlement. With regards to compensation, all persons subject to expropriation have the right to 'just compensation'. This principle is also recognised under international law and the general criterion is that is must be prompt, adequate and effective. Up to date the Namibian Government has expropriated about nine farms. This therefore making this topic relevant and important as there is no doubt that this will be a continuing practice which did and will affect many lives not only in Namibia but in all the jurisdictions mentioned by this paper.[8]

1.5 Literature Review

The works encountered on this field of study are diverse and broad. However, all of these seemed to concentrate on the issue of whether the act of expropriation itself is fair and/or Constitutional. Furthermore, the existing literature focuses mainly on decided cases and their relation to land reform as well as a focus on expropriation as a limitation on the right to private ownership. This paper shall focus on the elements of public interest and just compensation compared to the jurisdictions of South Africa and Zimbabwe.

1.6 Research Methodology

The research methodology employed included descriptive and correlation methods as well as analytical thinking through a comparative analyses. Empirical research proved futile as the topic requires a legal interpretation and not a general understanding of society.

[8] *Ibid.*

Chapter 2: EXPROPRIATION IN THE NAMIBIAN CONTEXT

2.1 Definition and meaning of expropriation

Ownership is the most complete right in a thing. Broadly speaking, it entitles the owner to use the thing in any way he wishes, contrary to what the rest of the world may wish, but subject to limitations imposed by public and private law.[9] Compulsory acquisition of property rights by one implies the involuntary loss thereof by the other. Compulsory acquisition of rights in property, coupled with involuntary loss of them, has traditionally been effected by what is called expropriation executed under many pieces of legislation for public purposes or in the public interest.[10]

2.2 The concept of public interest

Article 16 of the Constitution of Namibia[11] 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.

Article 16(2) sets out the requirements that must be fulfilled for the government to legally expropriate land as follows: there must be 'just compensation' and it must be in the 'public interest'. The Constitution neither defined just compensation nor what is regarded to be in the public interest. The clarification of these issues was left to an Act of Parliament and common law principles where the Act of Parliament failed to define. Similarly, all acts of state including the power to expropriate land are

[9] *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A) at 106-7.
[10] Southwood, M.D. 2000. T*he Compulsory Acquisition of Rights. By Expropriation, Ways of Necessity, Prescription, Labour Tenancy and Restitution.* South Africa: Juta & Co, Ltd
[11] 1990

governed by the doctrine of administrative action which is embodied under article 18 of our Constitution. Namibia at the moment does not have administrative justice legislation like in the case of South Africa. However, when our courts are faced with an administrative dispute, firstly they look at the Constitution in order to find the law. If for some reason the Constitution does not provide sufficient answers, then the courts will look at the common law principles such as the audi alteram partem rule in order to solve the dispute.

In Namibia this Act envisaged in Article 16(2) has been enacted in the form of the Agriculture (Commercial) Land Reform Act of 1995. This Act is meant to provide the Namibian Government with the necessary legal tools to acquire commercial farms for the resettlement of displaced persons, and for the purposes of land reform. The Namibian Government has for some time relied on the concept of the "willing-buyer willing-seller" principle however it has failed as it proved not effective enough to meet the high demand for land in Namibia."[12] The Agriculture (Commercial) Land Reform Act[13], hence, was passed by Parliament to make provision for amongst other things the acquisition of agricultural land by the state for purposes of land reform and compulsory acquisition of certain agricultural land.[14]

The traditional concept of public interest as contemplated within the context of eminent domain, includes infrastructural development and public utility. Since the Constitution leaves the definition of public interest undefined and open textured, the attempts at definitions are found in particular pieces 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 but the most prominent among such pieces of legislation is the Agricultural (Commercial) Land Reform Act 6 of 1995 as mentioned above.[15] In the preamble of this Act, public interest was expressed to include

[12] Amoo, S.K. and Harring, S.L. 2009. *Namibian Land: Law, Land Reform and the restructuring of the post apartheid Namibia.* University of Botswana Law Journal.Vol.9. Pretoria University Law Press, p 105.
[13] Act 6 of 1995
[14] Narib, G. 2003. *Is there an absolute right to private ownership of commercial land in Namibia? Land, Environment and Development Project.* Windhoek: Legal Assistance Centre, p 3.
[15] Odendaal, WA. 2005. *Confiscation or Compensation? An analysis of the Namibian Commercial Agricultural Land Reform Process.* Available at http://www.lac.org.na/projects/lead/Pdf/odendaal.pdf; last accessed on 14 April 2011.

agricultural and resettlement purposes in the context of the government's land reform and poverty alleviation programme.

The Agricultural (Commercial) Land Reform Act No. 14 of 2003 amended section 14(1) of the principal Act within the inclusion of the phrase "in the public interest", which now reads as follows; "Subject to subsection (2), the Minister may, out of moneys appropriated by Parliament for the purpose, acquire in the public interest, in accordance with the provisions of this Act, agricultural land in order to make such land available for agricultural purposes to Namibian citizens who do not own or otherwise have the use of agricultural land or adequate agricultural land, and foremost to those Namibian citizens who have been socially, economically or educationally disadvantaged by past discriminatory laws and practices".[16]

Although it seems fairly easy to define, the phrase "in the public interest" remains open to different interpretations. For example, land expropriation of land for land reform purposes could be interpreted as in 'public interest'. However, disputes may arise as to whether the expropriation of a particular piece of land is in the public interest. In this regard factors such as, current and future land use patterns, the real and potential benefit of such land to the public, the financial costs of expropriating land to the State, the environmental condition of the land, and the availability of other land for the same or similar purpose should be considered when making decisions to expropriate land.[17]

It would seem that Namibia has the necessary foundation in place by virtue of the Constitution and the Act to regulate and govern the process of land resettlement through expropriation. However, in reality, the impact and effect of land expropriation in practice is immensely criticised as not completely serving the 'interest of the public'. Local media featured, for example, in a local daily[18] in April 2011, an article regarding the Government of Namibia Cabinet which had issued a statement in support of the manifestly hateful, inciteful and racist utterances made by the Deputy Minister of Fisheries and Marine Resources, Kilus Nguvauva. Media reports said that Deputy Minister Nguvauva demanded the seizure and expropriation of the private commercial farms belonging to several white Namibian citizens in the Omaheke

[16] *Ibid.*
[17] *Ibid.*
[18] *The Namibian*

Region of the country. Deputy Minister Nguvauva made the call after a personal confrontation he has had with several white commercial farmers in the said region. On March 17 2011, The Namibian quoted Nguvauva as having said that "some of us were thinking that the whites should be chased out of this country".[19] This report in the newspaper was an example of how some members of Government feel towards the land issue in Namibia and it is evident that in this utterance, the public's interest was certainly not a determining factor for expropriating land fairly. Expropriations in the country, although experienced as slow moving, has not been completely futile as there has been successful expropriations to date. In 1990, when Namibia became independent, 5,000 white farmers owned 74 per cent of arable land. Here the government used the same methods as South Africa to buy land. In a move aimed at reassuring white farmers, the constitution of the new republic prohibited expropriation except for the public good. The new Namibian government resisted pressures from its trade unions, despite the fact that many white farmers were intent on selling land at 'inflated and unrealistic' prices, according to one of the country's ministers, John Mbango (Ministry of Land in a 1997 declaration). However, to this day, there have been very few outbursts of dissent against the policy.[20]

Despite fears that Namibia's land reform process could turn ugly and see Zimbabwe-style land invasions following the introduction of expropriation against compensation (as will be discussed later on in this dissertation), Namibia's government has maintained it will stick to the law and safeguard peace and stability in its land reform process.[21] Although the protection of a citizen's rights in property is an important principle in civilised society, the state has, since at least Roman times, been able to acquire rights in a citizen's property when it is considered to be in the public interest.[22]

[19] Press Release. 2011. *Cabinet Statement on white farmer tantamount to official racism.* Available at http://www.nshr.org.na/index.php?module=News&func=display&sid=1572; last accessed on 14 April 2011.
[20] Dossier. 2009. *South Africa, Namibia, Zimbabwe. Differences in land conflicts.* Available at http://www.acp-eucourier.info/South-Africa-Namibi.651.0.html; last accessed on 14 April 2011.
[21] Roschlau, F. 2007. *Farmers fight land reform process tested in court.* Available at http://www.monstersandcritics.com/news/africa/news/article_1334193.php/Namibia_s_land_reform_process_tested_in_court; last accessed on 14 April 2011.
[22] Gildenhuys, A. 1976.*Onteieningsreg.* Durban: Butterworths, pp 1-2.

2.3 The concept of just compensation

The Agricultural (Commercial) Land Reform Act in section 14 implicitly requires a "willing buyer, willing seller" principle, only permitting the purchase of commercial lands offered for sale, or the acquisition of abandoned or underused land. This policy has been criticised as being expensive, and at the same time failing to permit the acquisition of large blocks of land for more efficient resettlement. Article 16 does not require this approach, for it clearly sanctions the expropriation of land without regard to the individual willingness of sellers. No expropriation process is set out in Article 16, so it is left entirely to the terms of the Agricultural (Commercial) Land Reform Act. This Act, somewhat inconsistently, does set out an expropriation process in Part IV but only after apparently requiring a "willing buyer willing seller" process in section 14. This apparent discrepancy probably reflects the delicate political ground that the government was treading in passing the Act. The "willing buyer willing seller" principle places a great burden on the Government's land reform process, both in terms of cost and also in terms of social planning.[23]

Article 16(2) of the Constitution, in addition to public interest, also concerns itself with the term "just compensation". Section 25 of the Commercial (Agricultural) Land Reform Act deals with the basis on which compensation for expropriation is to be determined. Section 25(5)(a) provides that the improved value of the property should be taken into account when compensation is awarded. However, section 25(5)(b) provides that improvements made after the date the expropriation notice was given to the owner, will not be compensated for. Compensation will only be given for maintenance of existing infrastructure on the property in question. Section 25(1)(a)(i) stipulates that the amount of compensation for agricultural land should not exceed the aggregate of the amount which the land would have realised if sold on the date of notice on the open market on a willing buyer willing seller basis. Subsection (ii) however requires that an amount could be required by the owner to be fully compensated for the actual loss caused by expropriation.[24] According to Section 25 (3), interest at the standard rate is to be paid on any outstanding portion of the

[23] Harring, S.L. and Odendaal, W. 2002.*"One Day We Will Be Equal.."A Socio-Legal Perspective on the Namibian Land Reform and Resettlement Process.* Windhoek: Legal Assistance Centre, p 11.
[24] Odendaal, WA. 2005. *Confiscation or Compensation? An analysis of the Namibian Commercial Agricultural Land Reform Process.* Available at http://www.lac.org.na/projects/lead/Pdf/odendaal.pdf; last accessed on 14 April 2011.

amount of compensation payable from the date on which the state takes possession of the property in question. The basic question that must be answered is whether or not the compensation that must be paid in terms of Section 25 must reflect the actual market value of the expropriated property.[25]

According to Namibian law, just compensation is required for an expropriation to be lawful. Nowhere is it clearly stipulated whether or not in assessing just compensation reference should be made to the market value. Ordinarily, however, under international law, just compensation would first require an assessment of the market value of the expropriated property to establish appropriate compensation, followed by a second step in which the circumstances of the individual case are taken into account. This conclusion is in line with the Namibian Agricultural (Commercial) Land Reform Act, which makes clear reference in Section 25 (a) (i) to the market value and restricts the amount calculated as compensation to an amount that would be realised on the open market in a willing seller, willing buyer scenario. It is therefore advisable that the market value be established first, as practiced by the South African Courts.[26] Section 25 (5)(a) further stipulates that in determining the amount of compensation to be paid for expropriation, any lawful enhancement of the value of the property, as consequence of the use thereof, shall be taken into account. This means that the basic consideration for calculating compensation should be the actual value of the property, which includes enhancements consequent to the usage of the land. Value would mean market value and would constitute the upper limit of compensation as stipulated by Section 25 (a)(i) of the Namibian Agricultural (Commercial) Land Reform Act which, as indicated above, restricts the compensation to be paid to this sum. This provision makes it impossible to raise the compensation to above market value. Excluded from the calculation are improvements made after the date of notice of expropriation, except where they were necessary for the proper maintenance of the property. The purpose of this restriction is to prevent improvements being made in the knowledge of impending expropriation with the intention of raising the amount of compensation payable.[27]

[25] Treeger, C. 2004. *Legal Analysis of farmland expropriation in Namibia.* Available at http://www.nid.org.na/pub_docs-no01_04.pdf; last accessed on 20 October 2011.
[26] *Ibid.*
[27] *Ibid.*

2.4 The Test Case for Expropriation in Namibia also known as the Kessl Case[28]

"The right of State to expropriation private property, to be more specific, commercial farms for land reform purposes, was challenged in the Kessl[29] case on various grounds and is known in Namibian property jurisprudence as a test case."[30]The applicants in this case sought review of the decision taken by the respondentsto expropriate their farms. The farms expropriated were, two farms[31] belonging to Mr G. Kessl, one farm belonging to Mr. Martin Joseph Riedmaier[32] and one farm belonging to Heidmarterde CC.[33] All three farmers were German Citizens and residents of Germany but have been the owners of the said farms for a very long time. The issues in this case were whether the *audi alteram partem* rule is applicable in expropriation cases and whether the Government had complied with the requirements of administrative justice. The requirement of public interest, as a prerequisite to expropriation in Article 16(2)[34] was also an important issue that had to be adjudicated upon by the Court.Article 16(2) has an open textured provision on what amounts to "public interest", and this case therefore presented the Court with an opportunity to pronounce itself on the issue for the development of Namibian property law jurisprudence. The court ruled that in terms of s 20(6) of the Agricultural Commercial Land Reform Act 16 of 1995, 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.* Consequently, 'public interest' cannot be determined simply in the context of poverty alleviation alone.[35] Although the case did not express itself as to a direct definition of the term public interest, it did however add guidelines in determining what the public interest entails, including; that the interests of persons employed and resident as well as their families on these expropriated lands should be considered.

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[28] *Kessl v Ministry of Lands and Resettlement and Others and Two Similar Cases* 2008 (1) NR 167 (HC)
[29]*Ibid.*
[30] Amoo, SK. *Constitutional Property Rights and Land Reform in Namibia.* Available at http://www.juridicas.unam.mx/wccl/ponencias/16/278.pdf; last accessed on 20 October 2011.
[31] Farm Gross Osumbutu No. 124 and Okazomdudu West No. 100
[32] Farm Welgelegen No. 303
[33] Heidmarterde 391
[34] The Constitution of the Republic of Namibia, 1990
[35] Amoo, SK. *Constitutional Property Rights and Land Reform in Namibia.* Available at http://www.juridicas.unam.mx/wccl/ponencias/16/278.pdf; last accessed on 14 April 2011.

Chapter 3: THE POSITION IN SOUTH AFRICA

3.1 Sources and development of expropriation

Since 1965 expropriation has received considerable legislative attention. First the Expropriation Act 55 of 1965 was amended three years later by the Expropriation Amendment Act 43 of 1968. Then there were two further amendments in the form of the Expropriation Amendment Act 85 of 1970 and the Expropriation Amendment Act 53 of 1971. All of which were then repealed by the Expropriation Act 63 of 1975 and then further amended by the Expropriation Amendment Acts of 1977, 1978 and 1980.[36] In the South African context, expropriation in its most ordinary meaning is defined as: "to disposes of ownership, to deprive of property".[37] It is classified as an act of superior powers, which deprives an owner and vests title in the expropriating authority, without regard to any undertaking or obligation to make compensation. The power is vested in the state and delegated to the Minister is some instances.[38] Expropriation is thus a process through which ownership is acquired by unilateral act without the need for cooperation or consent.[39] "The expropriating authority accordingly does not derive its title from the previous owner, but obtains its title by reason of the consequences attached by law to the operation of a valid notice of expropriating."[40] The purpose and effect of expropriation is to divest the owner and vest rights of ownership in the expropriating authority. It can be said that the scope of expropriation under the South African dispensation is relatively different with how the term is defined under Namibian law. In all respects the meaning is the same including the deprivation of property to the government for land resettlement purposes. However, one important element is absent which is very prominent in the Namibian context namely the 'willing buyer willing seller' principle. It would seem from the Constitutional definitions stated above, that South Africa does not require the willingness or even the consent of the owner of that property in order for it to proceed with expropriating that land.

[36] Jacobs, M. 1982.*The Law of Expropriation in South Africa.* Cape Town: Rustica Press (Pty) Ltd.
[37] *Minister of Defence v Commercial Properties Ltd & Others* 1955 (3) SA 324 (N) at 327 G; *Beckenstrater v Sand River Irrigation Board* 1964 (4) SA 510 (T) at 515 A
[38] Miller, D.C. 1986. *The Acquisition and Protection of Ownership.* Wetton: Juta & Co, Ltd.
[39] *Mathibe & Others v Moscheke*1920 AD 354 at 365
[40] *Stellenbosch Divisional Council v Shapiro* 1953 (3) SA 418 (C) at 423 G

Section 25 of the South African Constitution governs the position and says that no one may be deprived of property except in terms of law of general application, and that no law may permit arbitrary deprivation of property. In terms of s 36(1) of the Constitution, this right may only be limited in terms of law of general application, to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose, and less restrictive means to achieve the purpose. Sections 25(2), (3) and (4) of the Constitution deal directly with the concept of expropriation. They provide that property, not restricted to immovable property, may be expropriated only in terms of law of general application for 'public purposes' or in 'the public interest'. Note here that the Constitution requires public interest **and** public purpose. The term public interest is defined in s 25(4)(a) to include the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources.

3.2 The concepts of public interest and public purpose

In interpreting the expression 'public', Innes JA said, in *Rondebosch Municipal Council v Trustees of the Western Province Agricultural Society,*[41] at 283-284: "The word *public* is one of wide significance, and it may have several meanings, between some of which, in spite of their common origin, there are very real differences. In a broad sense it is commonly applied to things which pertain to or affect the people of a country or a local community. The expressions *public opinion, public road, public place, public hall,* is instances of the use of a word in that general way. On the other hand, it is frequently employed in a more restricted sense to denote matters which pertain not to the people directly but to the state or government which represents the people. Thus the public accounts signify the government accounts; public revenue and public lands denote the revenue and the lands of the state; and the public service means the government service. Hence, as it seems to me, public purposes may either be all purposes which pertain to and benefit the public in contradistinction

[41] 1911 AD 271

to private individuals, or they may be those more restricted purposes which relate to the state and the government of the country – that is, governmental purposes".[42]

Although given an extended meaning by its definition in the present Expropriation Act 63 of 1975,[43] in its unglossed form the term is well known and has come by well-known judicial interpretation to mean 'purposes which pertain to and benefit the public in contradistinction to individuals'.[44] Sections 28 of the interim Constitution and 25 of the Constitution intend to create a balance between the preservation of property rights and the need for them to be attenuated sometimes when the common good demands it.[45]

Section 28 of the interim Constitution does not authorise expropriation 'in the public interest'. However, in addition to authorising legislation to expropriate for public purposes, in section 25(2)(a), the Constitution authorises legislation for expropriation of property 'in the public interest'. According to section 25(4)(a), 'the term public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources'. It must however be construed with due regard to the ordinary meaning of the words, in a generous and purposive way giving expression to the values underlying the Constitution.[46]

Clearly the expression 'in the public interest' means something different from 'for public purposes'. Both contain the word 'public' which was considered by Innes JA in *Rondebosch Municipal Council v Trustees of the Western Province Agricultural Society.*[47] There, he pointed out that the word can have a broad sense and mean things which pertain to or affect the people of a country or a local community, or a narrow sense meaning matters which pertain to the state or the government. The framers of the Constitution used the word in its wider sense in the expression 'public purposes' in the earlier part of the same sentence of the subsection, and, there being

[42] Southwood, M.D. 2000. T*he Compulsory Acquisition of Rights. By Expropriation, Ways of Necessity, Prescription, Labour Tenancy and Restitution.* South Africa: Juta & Co, Ltd.
[43] Section 1 of the Act says: "Public purposes include any purposes connected with the administration of the provisions of any law by an organ of state."
[44] *African Farms and Townships Ltd v Cape Town Municipality* 1961 (3) SA 392 (C) 396-7; *Slabbert v Minister van Lande*1963 (3) SA 620 (T) 622; *Fourie v Minister van Lande en n Ander* 1970 (4) SA 165 (O) 171-4; *White Rocks Farm (Pty) Ltd and Others v Minister of Community Development* 1984 (3) SA 785 (N) 793
[45] Southwood, M.D. 2000. *The Compulsory Acquisition of Rights. By Expropriation, Ways of Necessity, Prescription, Labour Tenancy and Restitution.* South Africa: Juta & Co, Ltd.
[46] *Ibid.*
[47] 1911 AD 271 at p 283-284

no indication to the contrary in the context and no discernable reason to limit the word in the latter expression 'in the public interest', it is probable that they intended it to have the same, wider, meaning there.[48] Reinforcing this probability is the consideration that the word is seldom, if ever, used in conjunction with the words 'interest', to mean limited to the interest of the state or government. On the contrary, the expression is usually taken to mean the interest of the public at large. This is demonstrated by the fact that the courts, in construing the expression 'in the public interest' in other statutes have intuitively and without analysis adopted the wider sense for the word 'public' in the expression 'in the public interest'.[49] Smalberger JA did so when considering a Transvaal ordinance which authorised expropriation 'for any purpose in connection with the construction ... of any road'[50] and where property was expropriated as part of a scheme for road alterations and was expropriated to be given to a parastatal company. He said:[51] 'The fundamental problem, however, still remains – is the Administrator empowered under s 7(1) to acquire or expropriate the property of one person for what is essentially the benefit of another? Expropriation, generally speaking, must take place for public purposes or in the public interest. The acquisition of land by expropriation for the benefit of a third party cannot conceivably be for public purposes. *Non constat* that it cannot be in the public interest. It would depend on the facts and circumstances of each particular case.' Roper J in *Clinical Centre (Pty) Ltd v Holdgates Motor Co (Pty) Ltd*[52] came to the same conclusion where, construing section 2(j) of the Rents Amendment Act 53 of 1947, he said: 'In my view a scheme is "in the public interest" if it is to the general interest of the community that it should be carried out, even if it directly benefits only a section or class or portion of the community'.[53]

The legislature has commanded, in section 25(40)(a) of the Constitution, that 'the public interest' in section 25 must be read to include 'the nation's commitment to land

[48] *Minister of the Interior v Machadadorp Investments and Another* 1957 (2) SA 395 (A) at p 404
[49] *Clinical Centre (Pty) Ltd v Holdgates Motor Co (Pty) Ltd* 1948 (4) SA 480 (W) at p 489; *South African Hotels Ltd v Weinberg and Others* 1950 (3) SA 817 (C) at p 822; *Strelitz and Another v Meise and Another* 1950 (3) SA 827 (E) at p 832; *Barry v Smolowitz*1950 (4) SA 82 (E) at p 89; *Naidoo v Naidoo*1953 (3) SA 373 (N) at p 376; *Leicester Properties (Pty) Ltd v Farran*1976 (1) SA 492 (D) at p 495-6
[50] Section 7(1) of the Transvaal Roads Ordinance 27 of 1957
[51] In *Administrator, Transvaal, and Another v J van Streepen (Kempton Park) (Pty) Ltd* 1990 (4) SA 644 (A) at p 661B-G
[52] 1948 (4) SA 480 (W) at p 488
[53] Southwood, M.D. 2000. *The Compulsory Acquisition of Rights. By Expropriation, Ways of Necessity, Prescription, Labour Tenancy and Restitution.* South Africa: Juta & Co, Ltd.

reform' and 'the nation's commitment ... to reforms to bring about equitable access to all South Africa's natural resources.' The nature and extent of such 'commitment' is not spelled out in the Constitution.[54]

In considering the public interest, the individual is to be considered in the context of the whole community's interests. A comparison must be made between the interests of the individuals comprising the community taken as a whole not in its organised capacity, and the interests of an exproriatee. The interest of the community as a whole comprises, in the final analysis, the individual interests of each of its members collected together. Where the benefit to such assembled interests outweighs the disbenefit to an expropriatee's interests, the legislation authorises expropriation, or the expropriation has been done for public purposes or in the public interest[55].[56]

When compared to the Namibian context, there is one clear distinction. In Namibia the only yardstick used to measure the legitimacy of expropriation is that is must be in the public's interest (except the additional requirement of just compensation which will be discussed later on in this paper). South Africa however, not only requires public interest but also public purpose as an additional element of the expropriation process. It would seem that the South African position on expropriation is more definitive on the issue and does not purposely leave the question open to the Courts as the Namibian Constitution and Act[57] do.

3.3 The concept of compensation

Payment of compensation, although almost treated as an obligation in modern law, is not reciprocal or contingent obligation in the sense that acquisition by the expropriating authority is dependent upon its fulfilment. Compensation is thus a matter of legislative discretion.[58] In South Africa, expropriation has to be subject to compensation, the amount of which, and the time and manner of payment of which must be agreed, or decided or approved by a Court. The amount, timing and manner of payment of the compensation must be just and equitable, reflecting an equitable

[54] *Ibid.*
[55] *Stanley v Central News Agency* 1909 TS 488 at p 491
[56] Southwood, M.D. 2000. *The Compulsory Acquisition of Rights. By Expropriation, Ways of Necessity, Prescription, Labour Tenancy and Restitution.* South Africa: Juta & Co, Ltd.
[57] The Agricultural (Commercial) Land Reform Act 16 of 1995
[58] Miller, D.C. 1986. *The Acquisition and Protection of Ownership.* Wetton: Juta & Co, Ltd.

balance between the public interest and the interests of those affected, having regard to all relevant factors[59].[60] The compensation provisions in the Constitution are sections 25(2)(b) and (3). They lay down that expropriation must be against compensation. This was confirmed in *First National Bank of South Africa t/a WESBANK v Minister of Finance*[61], where Ackermann J stated that for a deprivation to amount to an expropriation it must pass scrutiny under section 25(2)(a) and make provision for compensation under section 25(2)(b) of the Constitution. This raises the important question of how compensation is to be determined.

The compensation payable must be either agreed as between the parties or determined by a court. The Constitution gives South African courts broad discretion in determining compensation. Section 25 of the Constitution makes it clear, however, that the compensation and its time and manner of payment must reflect an equitable balance between the public interest and the interests of those affected having regard to all relevant circumstances. The listed circumstances to which regard must be had are:

(a) The use to which the property is being put.

(b) The history of its acquisition.

(c) Its market value.

(d) The value of the investments in it by those affected.

(e) The interests of those affected.[62] Possible factors or circumstances which, though not listed in the subsections, might be relevant and, if relevant, must be taken into account or have regard taken of them, could be:

(f) consequential loss cause to the expropriatee over and above the loss to him of the value of the rights expropriated, or

(g) the benefits which might accrue to the expropriatee as a result of the expropriation, or

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[59] Section 25(3) of the Constitution

[60] Southwood, M.D. 2000. *The Compulsory Acquisition of Rights. By Expropriation, Ways of Necessity, Prescription, Labour Tenancy and Restitution.* South Africa: Juta & Co, Ltd.

[61] 2002 (4) SA 798 (CC)

[62] section 28(3) or section 25(3) respectively

(h) the expropriatee's efforts to mitigate his loss, or

(i) part payments of the compensation, or

(j) the interest which runs on unpaid compensation. It is submitted that the range of unlisted possibilities is too broad to specify all possible relevant circumstances.[63]

In terms of section 25 of the Constitution, the amount of compensation must be determined by means of an agreement. If there is no agreement between the parties, the amount of compensation, the time of its payment or the manner of its payment, the particular aspect will be decided upon by a court.[64] The Court will decide what amount is just and equitable, reflecting an equitable balance between the public interest and the interests of those affected as mentioned above.[65]

Subsection 25(3) of the Constitution was considered for the first time by the Land Claims Court in *Mbongeni John Khumalo and 13 Others v Potgieter and Others.*[66] In this case the judge considers international law to address the issue and says that: 'The willing buyer willing seller concept is echoed in s 12(1)(a)(i) of the Expropriation Act 63 of 1975. In fixing market value the valuer must determine the probable amount which the subject property would have realised if sold in the open market by a willing seller to a willing buyer, taking into account its highest and best use'.[67] Similarly in *Kangra Holdings v Minister of Water Affairs*[68]*,* compensation for the real financial loss suffered may be claimed. It would seem that Section 25 of the Constitution is very vague on the calculation of compensation. Case law on the other hand, has established what seems to be a more precise method of calculating compensation.

The so called Gildenhuys formula: *Ex Parte Former Highlands Residents*[69] is the only reported case dealing with the interpretation of section 25 (3) of the Constitution

[63] Southwood, M.D. 2000. *The Compulsory Acquisition of Rights. By Expropriation, Ways of Necessity, Prescription, Labour Tenancy and Restitution.* South Africa: Juta & Co, Ltd.
[64] *Ibid.*
[65] Van der Walt, A.J. and Pienaar, G.J. 2002. *Introduction to the Law of Property.*4th Edition. Durban: Juta & Co Ltd, p 130.
[66] Land Claims Court Case No LCC 34/99 (unreported) 17 December 1999
[67] Southwood, M.D. 2000. *The Compulsory Acquisition of Rights. By Expropriation, Ways of Necessity, Prescription, Labour Tenancy and Restitution.* South Africa: Juta & Co, Ltd.
[68] 1998 (A)
[69] 2000 (1) SA 489 (LCC)/ (2000) 2 B All SA 26

and was referred to by the Cape High Court in *Du Toit v Minister of Transport,*[70] which also dealt with the awarding of a compensation claim for state expropriation. In *Ex Parte Former Highlands Residents*,[71] Gildenhuys J dealt with section 2 (2) of the Restitution of Land Rights Act 22 of 1944 (in terms of which no person is entitled to restitution if just and equitable compensation in terms of section 25 (3) has been received in respect of the dispossession of land rights) by finding that the provisions of section 25 (3) are clearly intended to require that market value, while important, not be the conclusive and determinative factor in the assessment of just and equitable compensation.[72] Gildenhuys J found that the market value of the expropriated property does nonetheless play a central role in the determination of fair and equitable compensation, not least because it is, other than factor (d) regarding state subsidies, the only factor that is readily quantifiable. In this regard, however, he also noted that the requirement that financial loss be compensated can lift the compensation to above the market value, while public interest may reduce it. He concludes by finding that in his view, the equitable balance required by the Constitution for a determination of just and equitable compensation will in most cases best be achieved by first determining the market value of the property and thereafter subtracting from or adding to the amount of the market value, as other relevant circumstances may require. In a nutshell, the amount of compensation is the market value of the property minus the present value of past subsidies.[73] Finally, Section 12(1) of the Expropriation Act[74] sets out in great detail how compensation should be calculated and acts as a guideline to determine compensation that is just and equitable. Hence, under the Act[75], compensating the value of the property means that the market value of the property is paid to the owner. Market value is calculated based on what a willing buyer would pay a willing seller in the open market.[76]

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[70] 2003 (1) SA 586 (C) at 596C
[71] 2000 (1) SA 489 (LCC)
[72] Dlamini, SRA. *Taking Land Reform Seriously: From willing seller – willing buyer to expropriation.* Available at http://www.publiclaw.uct.ac.za/usr/public_law/LLMPapers/dlamini.pdf; last accessed on 14 April 2011 at p 62.
[73] *Ibid.*
[74] 63 of 1975
[75] *Ibid.*
[76] Du Plessis, W.J. 2009. *Compensation for Expropriation under the Constitution.* Available at http://scholar.sun.ac.za/95ABAF2F-33A2-4536-8BC3-9919EB6D3A66/FinalDownload/DownloadId-10BF13FE137A5661E4690726E4E56F8C/95ABAF2F-33A2-4536-8BC3-

Chapter 4: THE POSITION IN ZIMBABWE

4.1 The Constitutional understanding of Expropriation

The relevant parts of the property clause, i.e. sections 11 and 16 of the Constitution of Zimbabwe,[77] read as follows:

(11) Whereas every person in Zimbabwe is entitled to the fundamental rights and freedoms of the individual, that is to say, the right whatever his race, tribe, place of origin, political opinion, colour, creed or sex, but subject to the rights and freedoms of others and for the public interest, to each and all of the following, namely – (c) Protection for the privacy of his home and other property and from the compulsory acquisition of property without compensation...

(16)(1) No property of any description or any interest or right therein shall be compulsorily acquired except under the authority of a law that – (c) Subject to the provisions of subsection (2), requiring authority to pay fair compensation for the acquisition before or within a reasonable time after acquiring the property, interest or right...

The original wording of section 16 of the Constitution of Zimbabwe forbade the compulsory acquisition of property of any description unless it was reasonably necessary for a variety of purposes, including agricultural settlement, land reorganization or the relocation of displaced persons; and the payment of "prompt and adequate" compensation assessed on the basis of market principles. Persons whose properties had been compulsorily acquired were free to remit the compensatory sum in any currency and to any country of their choice without paying any taxes or other levies. In addition section 52(3)(b)(i), read together with subsection (4) of that Constitution stipulated that provisions concerning fundamental rights (which included the property rights spelled out in section 16) could not be amended for ten years without an affirmative vote of all the members of the National Assembly – a body that guaranteed 20 seats to Zimbabwe's white population during these first 10 years. These constitutional stipulations effectively blocked any

9919EB6D3A66/bitstream/handle/10019.1/1078/Du%20Plessis,%20WJ.pdf?sequence=1; last accessed on 20 October 2011.

[77] 1980 as Amended in 2000 and 2005

meaningful programme of land reform and resettlement for at least the first ten years of national sovereignty unless land was available on the open market. When section 52 of the Constitution lapsed in 1990, the Government amended section 16 to prescribe new conditions for expropriation of property. These were "reasonable notice" of an acquisition, payment of "fair compensation within a reasonable time" (rather than "prompt and adequate" compensation), and an order of confirmation of acquisition within 30 days if such acquisition were contested. However, this amendment did not change the requirement of compensation.

Given the political pressures for reform driven by sporadic land invasions, the new Government introduced a new provision in the Constitution (Section 16A) which provided, inter alia, that where agricultural land is compulsory acquired for "the resettlement of people in accordance with a programme of land reform", the obligation to pay compensation for land lies with the United Kingdom as the former colonial power, and the obligation of the Government of Zimbabwe is limited to the payment of compensation only for improvements. In effect, unless proof could be shown that the land acquired had been purchased, the Government's overriding compensation obligation was limited to improvements on the land at the time of acquisition. This is the current Constitutional position.[78]

4.2 The concept of public interest

Extensive research on the issue of public interest under the Zimbabwean context showed that the concept does not enjoy as much importance and relevance as in the Namibian and South African jurisdictions. Zimbabwe has embarked on what can be described as a "fast-track" process of resettlement which is being carried out so rapidly, and is short-circuiting legal procedures, it has been found overall to violate rights to equal protection of the law, non-discrimination and due process. The violence accompanying land occupations is evidence of this statement and has also created fear and insecurity on white-owner commercial farms, in black communal areas, and in "fast-tracked" resettled areas, which inevitably threatens to destabilize the entire Zimbabwean countryside.[79] The 'willing buyer/ willing seller' policy has

[78] Dlamini, S.R.A. 2011. *Taking Land Reform Seriously: From willing seller – willing buyer to expropriation.* Available at http://www.publiclaw.uct.ac.za/usr/public_law/LLMPapers/dlamini.pdf; last accessed on 14 April 2011.
[79] *Ibid.*

failed as a means of achieving fast delivery for land redistribution[80] as in recent years, the Zimbabwean government has launched an expropriation process of the lands of former colonists, with the goal of correcting the appropriation of lands during the colonial era on a fast track basis ignoring basic principles of the law.[81]

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.[82] The purposes for which land could be compulsorily acquired included the interests of defence, public safety, public morality, public health, town and country planning. Furthermore it was stipulated that land acquired in this manner should be used for purpose beneficial to the public generally or a section thereof. The provision further specified that under-utilised land could only be acquired for the settlement of land for agricultural purposes.[83] The entrenched provision including the provision that reserved twenty seats for whites could not be amended for ten years after the implementation of the Constitution. In 1990,section 16 of the Constitution 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. 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) and rural land where the acquisition is reasonably necessary for the utilization of that purpose or any other land – (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

[80] *Ibid.*
[81] Dossier. 2009. *South Africa, Namibia, Zimbabwe. Differences in land conflicts.* Available at http://www.acp-eucourier.info/South-Africa-Namibi.651.0.html; last accessed on 14 April 2011.
[82] Section 16(1)(a) of the Constitution of Zimbabwe
[83] Section 16(1)(b) of the Public Lands Acquisition Act cap 296 of The Laws of Zambia

compensation, but for fair compensation within a reasonable time and it also brought in a new concept of designation.

Under customary international law as well as was seen in the case of Namibia and South Africa is that the first requirement for a lawful expropriation is that it must be for a public purpose or in the public interest. Thus, while the compensation requirements makes an expropriation that is non-discriminatory and for a public purpose conditionally legal, an expropriation that is discriminatory or not for a public purpose is illegal in itself, whether or not compensation is paid.[84]

4.3 The concept of compensation

The Zimbabwean Parliament passed two amendments to the Constitution of Zimbabwe: one on 19 April 2000 (Amendment 16)[85] and one on 14 September 2005 (Amendment 17).[86] The two amendments authorised the seizure of white-owned farmlands without compensation. The amendment of the Constitution by Article 16A, affected the requirements relating to payment of compensation directly. The amendment required that compensation be paid, but that the compensation be paid 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 state has to pay prompt, adequate and effective compensation. In terms hereof, prompt compensation meant just that. The Government has to pay the compensation there and then, subject to administrative procedures. Adequate compensation has been interpreted, in international arbitrations, to mean market value, and no less. Anything less would not do. The expropriatee had to be placed in the same position as he/she would have been in, in financial terms, had the expropriation not taken place.[87] In the case of *May & Ors v Reserve Bank of Zimbabwe*[88], It was held that adequate compensation meant market value. The only issue for the Supreme Court

[84] Zongwe, D.P. 2010. *The Contribution of Campbell v Zimbabwe to the foreign investment law on expropriations.* Namibian Law Journal. Vol. 2 Issue 1
[85] Constitution of Zimbabwe Amendment No. 16, Act 5 of 2000
[86] Constitution of Zimbabwe Amendment No. 17, Act 5 of 2005
[87] Nherere, P. 2001. *The Legal Framework for Land Acquisition*. Available at http://library.fes.de/fulltext/bueros/simbabwe/01058003.htm; last accessed on 20 October 2011.
[88] 1985 (2) ZLR 358 (SC)

was whether market value meant the price of the shares on the Johannesburg Stock Exchange, or, the price of the shares on the Zimbabwe Stock Exchange, which latter value included a foreign currency premium. On the international plane, effective compensation meant that it was pointless to pay compensation in a worthless currency. Accordingly, the expropriatee has to be paid in a currency of choice. It is submitted that subsection (5) of the unamended Section 16 had this effect. The recipient of compensation monies was allowed to remit their monies outside the country. The provision was necessary because exchange controls would, otherwise, have applied.[89]

Since 2000, the Zimbabwean Government has expropriated a string of white-owned commercial lands without compensation.[90] In March 2008, in a consolidated case (*Mike Campbell (Pvt) Ltd & Others v Zimbabwe*),[91] 79 applicants filed an application with the Southern African Development Community (SADC) Tribunal to challenge the legality of the acquisition of certain agricultural lands by the Zimbabwean Government. On 28 November 2008, the Tribunal ruled that the expropriations of agricultural lands by the Zimbabwean Governments were illegal because they were based on racial discrimination and did not compensate the applicants.[92] In the case of *Davies v Minister of Lands, Agriculture and Water Development*[93]*,* the Supreme Court of Zimbabwe in its interpretation of section 11(c) of the Land Acquisition Act, drew a distinction between an acquisition and deprivation and held that section 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. Nor did every deprivation require that compensation be paid.

Although the amended Constitution makes provision for compensation, it is not automatic. This gives the government the power to compulsorily acquire agriculture land for the re-settlement of people in accordance with the programme of land reform. However, with due regard to the fact that the people of Zimbabwe, as a

[89] Nherere, P. 2001. *The Legal Framework for Land Acquisition*. Available at http://library.fes.de/fulltext/bueros/simbabwe/01058003.htm; last accessed on 20 October 2011.
[90] Zongwe, D.P. 2010. *The Contribution of Campbell v Zimbabwe to the foreign investment law on expropriations.* Namibian Law Journal. Vol. 2 Issue 1
[91] *Mike Campbell (Pvt) Ltd & Others v The Republic of Zimbabwe,* SADC (T) Case No. 2/2007
[92] Zongwe, D.P. 2010. *The Contribution of Campbell v Zimbabwe to the foreign investment law on expropriations.* Namibian Law Journal. Vol. 2 Issue 1
[93] 1996 (9) BCLR 1209 (ZS)

consequence of colonialism, were unjustifiably dispossessed of their land and other resources without compensation, and that they 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 Act[94] 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, compulsory acquired for resettlement. Furthermore, the amended provision state 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; (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 prior to 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; (g) any financial constraints that necessitate the payment of compensation in instalments over a period of time; and (h) any other relevant factor that may be specified in an Act of Parliament.[95]

South Africa and Zimbabwe signed a Bilateral Investment Promotion and Protection Agreement (Bippa) in 2009 meant to protect South African investors operating in the country from evictions and unnecessary attacks. Part of the agreement signed by the two governments protects investments made by South Africans and provides for compensation for expropriated farms. Another part provides that even if farmers are evicted they need to be compensated for improvements made on the farms. However, daily news reports recently stated that this treaty is being violated and that no assistance from the police of these unlawful activities is received.[96] It reported that “some of the South African farmers have been left destitute after being evicted

[94] 16(A) as amended by section 3 of the Constitution of Zimbabwe Amendment Act 16 of 2000
[95] Section 16(A)(2) of the Constitution of Zimbabwe as amended by Amendment Act 16 of 2000
[96] Ncube, X. 2011. *Zim, SA fight.* Available at http://www.dailynews.co.zw/index.php/news/53-top-story/4622-zim-sa-fight.html; last accessed on 20 October 2011.

from their properties by violent militants mostly loyal to President Robert Mugabe."[97] "Furthermore, South African farmers like Koos Smith of De Rust Farm and Tiennie Van Rensburg of Rueben Farm in Nyazura were evicted by a mob loyal to president Robert Mugabe, leaving too them destitute."[98] The South African ambassador to Zimbabwe said the Zimbabwean government has failed to own up to its promise despite appending its signature to the investment protection treaty and that South Africa, as the continent's biggest economy, is a significant investor in Zimbabwe.[99]

[97] *Ibid.*
[98] *Ibid.*
[99] *Ibid.*

Chapter 5: THE INTERNATIONAL STANDARD

For an expropriation to be legal in international law, it has to comply with the following requirements: (a) it must be for a public purpose; (b) it must not be discriminatory and (c) the State must pay compensation for expropriation. These requirements form part of customary international law and must be met cumulatively, which means that, if any of those requirements is violated, there is a violation of customary international law.[100]

The **Universal Declaration of Human Rights** (1948), adopted by the General Assembly of the United Nations in 1948 provides in article 17 that everyone has the right to own property alone as well as in association with others and that no one shall be arbitrarily deprived of property.

The **International Convention on the elimination of all forms of discrimination** (1965) determines in article 5(d) that state parties undertake to eliminate racial discrimination in all forms and to guarantee the right to everyone to own property alone as well as in association with others.

The **European Convention on Human Rights** (1950) in article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms provides that every natural or legal person is entitled to the peaceful enjoyment of their possession except in the public interest and subject to the conditions provided for by the law and by general principles of international law. Article 1 does not expressly require compensation for expropriation. However, the European Court of Human Rights has held that the taking of property without payment of an amount 'reasonably related to its value' would normally constitute disproportionate interference with property rights which could not be considered justifiable under Article 1.[101]

The **African Charter on Human and People's Rights** (1981) adopted the organization of African Unity in 1981 and provides for in article 14 that the right to property shall be guaranteed. This right may only be encroached upon in the interest

[100] Zongwe, D.P. 2010. *The Contribution of Campbell v Zimbabwe to the foreign investment law on expropriations.* Namibian Law Journal. Vol. 2 Issue 1

[101] *James v United Kingdom* (1986) 8 AHRR 123 at p 147; *Lithgow v United Kingdom* (1986) 8 EHRR 329

of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

Under international law, nationalization of private property by the state or expropriation is allowed, but subject to the condition that nationalization or expropriation is effected in the public interest, 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,*[102] provides that: "Nationalization, 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." What constitutes public interest however is not defined under international law and is therefore subject to municipal laws of a particular jurisdiction.

Under International law, expropriation is usually defined in contrast with deprivation which is seen as a less intrusive limitation of property. It is often said that expropriation consists of compulsory state acquisition of private property, while deprivation occurs when the state regulates the use and enjoyment of private property in the public interest.[103] Foreign constitutions employ different notions of expropriation and the terminology is not consistent. Some constitutions refer to 'expropriation'[104]; some to 'compulsory acquisition'[105] or 'taking' of property;[106] others

[102] 1977 53 ILR 389
[103] *Harksen v Lane NO* 1998 (1) SA 300 (CC)
[104] See section 25(2) of the South African Constitution of 1996; article 5 of the Austrian Basic Law of 1876; article 14.3 of the German Basic Law of 1949; article 16(2) of the Constitution of the Republic of Namibia Act 1990; article 26(1) of the Constitution of the Swiss Confederation 1999.
[105] See section 51(xxxi) of the Australian Commonwealth Constitution 1900; article 31(2) of the Indian Constitution as amended by the Fourth Amendment in 1955; article 13(2) of the Federal Constitution of Malaysia 1957; section 16(1) of the Constitution of the Republic of Zimbabwe 1980.
[106] See the Fifth Amendment to the US Constitution; article 29 of the Constitution of Japan 1946; section 5 of the Government of Ireland Act 1920.

simply refer to ‘deprivation’ as a generic term without explicitly distinguishing it from expropriation.[107]

In the jurisdiction of **Switzerland** for example, the state is required to compensate property owners for certain losses caused by limitation that was not intended but had the substantive effect of expropriation, even when the state did not acquire the property.

The notion of constructive expropriation originated in **American** case law, and US law is still the paradigmatic example of a system in which excessive regulatory deprivation of property is treated as a so-called regulatory taking or inverse condemnation.[108] According to US law, the police power allows the state to regulate and restrict the use of private property, without compensation, provided that the regulation is justified by a rational and legitimate public purpose in the narrow sense of promoting or securing public safety and health and is imposed in accordance with due process of law.[109] A regulatory law or action can be invalidated when it is imposed for an irrational or illegitimate purpose, but the courts will not lightly interfere with a legislative decision to regulate the use of property in the public interest.[110]

German law is the paradigmatic example of a jurisdiction that refuses to recognize constructive expropriation.[111] The property clause in article 14 of the German Basic Law 1949 makes provision for two kinds of legitimate state interference with private property: regulation of property through legislative provisions which determine the content and the limits of property rights; and expropriation of private property for a public purpose and against payment of compensation. Through regulation, the legislature can determine the content and limits of the individual property rights by imposing restrictions in the exercise of individual property rights. Regulatory limitations must be authorised by valid legislation and must also satisfy the proportionality principle. The proportionality principle requires that an equitable

[107] See article 1(a) of the Constitution of Trinidad and Tobago 1962; section 1(a) of the un-entrenched Canadian Bill of Rights 1960; article 1 of the First Protocol to the European Convention on Human Rights 1950.
[108] van der Walt, A.J. 1999. *Compensation for excessive or unfair regulation: A comparative overview of constitutional practice relating to regulatory takings*. South Africa: Juta at pp 280-286.
[109] *Miller v Schoene*276 US 272 (1928), where it was considered justified to destroy trees, without compensation, to prevent them from spreading a disease.
[110] *Hawaii Housing Authority v Midkiff*467 US 229 (1984)
[111] van der Walt, A.J. 1999. *Compensation for excessive or unfair regulation: A comparative overview of constitutional practice relating to regulatory takings*. South Africa: Juta at pp 286-290.

balance must be established between the interests if the individual and the social interest, and to satisfy this principle regulation must be strictly necessary; suitable for the purpose it serves; and not impose burdens disproportionate to its benefits. A regulatory measure that is not properly authorised or that goes too far and disturbs the equitable balance between the interests of the individual and social interest is invalid.[112] In German Constitutional law, expropriation is seen as a partial or complete acquisition of concrete individual property holdings for the realization of specific public duties, provided it complies with constitutional and statutory requirements.[113]

Constitutional property clauses include public purpose requirements to ensure that expropriations are strictly necessary and to prevent frivolous or arbitrary use of the state's power of eminent domain. These requirements have two related effects: to prevent or stop expropriations of private property for improper, unlawful purposes; and to control legitimate exercises of the power to expropriate.[114] "The proportionality principle requires that an equitable balance must be established between the interests of the individual and the social interest, and to satisfy this principle regulation must be strictly necessary; suitable for the purposes it serves; and not impose burdens disproportionate to its benefits.[115]

Foreign courts dealing with the public purpose requirement tend to distinguish two separate issues. The first is whether the expropriation in fact serves a legitimate public purpose in the sense that it satisfies an important public need. The second issue is whether there is a proper legislative authority for the expropriation as a way to serve the stated purpose. The comparative overview suggests that expropriation serves a public purpose even while benefiting a private person is most easily and widely accepted in cases involving general programmes of land reform or redistribution.[116] In foreign case law the tendency is to accept that there is a general duty to pay compensation for expropriation. The classic authority for this proposition, as far as Commonwealth jurisdictions are concerned, is the decision in *Attorney-*

[112] BVerfGE 25, 112 (1969) at 117; BVerGE 50, 290 (1979) (Mitbestimmung) at 340; BVerGE 52, 1 (1979) (Kleingarten) at 29
[113] Van der Walt, A.J. 2005. *Constitutional Property Law.* South Africa: Creda Communications, p 222.
[114] *Ibid.*
[115] *Ibid.*
[116] *Ibid.*

General v De Keyser's Royal Hotel Ltd,[117] where the House of Lords confirmed that there is a general, common-law right to receive compensation for expropriation, even in a war situation and even if the property is only used for a limited period of time and not acquired permanently.[118]

"During the Seminar on Compulsory Purchase and Compensation held at the University of Helsinki (TKK), Finland, 6 – 8 September 2007 (Helsinki seminar 2007) several key issues on expropriation statutes, processes and methods were raised and discussed. Participants expressed concern that despite existing differences in statutory provisions of these individual countries, an international code on compensation might be required to harmonize certain critical aspects of the practice in order to achieve globalization of standards."[119] "The process of valuation for compulsory acquisition of landed property is governed by legislative statutes that vary from one country to another. The term has a number of variants some of which are compulsory purchase; expropriation; land-take or eminent domain. In all cases the owners or occupiers are denied their property rights for overriding public interest, public purpose or public benefit and are entitled to full, just, fair, equitable and adequate compensation."[120] "The findings from the seminar reveal that the systems, procedures and practices in compulsory purchase vary a lot between countries. There are no international standards dealing with assessment of compensations nor associations or conferences dedicated to discuss problems in compulsory purchase and compensations."[121]

Since the beginning of the last century, the majority of states have supported an international minimum standard or a moral standard for civilized states for determining compensation. This standard is affirmed in the Declaration of the United Nations General Assembly on **Permanent Sovereignty over Natural Resources** adopted in 1962. It has also enjoyed the support of many tribunals and claims

[117] [1920] AC 508 (HL)
[118] Van der Walt, A.J. 2005. *Constitutional Property Law.* South Africa: Creda Communications, p 270.
[119] Viitanen, K. 2009. *Global Concerns in Compulsory Purchase and Compensation Processes.* Available at https://www.fig.net/pub/monthly_articles/february_2009/february_2009_viitanen_kakulu.html; last accessed on 20 october 2011.
[120] *Ibid.*
[121] *Ibid.*

commissions.[122] The international standard is in line with the "Hull formula", enunciated by United States Secretary of State Cordell Hull in 1938 and subsequently adopted by industrialised nations. This formula requires that compensation must be "prompt, adequate and effective".[123] In essence, this means that the nationalising state should make payment in a currency that can be readily used, that it should reflect the full value of the expropriated property, perhaps incorporating an element for future lost profits, and that it must be handed over within a reasonable time after the expropriation, failing which interest should be paid.[124]

[122] Treeger, C. 2004. *Legal Analysis of farmland expropriation in Namibia.* Available at http://www.nid.org.na/pub_docs-no01_04.pdf; last accessed on 14 April 2011.
[123] *Ibid.*
[124] *Anglo-Iranian Oil Co. Case* 1952, ICJ Report 93 at p 100.

Chapter 6: CONCLUSIONAND RECOMMENDATIONS

A distinguishing aspect of the colonisation process in Southern Africa was the expropriation of land from the indigenous peoples.[125] However, it was mainly in the white-ruled colonies that land expropriation culminated in a more or less permanent division of ownership along racial lines.[126] This is particularly the case in South Africa, Zimbabwe and Namibia, where the white settlers seized prime land and pushed the indigenous black populations onto overcrowded and often inferior lands.[127] At least until recently, all three countries have shared a 'dualistic' agrarian structure, in which significant white populations owned or operated most high-value agricultural land and were engaged in commercial and export-orientated agriculture, alongside reserves characterized by overcrowding, substantial poverty and landlessness.[128] Furthermore, white economic elites in the region were also often able to codify their gains when they transferred political power to the black majority. Thus, the focus of land reform, in these former white settler colonies, has very reasonably been on the redistribution of white commercial farmland to black rural people.[129]

The expropriation of land came about as a necessary tool to try and equalize the imbalances created bycolonization of Southern African countries in the past. Many African countries, after gaining independence, had as its main priority the problem of resettling its citizens and expropriating land for that purpose. In Namibia and South Africa, the relevant constitutions made provision therefor and subjected its fairness to the requirements of public interest and just compensation. In Namibia the process of expropriation has been called slow and ineffective but active. The cases which have gone to court in Namibia have mainly focussed on procedural aspects of the process and hence, expropriation as a whole has not been rejected nor discontinued in Namibia. In South Africa, the position is quite similar to that of Namibia. The Government made provision for expropriation in various legislative pieces and

[125] Sachikonye, L.M. 2004. "*Land reform in Namibia and Zimbabwe: A Comparative perspective*." In Hunter, J. (ed) Who should own the land? Analysis and views on land reform and the land question in Namibia and southern Africa. Windhoek: Konrad-Adenaur Foundation, p 65.
[126] *Ibid.*
[127] *Ibid.*
[128] Hall, R. (2003). "*A Comparative Analysis of land reform in South Africa and Zimbabwe".* In Lee, M.C. and Colvard, K. (eds.) Unfinished Business: The Land Crisis in South Africa. Pretoria: Africa Institute of South Africa, p 256.
[129] *Ibid*.

implemented it steadily and slowly. Although the progress is not where it is desired to be it must be mentioned that South Africa also complies with and strictly adheres to the elements of public interest and just compensation. The situation in Zimbabwe, as was seen, is quite different from the other two jurisdictions.The Constitution of Zimbabwe initially provided for the elements of public interest and compensation but did away with what they termed “these restrictions to land reform” by adopting a fast-track approach to expropriating land in the form of aggressive land invasions and deprivations. In terms of the Amendment to their Constitution section 16A, the Government now has the authority to expropriate white owned farms without due process i.e. just compensation.

It is my submission that expropriation is fair and equal when it is subject to the public’s interest and just compensation as exercised by the jurisdictions of Namibia and South Africa. The situation in Zimbabwe however, does not accord with these universal requirements and thus is in need of constitutional reform to address the issue. It is recommended that Zimbabwe take a similar approach to that of Namibia and South Africa and adopt a more patient approach towards resettling its indigenous peoples.

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