

The right of access to land and its implementation in Southern Africa: A comparative study of South Africa and Zimbabwe land reform laws and programmes

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1 INTRODUCTION

South Africa and Zimbabwe share a common history of colonisation and land dispossession that resulted in the bulk of the agricultural land being owned by a minority settler group. In both countries the colonial state confined the indigenous African people to reserves consisting largely of barren land or areas with poor rainfall patterns while the more fertile land was allocated to white settlers for commercial agriculture. The struggle for liberation from colonial and apartheid domination in South Africa and from colonial and minority rule in Zimbabwe was partly based on the objective of regaining the land.

In South Africa, although dispossession originally took place through conquest and unfair agreements, systematic dispossession by the state was institutionalised in the Native Land Act of 1913.¹ This Act allocated 8% of the land area of South Africa as reserves for the Africans while the rest was available to the minority white population. Land available for use by Africans was increased by 5% in 1936,² bringing the total to 13% of the total area of South Africa. This meant that 80% of the population was confined to 13% of the land while 20% owned over 80% of the land.³ This apportionment of land continued until the end of apartheid in the early 1990s and remains virtually unchanged. According to Dr Siphosile Sibanda, Acting Chief Director of the Land and Tenure Reform branch of the Department of Land Affairs, the total area of land transferred to black ownership since 1994 is about 3,4 million hectares of farmland. This

1 Native Land Act 36 of 1913.

2 Native Development and Trust Land Act of 1936.

3 Van der Walt 'Land reform in South Africa since 1990 - an overview' (1995) 10 *South African Public Law* at 2.

figure includes land delivered through restitution, redistribution and state land.⁴

In Zimbabwe, the same pattern was followed. While much of the land was obtained by the European settlers through conquest, the Native Reserves Order in Council of 1898 formalised the apportionment of land by setting up reserves for the Africans. The reserves 'were set up in low potential areas which subsequently became . . . communal areas'.⁵ In 1914, the apportionment of land was such that 3% of the population controlled 75% of the land while 97% were confined to 23% of the land.⁶ The Land Apportionment Act of 1930 formalised the division of land into European areas (49 000 000 acres for a population of 50 000 whites) and Native Reserves (29 000 000 acres for a population of 1.1 millions Africans).⁷ While some land was added to the reserves in 1952 and 1967, at the time of independence in 1980, the majority of Africans were still crowded into the communal areas, occupying 41.41% of the land.⁸

The liberation struggles in both countries were not won through armed struggle but ended in negotiated settlements, which necessitated compromises on the issue of land. Whereas the hopes of the indigenous populations were that on liberation they would regain the land, the negotiated settlements left the status quo with respect to land largely unchanged, though making provision for gradual acquisition of land by the state for redistribution.

2 IS THERE A RIGHT TO LAND?

The vast majority of citizens in African countries derive their livelihood through subsistence farming. It is therefore imperative that they have access to adequate land to enable them to get enough food and, where possible, to produce for the market so that they can generate sufficient income for other needs such as clothing and education.⁹ The question is whether there is a right of access to land as a fundamental right to which everyone is entitled to, and which citizens can claim from their governments.

4 Agriculture and Land Affairs Portfolio Committee; Land Affairs Select Committee: Joint Meeting 8 February 2005. 'Land and tenure reform and land planning and information branches of department of land affairs' available at <http://www.pmg.org.za>. This represents 4% of the 82 million hectares of agricultural land in the commercial farming sector and is an improvement on the 1% delivered from 1994 to 2000. See, however, 'Land Reform for dummies' *Mail and Guardian online* (Nov 2004) at <http://archive.mg.co.za> where it is stated that recent statistics show that only 3% has been transferred to black ownership up to the end of 2004.

5 Government of Zimbabwe 'Land issue fact sheet' at <http://www.gta.government.zw/land>.

6 *Ibid.*

7 *Ibid.*

8 Center for Housing Rights and Evictions (COHRE) 'Land, housing and property rights in Zimbabwe' (2001) Table I at 11.

9 See Saruchera M and Odhiambo M 'Civil society and social movements: Advocacy for land and resource rights in Africa' in (2004) *Policy Brief No 12: Debating land reform and rural Development* PLAAS at 1.

There is no specific or direct right of access to land in any of the international human rights instruments. However, there are other fundamental rights from which a right of access to land can be implied. These include the right to food and the right to housing. Without land, the majority of citizens of Africa who live in rural areas would not be able to feed themselves and their families or provide shelter.¹⁰ It may even be said that without land the right to life itself and to human dignity would be meaningless. The Universal Declaration of Human Rights¹¹ and the International Covenant on Economic, Social and Cultural Rights¹² recognise the right to food and housing. Article II of the Covenant states:

The States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realisation of this right . . .¹³

The Declaration on Social Progress and Development, though not a binding instrument, reinforces the Covenant on Economic, Social and Cultural rights when it states:

Social progress and development require the participation of all members of society in productive and socially useful labour and the establishment, in conformity with human rights and fundamental freedoms and with the principles of justice and the social function of property, of forms of ownership of land and of the means of production which preclude any kind of exploitation of man, ensure equal rights to property for all and create conditions leading to genuine equality among people.¹⁴

Equally supportive of a right of access to land is the right to development, which is stated to be 'an inalienable right by virtue of which every human person and all peoples are entitled to participate in, contribute to and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised'.¹⁵ It is argued that these statements from the international community require

10 Assuming that urban dwellers have access to jobs, they may be able to purchase food and only need land for shelter. However, it is also true that in Africa the rate of unemployment is very high and many live in abject poverty.

11 Universal Declaration of Human rights adopted by the General Assembly of the United Nations on 10 December 1948. Art 25 s 1 states: 'Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.'

12 International Covenant on Economic, Social and Cultural rights of 16 December 1966, Art 11.

13 According to the UN High Commission for Human Rights, as of 9 June 2004, 44 African countries had signified their accession, ratification or signature of the Covenant on Economic, Social and Cultural Rights, including South Africa and Zimbabwe. See 'Status of ratification of the principal International human rights treaties' at www.unhchr.ch/report.pfd.

14 Art 6 par 2 of the Declaration on Social Progress and Development proclaimed by Resolution 2542 (XXIV) of the United Nations General Assembly on 11 December 1969.

15 Declaration on the Right to Development adopted by the United Nations General Assembly in Resolution 41/128 of 4 December 1986; art 1 s 1.

states to carry out land reforms that lead to adequate access to land for their people and ensure a decent existence.

It has been suggested that, at a minimum, all people have a moral right to have enough property to enable them to survive or to lead a dignified existence. If they do not have it, society via the state should provide it. In other words, a right to property (in this case, land) should be regarded as a second-generation right or a socio-economic right.¹⁶

In his discussion of property as a human right, Albie Sachs refers to the situation of squatters as setting into contradiction two totally different aspects of property rights: 'the birthright of all human beings to a little piece of space called home, and the rights conferred by the state on holders of title not to be disturbed in their possession.'¹⁷ He argues:

Everyone is entitled to a spot on this earth where he or she can feel safe and be inviolable, sheltered not only from the elements but from the unwanted intrusions of other people . . . Everyone should be guaranteed land or other space on which to have a home and enjoy personal privacy.¹⁸

Although Sachs is concerned with the right of squatters to land for shelter, he goes on to consider the right of farm workers and other propertyless dwellers on private farms to be guaranteed rights to use the land.¹⁹ It is submitted that a right of access to sufficient land for a decent existence should be guaranteed by the state, which should use resources at its disposal and if necessary seek assistance from the international community to fulfil this right.

3 CONSTITUTIONAL FRAMEWORK PROMOTING ACCESS TO LAND

3.1 South Africa

3.1.1 *The Constitution*

South Africa has an extensive property clause in the 1996 Constitution²⁰ which covers the traditional protection of property rights and at the same time provides a framework for land reform, aimed at extending property rights to those who were deprived of or denied these rights over the decades of colonialism and apartheid. As Ackerman J put it, '[t]he purpose of section 25 has to be seen as protecting existing property rights as well as serving the public interest, mainly in the sphere of land reform but not limited thereto, and also as striking a proportionate balance between these two functions'. Referring specifically to the land reform provisions, he says: 'Subsections (2) to (9) of section 25 underline the need for and

16 De Waal J *et al* *The Bill of Rights Handbook* 4ed (2001) 411, relying among others on Waldron J *The Right to Private Property* (1988) 16- 24.

17 Sachs A *Advancing Human Rights in South Africa* (1992) at 68.

18 *Ibid* at 69 and 70.

19 *Ibid* at 70- 72.

20 Constitution of the Republic of South Africa Act 108 of 1996.

aim at redressing one of the most enduring legacies of racial discrimination in the past, namely the grossly unequal distribution of land in South Africa.²¹

Section 25(1) is a negatively phrased right to property. It does not directly guarantee a right to acquire land or other property. It provides that 'No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.' However, the Constitutional Court has indicated that the negative phrasing of the right does not detract from its efficacy. The court noted that there is no universal formulation of the right to property. It confirmed that the negative formulation in the South African Constitution protects the right to acquire and hold property, albeit implicitly.²² Section 25(2) regulates the power of the state to expropriate by requiring that property may be expropriated only in terms of a law of general application –

- (a) for public purposes or in the public interest;
- (b) subject to compensation, the amount, timing and manner of payment of which must be agreed, or decided or approved by court.

The section further provides that compensation must be just and equitable having regard to relevant factors, including those enumerated in section 25(3).

Thus, section 25 guarantees the right of property subject to intervention by the state to regulate the use of or to expropriate private property for public purposes or in the public interest. Significantly, public interest is specifically defined to include 'the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources . . .'.²³

The property clause goes further to include specific provisions on land reform which impose obligations on the state to bring about greater access to land. These provisions embody three different aspects of enhancing access to land: restitution, redistribution and tenure reform respectively. Restitution, discussed in detail below, is framed as a right of those who were dispossessed of property after 19 June 1913 as a result of racially discriminatory laws or practices, to restoration of their property rights or to equitable redress.²⁴ Redistribution refers to the acquisition of land by the state for purposes of distribution to those who have no land or who have inadequate access to land. This is provided for in section 25(5)

21 *First National Bank of SA Limited t/a Wesbank v Commissioner for South African Revenue Services and Another; First national bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (7) BCLR 702 2002 (4) SA 768 (CC), especially at pars 49–50.

22 *Ex parte Chairperson of the Constitutional Assembly In re: Certification of the Constitution of the Republic of South Africa 1996* 1996 (10) BCLR 1 par 72.

23 Constitution s 25(4).

24 Constitution s 25(7). 'Equitable redress' is defined in s 1 of the Restitution of Land Rights Act 1994 as 'any equitable redress, other than restoration of land . . . including (a) the granting of an appropriate right in alternative state-owned land, (b) the payment of compensation'. 19 June 1913 was the date when the notorious Native Land Act of 1913 was promulgated.

of the Constitution, which requires the state to 'take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis'.

This provision imposes a positive right on the state to enhance access to land, although it falls short of calling on the state to provide land to all who need it. It may be said that the provision creates a socio-economic right to claim land from the state. This view is supported by the judgment of the Constitutional Court in *Government of the Republic of South Africa v Grootboom and Others*²⁵ where it is stated that the right to housing and children's right to basic nutrition and shelter 'need to be considered in the context of the cluster of socio-economic rights enshrined in the Constitution. They entrench the right of access to land, to adequate housing and health care, food, water and social security'.

The significance of the constitutional right of the poor who need land for their basic needs is expressed by the court in the statement that '[t]he state must also foster conditions that enable citizens to gain access to land on an equitable basis. Those in need have a corresponding right to demand that this be done'.²⁶ The court emphasised that the Constitution obliges the state to give effect to socio-economic rights and that in appropriate circumstances the courts must enforce these rights.²⁷

The state's obligation to enhance access to land is, however, circumscribed in two ways: first, the obligation is limited to taking 'reasonable legislative and other measures' and, secondly, the state is only obliged to act 'within its available resources'.²⁸ As far as available resources are concerned, it is recognised that the state does not have unlimited resources to satisfy all the legitimate needs of its citizens. Therefore, fulfilment of its constitutional obligations is subject to availability of resources in the context of the other obligations of the state.²⁹ Budgetary allocations are left to the discretion of the executive and the legislature. The issue of deference of the courts to the other branches on matters of budgetary allocation has been dealt with in a number of cases by the Constitutional Court.³⁰ In *Minister of Health v Treatment Action Campaign*, the court expressed itself as follows:

25 2000 (11) BCLR 1169 (CC) (hereafter referred to as *Grootboom*) par 19. In fn 15, Yacoob J reproduces s 25(5) as providing for the socio-economic right of access to land.

26 At par 93.

27 At par 94. S 7(2) of the Constitution states: 'The state must respect, protect, promote and fulfil the rights in the Bill of Rights'.

28 The interpretation of these phrases is discussed in more detail in Lahiff E and Rugege S 'A critical assessment of land redistribution policy in the light of the *Grootboom* judgment' (2002) 6 *Law, Democracy and Development* at 284-291.

29 *Grootboom* (fn 25) at par 41. This limitation is consistent with Art 2 of the International Covenant on Economic, Social and Cultural Rights which states: 'Each State Party to the present Covenant undertakes to take steps, individually and through international co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means . . .'

30 See for instance *Soobramoney v Minister of Health (KZN)* 1998 (1) SA 765 (CC) par 29 and *Grootboom* (fn 25) at par 41.

The courts are not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum core obligation standards should be, nor for deciding how public revenue should most effectively be spent . . . Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet constitutional obligations and to subject the reasonableness of such measures to evaluation.³¹

The third aspect of land reform provided for under the Constitution is tenure reform. This refers to measures to provide security of tenure to persons whose access to land, though lawful, is vulnerable. The Constitution provides that such persons are entitled to secure tenure or comparable redress.³² The provision is aimed at all persons who have insecure tenure rights, including labour tenants and farm workers who, because of laws or policies that denied them secure access to their own land, have been forced to live and work on other people's farms. The provision also covers the insecurity of tenure in communal areas where the majority of black people live under customary tenure or various forms of state permits for the use of land. The Land Reform (Labour Tenants) Act 3 of 1996 addresses the tenure needs of labour tenants, while the Extension of Security of Tenure Act 62 of 1997 deals with other non-owners (called occupiers) living legally on farms. The Interim Protection of Informal Land Rights Act 31 of 1996 protects insecure rights in communal areas as well as other vulnerable occupiers of land not covered by other legislation. However, it is of limited application and was intended as a temporary measure.

A more comprehensive law protecting occupiers of land in communal areas came in the form of the Communal Land Rights Act 11 of 2004.³³ The main thrust of the Act is to improve security of tenure of landholders, giving members of communities on communal land the right to acquire title to the land as a group or as individuals. A community can register as a juristic person with perpetual succession, irrespective of the changing membership of the community, and thereafter acquire land and have it registered in its name.

3.1.2 Recent cases dealing with the right of illegal occupiers to land

No recent case law unequivocally recognises the right to land in the sense of an individual citizen having the right to demand to be provided with a piece of land for his or her needs, in contrast to communities living in desperate conditions as dealt with in *Grootboom*.³⁴ Recent cases have been

31 2002 (5) SA 721 (CC) pars 37-38.

32 S 25(6) provides: 'a person or community whose tenure is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure that is legally secure, or to comparable redress.'

33 By February 2005 the Act had not yet come into force. See Minutes of the Agriculture and Land Affairs Portfolio Committee (fn 4 above).

34 *Grootboom* (fn 25 above) par 19.

those of squatters under threat of eviction seeking alternative land from the state in terms of their right to housing, enshrined in section 26(1) of the Constitution. As indicated in *Grootboom*, the right of access to adequate housing normally implies a right of access to land. This is particularly true in the case of squatters. All they demand is security of tenure on a piece of land where they can construct their shacks.

Building on the judgment of the Constitutional Court in *Grootboom*, the courts have stressed the obligation of the state, in certain circumstances, to provide alternative accommodation in the form of land to communities without land of their own and under threat of eviction from wherever they are squatting. Thus, in *City of Cape Town v Rudolph and others*³⁵ the Cape High Court issued a structural interdict ordering the city to devise a programme for the resettlement of squatters living on its land in unhealthy and deplorable conditions. The city was to report to the court within four months on steps taken to comply. *Rudolph* also stressed that the right to property in section 25(1) has to be balanced against the public interest of protecting people without land and living in desperate conditions.

In *Modderklip Boerdery (Edms) Bpk v President van die RSA en andere*³⁶ the High Court ordered the state to assist in the execution of an eviction order against over 40 000 squatters living on applicant's land. The court declared that the state had an obligation to give effect to the rights of unlawful occupiers to land and housing in terms sections 25(5) and 26(1). The state was given three months to produce a comprehensive plan providing for the ending of unlawful occupation, prioritising a program that would give effect to the community's right of access to land and housing, and providing alternative accommodation for those who did not qualify for government subsidies. On appeal,³⁷ the Supreme Court of Appeal stated that the right to housing in this case was 'limited to the most basic, a small plot on which to erect a shack or the provision of an interim transit camp'.³⁸ The court went on to state: 'In a material respect the state failed in its constitutional duty to protect the rights of Modderklip: it did not provide occupiers with land that could have enabled Modderklip (had it been able) to enforce the eviction order.'³⁹ The court approved the finding of the High Court that the state had not treated Modderklip equally in terms of section 9 of the Constitution in that the latter had to bear 'the heavy burden which rests on the state to provide land to some 40 000 people'.⁴⁰ However, the court did not confirm the structural interdict issued by the trial court. Instead, it substituted an order declaring that applicant was entitled to damages from the state in respect

35 [2003] 3 All SA 517 (C); 2004 (5) SA 39 (C).

36 2003 (6) BCLR 638 (T).

37 *Modder East Squatters v Modderklip Boerdery (Pty) Ltd; Modderklip Boerdery (Pty) Ltd v President of Republic of South Africa and Others* 2004 (8) BCLR 821 (SCA).

38 *Ibid* par 22.

39 *Ibid* par 30.

40 *Ibid*.

of the land occupied by the unlawful occupiers, and declaring that the occupiers were entitled to continue occupying the land until alternative land had been made available to them by the state or the provincial or local authority.⁴¹

The Constitutional Court had another opportunity to deal with the position of illegal occupiers and the right of access to land for housing in *Port Elizabeth Municipality v Various Occupiers*.⁴² With regard to the right to land, Sachs J stated:

There are three salient features of the way the Constitution approaches the interrelationship between land hunger; homelessness and respect for property rights: In the first place, the rights of the dispossessed in relation to land are not generally delineated in unqualified terms as rights intended to be immediately self enforcing. For the main part they presuppose the adoption of legislative and other measures to strengthen existing rights of tenure; open up access to land and progressively provide adequate housing. Thus the Constitution is strongly supportive of orderly land reform, but does not purport to effect transfer of title by constitutional fiat.⁴³

These cases can be seen as supporting the general idea of a right of access to land. However, they are not authority for a right of an individual to claim land from the state. On the other hand, as far as communities are concerned, we can conclude from section 25(5) of the Constitution and its interpretation in *Grootboom* and other cases as discussed above, that in South Africa there is a right to land for those in need of land for survival and to be able to live in dignity.

3.2 Zimbabwe

3.2.1 *The Constitution*

Zimbabwe's Constitution was a result of negotiations between the minority Rhodesian government and the liberation movements, mainly the Patriotic Front comprising the Zimbabwe African National Union (ZANU-PF) and the Zimbabwe African People's Union (ZAPU-PF), and was brokered by Britain, the former colonial power, at Lancaster House in London.⁴⁴ Land was a major issue and almost led to a breakdown of negotiations. Whereas the Rhodesian government and Britain wanted to protect existing land rights almost absolutely, the Patriotic Front insisted on the right of a future majority government to be able to acquire land compulsorily for redistribution with Britain paying compensation to the owners.⁴⁵ Upon assurances that Britain, United States and other countries would 'participate in a multinational donor effort to assist in land, agricultural and economic development programmes', the Patriotic Front agreed

41 *Ibid* par 52.

42 2004 (12) BCLR 1268 (CC).

43 *Ibid* par 20.

44 See Rhodesia 'Report of the Constitutional Conference held at Lancaster House' (1979) September–December <http://home.wanadoo.nl/Rhodesia/lanc2.html> accessed on 21/07/2003.

45 'Land Issue Fact sheet' at [http://www.gta.gov/Land_Issue/fact_lament_programme \(LRRP\)](http://www.gta.gov/Land_Issue/fact_lament_programme_LRRP).

to the proposal that there would be no compulsory acquisition of land but that a willing seller/willing buyer principle would apply to any land acquisition for the first ten years.⁴⁶

The Constitution that formed part of the Lancaster agreement, and became the Constitution of independent Zimbabwe, thus contained a provision protecting private property. Section 16, entitled 'Freedom from Deprivation of Property,' provided that no property shall be compulsorily acquired except under the authority of a law; that reasonable notice of the intention to acquire the property would be given by the acquiring authority to the owner; and that acquisition was reasonably necessary for public purposes or for settlement of land for agricultural purposes in the case of underutilised land. It also provided that where compulsory acquisition took place, the acquiring authority would 'pay promptly adequate compensation'. Where the acquisition was contested, the acquiring authority had to obtain a High Court order confirming the acquisition. If compensation was not agreed upon, the High court could be approached for a determination and the person compensated had the right to remit the money to any country.

Thus, while the Constitution protected the right to property and imposed stringent conditions for expropriation, it did not afford a right of access to land for the landless. Although the Constitution was later amended in a way that eroded the right to property and made it easier for the state to expropriate land for redistribution, the current version of the Constitution still does not provide a socio-economic right of access to land, not even a limited one such as that in section 25(5) of the South African Constitution. Redistribution is only indirectly provided for by permitting the state to compulsorily acquire land which is 'reasonably necessary for settlement for agricultural or other purposes'.⁴⁷ A citizen, however poor or desperate, has no right to demand access to land even where a redistribution programme is in operation. Under the fast-track land reform programme since 2000 any person may apply for land; however, land has been distributed not according to need but partly in accordance with political affiliation.⁴⁸ Although the fact that a community has a historical claim to the land is officially one of the criteria for acquisition of the land, there is no right by an individual or community to the restoration of such land. Unlike South Africa, there is no constitutional or statutory right to restitution of land lost to settlers under colonialism and minority rule.

As far as protection of the right to property against expropriation is concerned, constitutional amendments have eroded such protection considerably. A 1990 amendment changed the requirement to 'pay promptly adequate compensation' to payment of 'fair compensation before or

46 *Ibid.*

47 *Ibid.*

48 Human Rights Watch 'Zimbabwe: Fast track land reform in Zimbabwe' vol 14 No 1(A) at 27-31.

within a reasonable time after acquiring the property'.⁴⁹ A further amendment in 1993 restricted the jurisdiction of the courts to determine compensation for land compulsorily acquired for settlement for agricultural or other purposes.⁵⁰ Whereas previously the owner could seek the determination of compensation by the High Court based on the principle of 'prompt and adequate compensation', the new provision stated that the law providing for compulsory acquisition may:

- (a) specify the principles on which, and the manner in which, compensation for the acquisition of the land or interest or right therein is to be determined and paid;
 - (b) fix, in accordance with principles referred to in paragraph (a), the amount of compensation payable for the acquisition of the land or interest or right therein;
 - (c) fix the period within which compensation shall be paid for the acquisition of the land or interest or right therein;
- and no such law shall be called into question by any court on the ground that compensation provided by the law is not fair.

The principles for the determination of compensation, referred to in section 16(2) of the Constitution, are listed in the schedule to the Land Acquisition Act of 1992.⁵¹ Under these principles, consideration has to be given to a number of factors including the size, nature and condition of the buildings and other improvements on the land, soil types, agricultural and other activities that can be carried out on it, extent of cultivation et-cetera. Compensation for agricultural land for settlement is determined by the Compensation Committee established under the Land Acquisition Act.⁵² The Committee consists of five civil servants from the relevant ministries as well as not more than five other persons appointed by the Minister of Agriculture and Land Affairs. The determination of compensation is thus dominated by the executive. Appeals from the Compensation Committee lie to the Administrative Court,⁵³ which is a regular court of equivalent status to the High Court. However, its jurisdiction on the matter of compensation is circumscribed. Section 29D(3) of the Land Acquisition Act states:

In an appeal in terms of subsection (i), neither the Administrative court nor any other court may set aside an assessment unless the court is satisfied that the Compensation Committee, in making the assessment, did not observe any of the principles prescribed or referred to in section 21 or 29C.⁵⁴

If this provision is read together with the constitutional provision that 'no law shall be called into question by any court on the ground that the compensation provided by that law is not fair', it is clear that the courts

49 Inserted by the Constitution of Zimbabwe Amendment Act 30 of 1990, s 6.

50 Inserted by the Constitution of Zimbabwe Amendment Act 9 of 1993, s 3.

51 Part II of the Schedule to Land Acquisition Act 1992 cap 20:10 as amended.

52 Land Acquisition Act cap 20:10, s 29A.

53 Land Acquisition Act, s 29D(i).

54 *Ibid* s 29D(3).

have a minimal role in the determination of compensation for agricultural land expropriated for resettlement.

A serious blow to claims for compensation of expropriated agricultural land came with the amendment of the Constitution in April 2000 which transferred responsibility for paying compensation for land identified for redistribution from the Zimbabwe government to Britain. Section 16A⁵⁵ reads:

- (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.

The section goes on to spell out factors to be taken into account where compensation is to be paid, that is, where the fund has been set up. Some of the factors which a court must take into account in determining compensation in the absence of agreement are similar to those listed in section 25(3) of the South African Constitution.⁵⁶ As has been observed in the case of South Africa, taking into account factors such as the history of acquisition of the land, and investments or subsidies which the state may have provided in respect of the land, may reduce the amount of compensation considerably below the market value or to nothing at all.⁵⁷ Under the amended Constitution, the Zimbabwe government is only obliged to pay for improvements such as irrigation systems, dams, farmhouses etcetera.⁵⁸

This poses the question: can a country impose an obligation on another country to pay compensation to those expropriated by the former? The moral issue, that Britain made the dispossession of black Zimbabweans possible, is understandable. Legally, however, it is doubtful that such an obligation would be enforceable by any court. While Zimbabwe may be claiming reparations for colonial wrongs committed by Britain, international jurisprudence on reparations for colonial exploitation is still unsettled. Zimbabwean courts have nevertheless had to accept the legality of section 16A since it was validly passed by Parliament. In *Commercial Farmers Union v Minister of Lands and Agriculture & Others*,⁵⁹ the Supreme Court found that section 16A had to be complied with by the government by producing a programme of land reform, which according to the Court was not in existence at the time.

55 Inserted by the Constitution of Zimbabwe Amendment Act 16 of 2000.

56 The Zimbabwe factors include: (a) the history of ownership, use and occupation of the land; (b) the price paid for the land; (c) the cost or value of the improvements on the land; (d) the current use to which the land and any improvements on it are being put; (e) any investments which the state 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.

57 De Waai *et al* (fn 16 above) at 425-6.

58 S16 read with s 16A of the Constitution of Zimbabwe.

59 2000 (12) BCLR 1318 (ZS), also reported as [2001] JOL 7651 (ZS) at 209-10.

In light of the above it seems clear that the constitutional provisions on property rights and access to land are more balanced in the case of South Africa than Zimbabwe. The Zimbabwe provisions give massive powers to the state without assuring the landless of a right to claim access to land and hardly provide any protection of property as such.

4 LEGAL MECHANISMS FOR LAND REDISTRIBUTION

4.1 South Africa

In South Africa there is no comprehensive law providing for mechanisms for redistribution of land in accordance with section 25(5) of the Constitution. There is a pre-1994 law⁶⁰ which was not meant to bring about large-scale redistribution but, rather, to alleviate the more glaring needs for land, especially for housing in overcrowded African townships, and thereby hopefully to avoid radical land distribution by the future black government. This law was amended in 1998⁶¹ to broaden its scope, but remains limited. It empowers the Minister to designate state or private land for acquisition, development and transfer for settlement or for small-scale agricultural purposes to benefit the poor. The state is expected to provide a subsidy or grant⁶² towards the purchase, development or improvement of land. While the grants are insufficient to purchase a sizable piece of land for agricultural purposes, the law envisages individuals pooling their grants to purchase land and share it. The Minister also has the power to expropriate land for redistribution subject to compensating the owner.⁶³

Other laws dealing primarily with other aspects of land redistribution also provide for acquisition of land for specific types of persons in given circumstances. Thus, the Land Reform (Labour Tenants) Act provides for a labour tenant who qualifies as such under the Act to apply for acquisition of the land on which he/she resides or was residing before being evicted,⁶⁴ with the means to purchase such land provided by the State. However, this particular dispensation was only intended to be operative for five years from 1996 and expired in March 2001 after a year's extension by which time, according to the Department of Land Affairs, 21 000 applications had been verified, 19 000 had been found valid and 5 000 applicants had received land.⁶⁵ However, the number of claims settled is disputed by analysts as being too high.⁶⁶

60 Provision of Land and Assistance Act 126 of 1993.

61 *By the Provision of Certain Land for Settlement (Amendment) Act 26 of 1998.*

62 S 10, Provision of Land and Assistance Act 126 of 1999. Currently the subsidy is R16 000.

63 *Ibid* s 12.

64 S 16, Land Reform (Labour Tenants) Act 3 of 1996.

65 See Hall R 'Farm Tenure' in *Evaluating land and agrarian reform in South Africa* Occasional paper series No 3 (2003) at 25.

66 *Ibid*.

Another law that may be used for land redistribution for a dedicated class of persons is the Extension of Security of Tenure Act,⁶⁷ aimed at providing security of tenure to occupiers living on other people's land in rural areas. This Act affects mainly current and former farm workers and their families living on commercial farms, and provides that such occupiers may apply to the Department of Land Affairs for acquisition of the land on which they are residing, or other land to be provided by the owner of the land on which they reside, or made available by other persons or institutions such as local government.⁶⁸

The Development Facilitation Act⁶⁹ is equally limited in its scope and its effect on redistribution. This Act is largely aimed at accelerating development of land for settlement by bypassing cumbersome sub-division, planning and building regulations that are ordinarily required in the development of a township. Again it empowers the Minister to designate land for development and provides mechanisms for approval of development plans by special tribunals. However, although the developed areas are ultimately allocated to individual owners, this law cannot be said to have a serious impact on making land available to those who need it, and certainly not for purposes of producing food.

A significant piece of legislation is the Restitution of Land Rights Act,⁷⁰ enabling persons or descendants of persons dispossessed of rights in land after 19 June 1913, as a result of racially discriminatory laws or practices, to get restoration of those rights or equitable relief such as alternative state-owned land or compensation.⁷¹ Although the Act has the effect of transferring land from current white owners to black individuals or communities, it is still limited in its scope and effect because its 1913 cut-off date excludes many potential claimants who were dispossessed before 1913. It is also limited in the sense that only persons or their descendants who were dispossessed of their rights in land due to discriminatory laws or practice may qualify for redress. At the end of the restitution process, when all the 79 694⁷² claims have been settled, a large proportion of agricultural land in South Africa will still be in the hands of a few thousand white farmers. The Act therefore cannot be depended on either to bring about equity in the distribution of land or to alleviate the overcrowding in the rural areas and the urban townships. As of 30 June 2003, with almost half the claims settled, only 757 272 hectares have been transferred.⁷³

67 Act 62 of 1997.

68 *Ibid* s 4.

69 Act 67 of 1995.

70 Act 22 of 1994

71 *Ibid* s 2.

72 Commission on Restitution of Land Rights *Annual Report* April 2002–March 2003. The number of claims reported had increased from the 68 878 previously reported, as it was discovered during the validation exercise that some claim forms included more than one plot of land or different valid land rights.

73 Department of Land Affairs website: <http://land.pwv.gov.za/restitution>. Accessed 8/8/2003. The latest statistics on the Department's website do not show how much land

[continued on next page]

While this is a significant achievement in terms of processing claims, even double that amount of land would still be less than 2% of the land held by white commercial farmers.⁷⁴

However, the majority of claims settled so far have been urban claims involving small plots of land and most have been settled through monetary compensation. Most of the rural claims, involving thousands of hectares and involving thousands of claimants, are still to be settled and will hopefully involve substantial transfers of land.⁷⁵ The 2003 amendment to the Restitution of Land Rights Act,⁷⁶ strengthening the powers of the Minister to expropriate land for restitution purposes, may to some extent speed up the pace of land delivery by shortening the expropriation procedure in certain circumstances. It is particularly relevant in respect of the Minister acquiring land to award to dispossessed persons who for some reason do not satisfy the criteria in section 2 of the Act but are entitled to assistance in terms of section 6.⁷⁷ Nevertheless, the skewed land ownership setting can only be substantially transformed through redistribution. There is thus a need for a comprehensive land redistribution law, providing for rights of potential beneficiaries and responsibilities of the state through its local, provincial and national organs to accomplish the purpose of section 25(5) of the Constitution.⁷⁸ However, the absence of a comprehensive piece of legislation cannot entirely account for the slow pace of redistribution, which has seen only about 3% of the land redistributed from the large commercial farmers since the end of apartheid.⁷⁹

4.2 Zimbabwe

In Zimbabwe, unlike South Africa, there is a comprehensive law dedicated to land redistribution. The Constitution of Zimbabwe protected property

has been transferred under the programme but indicate that the number of claims settled have increased to 48 825. Of these, 36% were settled with land restoration. Department of Land Affairs: *Cumulative Statistics on settled restitution claims 1995 - 31 March 2004* <http://land.pwv.gov.za/restitution>.

74 In 2000 the commercial farming sector outside the former homelands covered 82 209 571 hectares. Department of Agriculture *Abstracts of Agricultural statistics* (2001).

75 *Ibid* at 5. The annual report states that although rural claims constitute only 20% of all claims, they affect the largest numbers of the rural poor and they involve the largest tracts of land. It gives the example of one claim in Kwazulu-Natal involving 43 000 hectares and involving more than 1 000 households.

76 Restitution of Land Rights (Amendment) Act 48 of 2003, inserting s 42E.

77 *Ibid* s 42E(a)(ii).

78 See Lahiff and Rugege (fn 28 above).

79 The Minister of Agriculture and Land Affairs was quoted in *Business Day* in October 2000 as saying that only 0.81% of farmland had been redistributed since 1994. At the end of 2001 government reported that 1 006 135 hectares of land had been redistributed or approved for redistribution, including state land. Dr GP Mayende *Media Briefing* Department of Land Affairs at <http://land.pwv.gov.za/news/2000mediabriefing.html>. In February 2004, Ms Van der Merwe of the Department of Land Affairs stated that between 1994 and 1999 only 1% of land had been delivered but that, under LRAD since 2001, 2% had been delivered and, therefore, the process was picking up. See Agriculture and Land Affairs Portfolio Committee (fn 4 above).

against compulsory acquisition except in terms of a law that provided for reasonable notice, adequate compensation and appeal procedures among other things. The Land Acquisition Act of 1985 was enacted for this purpose, taking into account the willing seller/willing buyer principle agreed upon at Lancaster House. The Act gave the State the right of first refusal in respect of all large-scale farms coming onto the market for purposes of resettlement of black Zimbabweans. After the expiry of the 10-year Lancaster 'sunset clause', a new Land Acquisition Act⁸⁰ was passed to enable the state to accelerate land acquisition, unhampered by a willing seller/willing buyer restriction.

The Land Acquisition Act of 1992 has been amended several times, especially since 2000. Its main aspects are procedures for the compulsory acquisition of land and provision for compensation where relevant. Section 3 authorises the President or any Minister authorised by him to compulsorily acquire land. In particular, subsection (1) authorises compulsory acquisition of:

any rural land, where the acquisition is reasonably necessary for the utilisation of that or any other land:

- (i) for settlement for agricultural or other purposes, or
- (ii) for purposes of land reorganisation, environmental conservation or the utilisation of wildlife or other natural resources; or
- (iii) for the relocation of persons dispossessed in consequence of the utilisation of land for a purpose referred to in subparagraph (i) or (ii).

The Act excludes acquisition of communal land covered by the Communal Land Act. It is therefore clearly aimed at the commercial farms.

An important provision is the requirement of a preliminary notice of compulsory acquisition. Where an acquiring authority intends to acquire any land other than by agreement, it is required to publish a preliminary notice describing the nature and extent of the land intended for acquisition, setting out the purposes for which it is to be acquired and calling upon the owner or occupier or any other person having an interest or right in the land who wishes to contest the acquisition, to lodge a written objection with the acquiring authority within 30 days.⁸¹ Where the owner or other interested person wishes to claim compensation, he or she may do so in accordance with section 20 if the claim is not for compensation for agricultural land required for agricultural purposes. However, where the claim is for compensation for land required for agricultural purposes, it is subject to the condition that the former colonial authority has set up a fund for compensating such claims.

80 Cap 20:10 of 1992.

81 *Ibid* s 5. The notice is in accordance with s 16(i)(b) of the Constitution which requires 'the acquiring authority to give reasonable notice of the intention to acquire the property, interest or right to any person owning the property or having any other interest or right therein that would be affected by such acquisition'.

The preliminary notice must be served on the owner and the holder of any other registered real right in the land to be acquired.⁸² In one case the High Court held that failure to serve notice on a mortgage holder rendered both the preliminary (section 5) notice and the final (section 8) order null and void. Previously, a number of compulsory acquisitions had been nullified due to the failure of the state to serve the preliminary notice on the owners and proceeding with final orders to vacate the farms.

Subsequent amendments have further undermined the reasonable notice requirement. In terms of section 8 of the Land Acquisition Act the state may issue an order acquiring the land that is the subject of a preliminary notice. Where such an order is issued, ownership immediately passes to the acquiring authority subject to confirmation of the order by the Administrative Court in case of objection. The State may demarcate and allocate the land concerned for agricultural purposes. It is emphasised that ownership passes to the State upon the order of acquisition being issued, whether or not compensation has been agreed upon, fixed or paid. Interference with the exercise of the rights of ownership by the State is an offence for which the violator is liable to a fine of Z\$20 000 or two years' imprisonment or both.

This provision has been used to justify disruption of farming operations, demarcation and allocation of plots to land invaders since 2000. In *Minister of Land and Agriculture & Others v CFU*⁸³ the respondent farmers' union argued that farming operations were being interfered with and that land was being demarcated and allocated to the land invaders. The new Chief Justice, Chidyausiku, held that the white farmers had no rights in the land that could be interfered with since, immediately upon being served with acquisition orders, they lost all claim to the land and any farming activity carried on by them was at the pleasure of the state. Although ownership passes upon expropriation in other countries, including South Africa, it is accepted that ownership passes subject to the payment of fair compensation agreed or determined by a court of law. In the case of Zimbabwe there is no assurance of compensation. By June 2002, 2 443 farms or 51 % of all white farms were under section 8 acquisition orders.

An owner whose land is expropriated is given not less than three months to vacate non-agricultural land. In the case of agricultural land required for resettlement, the owner or occupier may be given not less than 45 days to cease to occupy and use the land in question. If he/she fails to comply with the notice, he/she is liable to be evicted by order of court and commits an offence for which he/she is liable to a fine of not more than \$20 000 or two years imprisonment or both. Many white farmers are currently facing charges of failure to comply with section 8 acquisition orders and eviction orders.

82 Before the Land Acquisition (Amendment) Act 15 of 2000 was enacted, the section required notice to be served on 'any other person, who it appears to the acquiring authority may suffer loss or deprivation of rights by such acquisition whose whereabouts are ascertainable after diligent inquiry'.

83 [2002] JOL 9495 (ZSC).

It may be concluded that Zimbabwe had an effective tool in the Land Acquisition Act as originally enacted but has amended it in such a way that the State is able to dispossess owners of land without regard to due process of the law. As will be argued below, this so-called reform process has not come close to satisfying the needs of the poor peasants as originally intended.

5 IMPLEMENTATION OF LAND REDISTRIBUTION IN SOUTH AFRICA AND ZIMBABWE

5.1 South Africa

5.1.1 Programmes, plans and strategies for land redistribution

When it came into power in 1994 the newly-elected democratic government announced land reform as one of its priorities. In its original policy document, the Reconstruction and Development Programme (RDP), it set itself the target of transferring 30% of all agricultural land within five years.⁸⁴ This document informed the drafting of the White Paper on South African Land Policy⁸⁵ which committed the government to land reform, including land redistribution. The purpose of land redistribution, according to the White paper, is 'to provide the poor with access to land for residential and productive uses, in order to improve their income and quality of life. The programme aims to assist the poor, labour tenants, farm workers, women, as well as emergent farmers.'⁸⁶

From the outset the State opted for market-oriented methods of acquiring land. Although the Constitution permits expropriation of land for public purposes or in the public interest, the White Paper stated that '[r]edistributive land reform will be largely based on willing-buyer/willing-seller arrangements . . . Expropriation will be used as an instrument of last resort where urgent land needs cannot be met, for various reasons, through voluntary market transactions'.⁸⁷ So far the state has not once used its power to expropriate land, although it has often complained that land owners are unwilling to avail land for redistribution or pitch their prices too high.

Targets have, however, been changing since 1994, probably due to the failure to achieve the promised targets. Whereas in February 2000 the government's stated intention was to 'distribute at least 15% of farmland in five years',⁸⁸ in June 2001 the target reverted to 30% of agricultural land, but this time 'over a period of 15 years'.⁸⁹ In any case, redistribution

84 African National Congress 'Reconstruction and development programme (RDP)' (1994) *A Policy Framework*.

85 Department of Land Affairs *White paper on South African land policy* (1997).

86 *Ibid* at par 4.3.

87 *Ibid* at pars 4.3 and 4.4.

88 Department of Land Affairs *Ministerial policy statement* (2000).

89 Department of Land Affairs Media Release 'Minister Didiza to launch LRAD sub-programme in Nkomazi, Mpumalanga' (2001).

has not come anywhere close to achieving these targets. It has been estimated that, to achieve the 30% target, the State would have to redistribute 1,64 million hectares per annum.⁹⁰ Yet less than one million hectares were redistributed between 1994 and 2000, representing only 1% of commercial agricultural land.⁹¹ There has been some improvement under the Land Redistribution for Agricultural Development programme (LRAD), with another 2% delivered between 2001 and 2004. Nevertheless, it is unlikely that 24,7 million hectares will be distributed in 15 years. Achieving this target would require distributing on average 1,87 million hectares a year, which is not feasible under current budget conditions.

According to the Department of Land Affairs' Medium Term Strategic Plan for 2003-2007, a total of 867 641 hectares will be redistributed during the four years from 2003/04. This is an average of 216 910 hectares per annum, or 11,6% of the 1,87 million hectares required to achieve the 30% target in 15 years. This calls into question whether the demand-led approach can achieve this target even in 20 years.

The two principal redistributive mechanisms used by the State thus far, the Settlement/Land Acquisition Grant (SLAG) and the Land Redistribution for Agricultural Development programme (LRAD), will now be considered briefly.

5.1.2 *Settlement/Land Acquisition Grant*

SLAG was the main mechanism for land redistribution until 1999. Although it has not been abandoned, it has been overtaken by LRAD as the main vehicle of redistribution. Under SLAG, the state provided a standard subsidy of R16 000 per household to be used among other things for acquisition of land, improvement of land, acquisition of farm capital items and enhancing tenure rights. This subsidy is also supposed to cover the needs of the poor for a modest dwelling and/or a productive land ownership opportunity. Given that the amount is very small, it is expected that groups of poor households may pool their subsidies, and possibly access loans, to purchase agricultural land which they could own jointly and operate as a farm or sub-divide as individual farms.

Farm workers or former farm workers are encouraged to use the SLAG subsidy plus loan finance to purchase equity shares in farms. In addition, national government provides funds to municipalities for purchasing land in or around rural towns to be used by poor communities for grazing or as small garden areas to supplement incomes.

5.1.3 *Land Redistribution for Agricultural Development programme (LRAD)*

LRAD is currently the dominant redistribution mechanism. In a policy statement in February 2000, the new Minister of Agriculture and Land

90 According to Department of Land Affairs figures in 2000 *Annual Report Department of Land Affairs 2000-2001*.

91 *Business Day* 9 October 2000, quoting the Minister of Lands and Agriculture.

Affairs expressed dissatisfaction with the nature and application of SLAG. LRAD was drafted in 2000 and launched in August 2001. The major aspect of the programme is that grants are subject to an own contribution from the applicant. The minimum contribution is R5 000, qualifying an applicant to get the minimum grant of R20 000. A contribution of R400 000 would qualify an applicant to access the maximum R100 000.⁹² The lower-scale grants are supposed to be used to provide a food safety-net for the very poor – in other words, to engage in subsistence agriculture. However, the higher the grant the more it is expected of the beneficiary to produce for the market. At the higher end of the scale, the objective is to promote emerging black commercial farmers and use land redistribution 'as a mechanism to facilitate long-term structural change in agriculture'.⁹³

It would appear that emphasis has shifted from the poor and marginalised to emerging commercial farmers as the primary beneficiaries of redistribution programmes. This conclusion is supported by statements from the government. In his end-of-year Media Briefing for 2002, the Director-General of Land Affairs gave figures for redistribution under LRAD, but did not indicate how much of the land had gone to the poor and how much to emerging farmers. Under LRAD, it was stated, 260 000 hectares of agricultural land had been transferred to emerging black farmers, benefiting 16 037 emerging black farmers.⁹⁴ In April 2003 the Minister of Agriculture and Land Affairs announced that between 1 April 2002 and 30 March 2003, 185 609 hectares had been transferred under LRAD, with 8 139 hectares going to 'previously disadvantaged beneficiaries, including labour tenants'⁹⁵ – in other words, only 4.4 % of the total.

Besides the apparent state bias in favour of commercial farming, it is likely that the own contribution requirement will exclude potential beneficiaries among the poor from accessing grants. Although such contribution may be made in cash, in kind or in labour, the poor are unlikely to have farming implements or animals to pledge as contribution, or be able to spare enough labour for market-related projects, because much of their time is spent on survival activities. It is true that an own contribution is an incentive for potential beneficiaries to take the project seriously, but it would seem punitive to demand R5 000 of the very poor before they can have access to land for their very survival. For those in desperate need of land, the constitutional right of access to and as interpreted in *Grootboom*, is unlikely to be realised under LRAD. This is not to suggest that potential black farmers with the capacity and commitment to engage in medium to large-scale commercial farming should not be assisted to purchase farms.

92 Ministry of Agriculture and Land Affairs *Land redistribution for agricultural development: A sub-programme of the Land Redistribution programme* (2001).

93 Department of Land Affairs: Policy statement by the Minister of Agriculture and Land Affairs on 'Strategic directions on land issues' (2000) p 13.

94 See Mayende (fn 79 above).

95 Ministry of Agriculture and Land Affairs *Land affairs budget vote 2003-2004: Budget speech by Minister Thoko Didiza, National Council of Provinces* (2003) at <http://land.pwv.gov.za>.

Currently, large-scale commercial agriculture is virtually a monopoly of fewer than 60 000 white farmers. A programme that promotes greater access to land for the black majority and the resultant sharing of means of wealth-creation in agriculture is likely to promote reconciliation among black and white. Unlike Zimbabwe, there is no evidence of corruption and cronyism in land allocation. However, the primary purpose of land reform should revert to alleviating poverty and ensuring a dignified existence for the majority of the country's citizens.

Despite the fact that the government has not achieved its ambitious target set in 1994, there is evidence of progress in land redistribution and that it has come about in an orderly manner. Although there have been occasional land invasions by landless people,⁹⁶ the invasions have often been ended through negotiations. It does not appear as if South Africa is about to be engulfed in a wave of Zimbabwe-style land invasions.

5.2 Zimbabwe

5.2.1 Background

Zimbabwe has one type of land reform – that is, the Land Reform and Resettlement Programme – which involves state acquisition of land and resettlement. The primary purpose from the outset was to ease the congestion in communal areas. According to the government, additional objectives were:

- To reduce the extent and intensity of poverty among rural families and farm workers by providing them with adequate land for agricultural use . . . ;
- to increase the contribution of agriculture to GDP by increasing the number of commercial small-scale farmers using formerly under-utilised land; and
- to increase the conditions for sustainable peace and social stability by removing imbalances in land ownership.⁹⁷

Four groups of beneficiaries were targeted: (i) families from overpopulated communal villages; (ii) people with training in agriculture; (iii) 'indigenous people intent on making a break-through in commercial agriculture'; and (iv) special groups such as women.⁹⁸ The official target was to acquire 8,3 million hectares from large-scale commercial farmers for redistribution⁹⁹ to resettle 524 890 households.

The resettlement programme has a number of models of resettlement and use of land, in particular Model A1 (villagised) and Model A2

96 According to COHRE there were 12 land invasions in South Africa in the year between June 2000 and July 2001. COHRE *op cit* Annex 7.

97 Government of Zimbabwe (fn 5 above).

98 *Ibid.*

99 COHRE (fn 8 above) Table 3. Moyo 'The interaction of market and compulsory land acquisition processes with social action in Zimbabwe land reform' (2000) Paper presented at the annual colloquium on regional integration.

(self-contained units). In Model A1 each settler is allocated a residential plot and an individual arable plot with communally-shared grazing, wood lots and water points. In Model A2 each settler is given a self-contained unit with a residential, arable and grazing lot. There is also a separate model applicable to drier areas where the land is used largely for ranching rather than crop agriculture. Alternative models, including those where the community gets land from government but plans its own settlement and use, private sector involvement with government support and a model where the community identifies, negotiates and purchases the land with government support, have been considered but not implemented.

Thus, Zimbabwe's original vision of land reform was similar to the South African redistribution programme in the sense of making land available to previously marginalised groups as well as tackling the issue of equity in land distribution by assisting emerging black communal farmers. The major difference has been that South Africa adopted a market-based, demand-driven approach, expecting potential beneficiaries to identify land, negotiate with the owner and then seek State assistance. In Zimbabwe the policy and practice has been for the State to identify land, acquire it through negotiated purchase or compulsory acquisition and then call on people to apply for allocation and resettlement. The process at local level is officially representative, involving representatives of rural district councils (RDCs), traditional leaders and war veterans' associations on the committees.¹⁰⁰ Whereas these processes appear to have worked in the first phase of land reform,¹⁰¹ they have largely been ignored under the Phase II or "Fast-Track" resettlement programme announced in 1997.

5.2.2 Approach followed

Zimbabwe has followed a supply-led approach. Officially, the identification of land to be acquired for resettlement is based on five categories: (i) under-utilised land; (ii) derelict land; (iii) multiple ownership (ie owners have more than one farm); (iv) land belonging to absentee owners; and (v) land contiguous to congested communal areas.¹⁰² However, it is clear that the Zimbabwe government has not strictly abided by these criteria under the 'fast track' programme since the land invasions of 2000 begun. Even before the land invasions it appears that land identification was not in accordance with the set criteria, probably due to sloppiness of the officials concerned or because the State only paid lip-service to the criteria. By its own admission, government has de-listed 510 farms out of 1 471 farms listed for acquisition in 1997 due to various reasons, including that some

100 Land Reform and Resettlement Programme: Revised Phase II par 3.3.6.

101 From 1980 to 1997.

102 Government of Zimbabwe 'Brief for negotiations on the land reform and resettlement programme between the Zimbabwean and the British governments' (undated) <http://www.gta.gov.zw/Land%20Issues/LAND.htm> at 4.

of the owners had only one farm while others belonged to indigenous owners.¹⁰³

Despite the constraints imposed by the willing-seller/willing-buyer rule, the supply-led model of redistribution had substantial success in the first decade of independence. Between 1980 and 1989 about 73 000 families out of 162 000 were resettled on 3,5 million hectares, 0,5 million hectares of which was former state land in the large and small scale communal sectors not yet alienated.¹⁰⁴ Given the constraints, this seems a better record than South Africa during the period from 1994 to 2002.¹⁰⁵ COHRE attributes this 'relatively rapid progress' in the 1980s as being 'in part due to the post-liberation energy and enthusiasm of the new government, in a context of urgently needed reconstruction, but also because the British government honoured its commitment to cover the acquisition and a portion of the resettlement costs'.¹⁰⁶

A number of analysts observe, and the government of Zimbabwe itself acknowledges, that land reform slowed down in the 1990s despite the expiry of the ten-year 'sunset clause'.¹⁰⁷ Although the amended Constitution and the Land Acquisition Act of 1992 gave the State the authority to expropriate land for resettlement, only 0.3 million hectares were transferred from 1990 to 1999 as opposed to the government's target of 8.3 million.¹⁰⁸ A number of reasons are cited for this dismal performance, the major ones being (i) lack of outside funding, (ii) the Economic Structural Adjustment Programme of the World Bank, (iii) failure of the State to commit sufficient funds from its own budget, and (iv) the shift in policy in the 1990s from assistance to the poor peasants to settlement of individual black commercial farmers, with many farms going to highly-placed government officials and party supporters in the name of economic empowerment.¹⁰⁹ In addition, while the policy shift to support of black elites in itself might not necessarily have led to a slowdown in land acquisition, the apparent prevalence of cronyism and corruption led to Britain and other donors (including the World Bank) withholding funding for land reform.¹¹⁰

In this context it is disturbing to note that peasants who were resettled may be in danger of losing their land to the elites. According to a 2003 report, 180 peasant farmers in the Goromonzi District of Mashonaland

103 *Ibid* at 5.

104 *Ibid* at 3. See also COHRE *Land, housing and property rights in Zimbabwe* (2001) Africa Mission Report Table 3 at 15. These figures are based on Adarut M *Breaking ground: Development assistance for land reform* (2000). COHRE puts the number of resettled families on the 3 million hectares acquired from commercial farmers at 'more than 50 000 families' (at 16). Moyo *The land question in Zimbabwe* (1995) puts the number resettled on the 3.5 million hectares at 71 000 families.

105 See the discussion in parts 4.1 and 5.1 above.

106 COHRE (fn 8 above) at 16. The British government is said to have contributed about £33 million for land reform.

107 *Ibid* at 15.

108 *Ibid* at 15 Table 3.

109 *Ibid* at 16. See also Campbell H *Reclaiming Zimbabwe* (2003) at 103 and 122-3, 146.

110 Campbell *ibid* at 122-3.

East were being threatened with eviction by the provincial governor who claimed that the land had always been earmarked for commercial (ie, A2 model) farming.

5.2.3 International Conference On Land Reform in Zimbabwe: An attempt at a fresh start?

In September 1998 an International Donor Conference on land reform in Zimbabwe was held in Harare in the hope of raising funds to fund the programme and avoid further land invasions. Donors were hoping to put off the threat by the Zimbabwe government to expropriate 1 471 listed farms with the launch of its Land Reform and Resettlement Programme Phase II in November 1997. Although less than US\$100 million was pledged, donors imposed conditionalities including the willing seller/willing buyer principle, transparency in selection of beneficiaries and consultation with stakeholders and partners.¹¹¹ Thompson points out that, according to experts, Zimbabwe needed about US\$40 billion to redistribute land on the basis of market-price compensation and providing inputs to new farmers. By 2000, however, it had received only US\$45 million. She concludes: 'Even if all conditionalities were honoured by the government, international support does not begin to address the multi-billion dollar effort'.¹¹²

Thus, the international donor community is partly to blame for the chaos that erupted in Zimbabwe in 2000. It has been observed that the Zimbabwe government made an attempt to play by the rules of the Donors' Conference during 1998 to 1999 but its efforts were frustrated by 'legal resistance and outright obstruction by affected land owners, and a conspicuous absence of donor funding'.¹¹³ Although some progress was made in land acquisition, it was not enough to convince war veterans and others that government was doing enough. Against this background occupations resumed and, in reaction, government served acquisition orders in respect of 841 of the 1 471 farms that had been listed in 1997. However, legal challenges in the courts did not allow the acquisitions to go ahead as the State had failed to apply for confirmation of the orders in terms of the Land Acquisition Act.¹¹⁴ This legal frustration also played a part in the stance adopted by the Mugabe regime in ignoring the rule of law after 2000.

5.2.4 Land Invasions and the reform process in Zimbabwe

During the late 1990s war veterans, landless peasants and unemployed persons, impatient with the pace of land reform, sporadically occupied

111 Communiqué issued after the 1998 Donors' Conference on Land Reform and Resettlement in Zimbabwe, 9-11 September 1998, Harare.

112 Thompson C 'Zimbabwe: Intersection of human rights, land reform, and regional security' *Foreign policy in focus: Global affairs commentary* (2000).

113 COHRE (fn 8 above) at 20.

114 Government of Zimbabwe (fn 5 above) at 5.

white-owned commercial farms. This coincided with economic problems which brought together sections of civil society into forming a political opposition that was to become the Movement for Democratic Change.¹¹⁵ This, in turn, led Mugabe to exploit the land question by seeking to change the Constitution in a way that would enable him to seize white farms without compensation and use this land to buy popular support for keeping ZANU-PF in power. A draft Constitution was put together by a constitutional commission appointed by Mugabe and dominated by ZANU-PF, giving more powers to the President and including a clause for the compulsory acquisition of land without compensation. This prompted the Commercial Farmers' Union to campaign against the draft and to mobilise farm workers against it. Because of the draconian powers accorded to the executive, it was also opposed by civil society organisations, including the trade union movement led by Morgan Tsvangirai. In a referendum held in February 2000 the draft Constitution was rejected by 55% of the 1.3 million votes cast. This defeat led an incensed Mugabe to push for the power to carry out expropriations without compensation. In April 2000 the Constitution was amended by inserting section 16A which, as indicated above, purports to transfer the obligation to pay compensation for expropriated land from the acquiring authority, the Zimbabwe government, to a third party, the British government.

Soon after the referendum, land invasions by self-styled war veterans and supporters of the ruling ZANU-PF started with the active or passive support of the army and police. Although some government officials called on the invaders to leave the farms, President Mugabe encouraged the farm occupations to continue.¹¹⁶ In 2000 alone 1 600 farms were occupied by war veterans and ruling party supporters. This, however, did not improve the situation of the landless. The occupations were haphazard and bore no relation to the land needs of the populace. Officially, those in need of land are supposed to fill in a form available from a district administrator or Rural Development Council and apply through their RDCs to be allocated land as it becomes available.¹¹⁷ However, the occupations since 2000 were largely based on political affiliation.¹¹⁸ This was made worse by the fact that parliamentary elections were due in July 2000. As COHRE put it:

During the build-up to the elections, the ruling party skilfully manipulated the land issue for blatant political ends. Government support for the occupiers reaffirmed the party's position as champion of the landless poor. Moreover, it gave the ruling party a visible profile in the farming areas and, with that, allegedly a base from which to intimidate voters.¹¹⁹

115 On the economic crisis before the land invasions see Human Rights Watch (fn 48 above) at 8-9.

116 COHRE (fn 8 above) at 28.

117 Land Reform and Resettlement Programme: Revised Phase, quoted in Human Rights Watch (fn 48 above) at 12.

118 Human Rights Watch (fn 48 above) at 27-31.

119 COHRE (fn 8 above) at 31.

The occupiers, however, were not secure on the land they were allocated by their ZANU-PF or war veteran leaders. No records of allocations were kept and no documents issued.

5.2.5 *Legal challenges to the land invasions*

The land invasions were challenged by the Commercial Farmers Union in the courts. The courts issued a number of orders to government to end the invasions and evict the squatters.¹²⁰ The government ignored the orders and instead embarked on a campaign of intimidation against the judiciary, accusing it of subverting government programmes for land reform. Several judges, beginning with Chief Justice Gubbay, were forced to resign and replaced with judges thought to be sympathetic to the regime.¹²¹

Following the countrywide farm occupations in February 2000, the CFU brought an application before the High Court seeking an order against the leader of the veterans and the Commissioner of Police declaring the occupation of farms illegal. The order was granted by consent and ordered the illegal occupiers to vacate within 24 hours. The Commissioner of Police was directed to instruct his officers and members to enforce the law.¹²² The police, however, did not enforce the order and, instead, the Commissioner of Police filed an application in the High Court to have the order varied on the grounds that he did not have the manpower to enforce the order and that, in any case, it was a political matter which required a political solution. The court dismissed the application and again ordered the Commissioner of Police to enforce the law by ensuring the illegal occupiers vacated the white commercial farms.¹²³

In a later case, in December 2000,¹²⁴ the earlier orders not having been carried out, the Supreme Court again ordered the government to remove

120 For instance in *Commercial Farmers Union v Commissioner of Police and Others* Case No HC 3544/2000; *Commissioner of Police v Commercial Farmers Union* 2000 (9) BCLR 956 (Z); 2000 (1) ZLR 503 and *Commercial Farmers Union v The Minister of Land and Agriculture & Others* 2001 (3) BCLR 197 (ZS); [2001] JOL 7911 (ZS).

121 See Bean D 'Life, death and justice' (2002) *The Independent* (UK) at <http://independent.co.uk/uk/legal/story.jsp?story=330057>. Bean quotes former Chief Justice Gubbay as follows: 'Most disturbing was the harassment of the High Court and Supreme Court judges by war veterans. They called on the judges to resign or face removal by force. The Minister of Information spearheaded the campaign by accusing the Supreme Court of being biased in favour of white farmers at the expense of the landless majority.' Elsewhere the former Chief Justice stated that '[t]he invasion of the Supreme Court building on the morning of 24 November 2000, by close to two hundred war veterans and followers can only be described as disgraceful . . . Such deplorable behaviour sent the clearest message that the rule of law was not to be respected . . . Disappointingly, but perhaps expectedly, there was no official condemnation of the incident': Gubbay AR *The Challenge to Judicial Independence: First South Asian Regional Judicial Colloquium on Access to Justice* New Delhi November 2002.

122 *Commercial Farmers Union v Commissioner of Police and Others* Case No HC 3544/2000.

123 *Commissioner of Police v Commercial Farmers Union* 2000 (9) BCLR 956 (Z); 2000 (1) ZLR 503.

124 *Commercial Farmers Union v The Minister of Land and Agriculture & Others* 2001 (3) BCLR 197 (ZS); [2001] JOL 7911 (ZS).

the illegal occupiers and ensure the rule of law was restored to the commercial farming areas. It pointed out that the government had failed to obey its own law by ignoring the procedures for land reform set out in the Land Acquisition Act. The court risked angering the government further by holding as follows:

Government is unwilling to carry out a sustainable programme of land reform in terms of its own law. The first thing to be done is to return to lawfulness . . . All indications are that the Government has overreached itself in the number of farms listed, both from the point of view of the financial resources available and of the administrative capacity not only to handle the acquisition exercise, but also to cope with the very large burden that will be thrown upon the Administrative Court.¹²⁵

At the same time, the court used some unfortunate language, which was subsequently exploited by the government, in expressing the view that:

[a] huge problem has been created. Thousands of people have been permitted and encouraged to invade properties unlawfully. They have no right to be there. The situation will not be easy to resolve, but it must be resolved. Either their presence must be legalised, or they must be removed.¹²⁶

Although the court granted an interdict prohibiting the government from proceeding with the land acquisition process, its operation was suspended until 1 July 2001 to allow the government to produce a workable programme of land reform and satisfy the court that the rule of law had been restored in the commercial farming areas. The order, however, was interpreted by the government to mean that it could pass a law making the unlawful occupations legal. The result was the Rural Land Occupiers (Protection from Eviction) Act,¹²⁷ protecting land invaders who were in occupation as of 1 March 2001 and who were still in occupation as of the commencement of the Act on 5 June 2001.

The Act provides that, notwithstanding anything to the contrary in any other law, no court shall issue any order for the recovery of possession from such a protected occupier of any rural land or ejection therefrom or the payment of damages by such occupier in respect of the occupation during the period of protected occupation.¹²⁸ Orders of court which had already been issued to this effect were suspended¹²⁹ and protected occupiers were further immunised against criminal prosecution for trespass. The effect was that the land invaders were protected for as long as possible while the State took its time in satisfying the procedural requirements for acquisition of the land. Interestingly, the Act does not bind the State and no person is deemed a protected occupier on State land. A protected

125 *Ibid* at 213D and G.

126 *Ibid* at 213E.

127 Rural Land Occupiers (Protection from Eviction) Act 13 of 2001 Cap 20:26.

128 The period of protected occupation is defined as the period during which a preliminary notice is in force or where the matter is pending before the Administrative Court or, where confirmation of acquisition has been refused, a period of one year after the date of such refusal: *ibid* s 4.

129 *Ibid* at s 3(2) and (3).

occupier also ceases to be one if the title to the land subject to an acquisition order passes to the State.¹³⁰

Clearly, the State is using landless peasants for its political purpose: to terrorise the white farmers off the land. Once the State has the land, however, the invaders lose their protected status unless they are confirmed by the State and become state tenants. The Rural Land Occupiers (Protection from Eviction) Act is a blatant example of abuse of legislative authority to violate human rights guaranteed by the Constitution and to subvert the rule of law.

Following the forced resignations of the Chief Justice and other judges and their replacement, the State was able to have the land invasions issue resolved in its favour. In *Minister of Land and Agriculture v Commercial Farmers Union*¹³¹ the new Chief Justice, Chidyausiku, found that the government had complied with the conditions for suspending the interdict. He held that the Rural Land Occupiers (Protection from Eviction) Act served to restore the rule of law by legalising the presence of the previously illegal occupiers. Thus, the executive appears to have succeeded in getting its way with the so-called land reform, whatever the courts might say. However, this has not stopped the commercial farmers from continuing to seek interdicts against compulsory acquisitions and evictions. Some have succeeded in getting temporary respite¹³² but the government seems determined to continue until it has achieved its targets (probably all white farm land).¹³³

6 CONCLUSION

In both Zimbabwe and South Africa there is a clear need for enhancing access to land to improve living standards, alleviate poverty and overcrowding in communal areas and bring about a more equitable distribution of land. As argued above, although as yet there is no direct right in international law for citizens to demand land, such a right can be inferred from other rights recognised in international instruments. As far as South Africa is concerned, the Constitutional Court in *Grootboom* found a right of access to land to exist in section 25(5) of the Constitution. In Zimbabwe

130 *Ibid* at s 6. This section states: (1) This Act shall not bind the State. (2) For avoidance of doubt, no person shall -

(a) be a protected occupier of any land held by or registered in the name of the State; or

(b) continue to be a protected occupier of land which had been subjected to an acquisition order, after the date on which the title of the State to such land is registered in terms of section 10 of the Land Acquisition Act [Ch 20:10].

131 [2002] JOL 9495 (ZS).

132 See for instance *Lomagundi v Minister of Lands, Agriculture and Rural Resettlement and others* Case No HC5263/202 in which applicant succeeded in getting a temporary interdict against a section 8 acquisition order on the ground that the relevant Minister who issued it had not been legally appointed by the President after the Presidential election of 2002 as required by the Constitution.

133 There appears to be no specific target to be achieved similar to the redistribution of 30% of agricultural land by 2014 in South Africa.

there is no such a right. Nevertheless, both in South Africa and Zimbabwe the State is committed to realising reasonable access to land for those in need and has the legal framework to do so. However, neither country has made sufficient progress towards its target of ensuring that the landless and those with inadequate land for a decent existence are provided with land.

Whereas Zimbabwe clearly cannot afford the massive land reform programme on the basis of its own resources, it has been failed by the international community and especially the former colonial power, Britain. Both Britain and the United States promised in 1980 and in 1998 to fund the programme. Nevertheless, the Zimbabwe government has itself not shown commitment to orderly land reform by making land reform a priority in its budgeting. It has abused the process by allocating land on the basis of political affiliation rather than need. Though apparently starting off from a commitment to alleviate poverty through land reform, the project seems to have got derailed through a combination of factors including lack of funds, lack of democracy and the government's struggle to survive by all means in the face of political opposition. Zimbabwe had a reasonable legal framework capable of accommodating both a market approach and non-market mechanisms such as expropriation with just and equitable compensation based on various factors not restricted to market value. However, the amended Constitution and legislation make that framework unacceptable in terms of international standards.

South Africa, on the other hand, does have resources for a wide-scale redistribution programme but – given that allocations for this purpose have been around 0.34 % of the State budget – is arguably not treating the acquisition of land for redistribution as a high priority. South Africa seems keen to ensure that land acquired with state assistance is used productively. However, with no statistics to show how many people are in dire need of land, it is difficult to ascertain the rate of success in realising the right of access to land in terms of section 25(5) of the Constitution. Although landowners are understandably hiking their prices, the State has not exploited the avenue of expropriation in terms of section 25(2) and (3) of the Constitution. It is widely believed that the pace of redistribution is too slow and that the State should use its powers under the Constitution to speed up access to land if it is not to provoke the landless to resort to land invasions. An increased budget and a comprehensive land redistribution law should assist in speeding up delivery. This law could define the categories of persons entitled to seek land from the state, the responsibilities of the different spheres of government in land redistribution and related matters. The power of expropriation under section 42E of the Restitution of Land Rights Act, discussed above, may also speed up the delivery of land.

The situation in Zimbabwe is more complex. Zimbabwe claims to have completed the land reform exercise, having issued acquisition orders against all but a handful of white farms. However, these farms have been seized by the Zimbabwe government under laws that are contrary to international law and practice on the pretext of satisfying the need of

landless peasants for land. The evidence is that many peasants remain land-hungry and many of the farms have fallen into the possession of politicians and other elites. Zimbabwe needs to return to the rule of law and regulate land redistribution in an orderly manner, following due process of law and allocating land primarily on the basis of need. At the same time, without the assistance of the international community there can be no real chance of carrying out this project, nor of peace, stability and prosperity under Zimbabwe's current conditions.

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