THE CONSTITUTIONAL GUARANTEE OF PROTECTION AGAINST DEPRIVATION OF PROPERTY AND ITS OBSERVANCE IN ZAMBIA

BY

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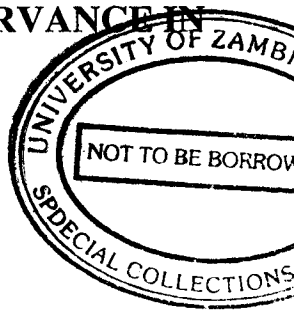

BY

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Submitted to the School of Law in partial fulfillment of the requirements of the degree Bachelor of Laws.

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SCHOOL OF LAW

I recommend that the obligatory Essay prepared under my supervision by
PHILEMON TEMBO

ENTITLED

"THE CONSTITUTIONAL GUARANTEE OF PROTECTION AGAINST DEPRIVATION OF PROPERTY AND ITS OBSERVANCE IN ZAMBIA", BE ACCEPTED FOR EXAMINATION

I have checked it carefully and I am satisfied that it fulfils the requirements relating to format as laid in the regulations governing obligatory Essays.

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SUPERVISOR

Dedicated to

My parents who have both ceased to be (deceased) Mom and Dad, you will never see this difficult work but it is wholly dedicated to you from my bereaved heart. Mom and Dad, you had always wanted me to have the highest level of education – hence your insistence on my working hard at school. This difficult work is a partial fulfillment of what you had always desired for me, And to Linda Nyirenda for being my only loyal and caring friend.

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At the outset, I must express my unending thanks to Jehova God who granted me the strength, the wisdom and the health to complete this work and for the people He provided to help me when all the hope of finishing it was lost.

This work is a concerted effort .My special thanks go to my learned supervisor, Mr.Mumba Malila, whose unfailing supervision and constructive criticism put me on the right track in this work. I will, to the end of time, continue owing him a debt of gratitude. Equally, my gratitude goes to the following;

To Law school, it has been the best company hitherto.

I am also indebted to Lukezo Juwaki for having been there when needed the most.

To my family, I simply can't quantify my gratitude to you, but I will some day soon.

To Linda Nyirenda, you have added meaning and glamour to my life, I will cherish all moments shared with you.

Lastly but not the least, I would like to sincerely thank Ms. Maggie Namukoko for carefully typing my work at the expense of her own demanding commitments without a word of complaint despite my "beautiful" handwriting.

Rise like lions after slumber

In unvanquishable number

Shake your chains to earth like dew

Which in sleep had fallen on you

In silence we all stumble

Because articulation is the tongue tied's fighting

Yet the silent cling to that average day:

The lights must never go out,

The music must always play,

HA,A LAWYER IS A NECESSARY EVIL

And these words shall then become like oppressions thundered doom

Ringing through each heart and brain

Head again – again – again !!

Per Philemon Tembo

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INTRODUCTION

Property is a fundamental necessity of life and is the very foundation, the framework on which social, political and economic activities of a nation are founded. Property is therefore the most valuable asset of the individual and the nation at large. In this sense, property law must provide for society a framework enabling owners of property to enjoy it in security, and dispose of it by conveyance or by will to strangers or to members of the family. In developed societies, the property owner's freedom of enjoyment and disposition exists subject to far-reaching control imposed by the state in the public interest.

Suffice to say it has long been accepted that the right to property is, and has always been part of the constitutionally recognised and protected rights under part III of the Constitution of Zambia. The Constitution nonetheless permits the state to derogate from these rights in circumstances that fall under broadly defined exceptions. This power of the state to interfere with property rights of private individuals has been justified under the doctrine of eminent domain. It is with these permitted exceptions to fundamental rights that our concern relates because persons who are in control of the political as well as the administrative machinery of government may, time and again as has been the case, employ these exceptional provisions of the Constitution in good and sometimes, bad faith backed by ulterior personal motives to further political ends.

This paper is concerned in particular, with the right to property as enshrined under Article 16 of the Constitution[1], and various statutory enactments and the manner in which these laws have been employed in Zambia. Many a time the discretion given to the President by the Lands Acquisition Act[2] and exercised by the appropriate Minister and Local Government authorities is so wide that mere emphasis on statutory provisions in some instances contrary to the provisions of the law.

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[1] Chapter 1 of the Laws of Zambia
[2] Chapter 186 of the Laws of Zambia

In essence, the whole property acquisition process is one-dimensional and is quite susceptible to corrupt practices by whatever officials are charged with it.

This paper is built around the hypothesis that "expropriation laws despite being good have on several occasions been abused and used for the purpose not intended by law."

By the nature of the topic, a number of key concepts will have to be defined in their usual sense as well as in the sense that they are to be understood in this paper. Notable among them are: human rights, private property and eminent domain.

It should also be noted that the substance of this paper revolves, mainly, around the Zambian experience during the Second Republic, and where necessary during the First Republic; since the Third Republic is still in its stages of infancy, hence it is only logical to expect to find instances of inherent arbitrariness and abuse of expropriation laws in the period prior to the advent of the Third Republic.

This paper intends to assess the impact that expropriation laws have had on an individual's enjoyment of his rights to property. Is the discretion given to the President and exercised by the Minister and the Local Government authorities not so wide that the individual be given a criteria by which he can judge that his interests are secured? Or, in the exercise of this wide discretion, is the President, the Minister or the Local Government authorities or its agents not under any obligation, moral or otherwise to respect the interests of the individual? If so, by what criteria has the individual to assess the official's obligations? By what rule is the citizen to challenge the validity of such a legal rule?

It is hoped that by this discussion, society will draw some lessons from past experiences and so avoid the costly mistakes of the past, and thus lead to good governance and economic development. It is contended that acquisition of private property in bad faith retards development. Therefore, private property should only be expropriated in the interest of the community where desire of expedience is genuinely the case.

The primary method that has been employed in carrying out this research has, to a large extent, been the innovative assessment of secondary data, mainly through the examination and interpretation of existing information from published texts and other materials.

Chapter one discusses the concept of human rights and the place of the right to property within the general human rights concept. Besides defining of human rights, the chapter traces the province of or substance of the concept of natural rights, amplifying in brief the historical evolution of natural rights.

This is then followed by a discussion of the apparent modern opposition to the concept of natural rights and the place of human rights in modern constitutions.

Chapter two discusses the concept of property and the relationship between the right to private property and human rights. This chapter defines property in relation to its nature. This is followed by a discussion of the theories of property: using their substance to determine whether the state is justified in compulsorily taking over property from individuals. Lastly, the chapter examines the definition of property as given/advanced under the Lands Acquisition Act, examining, in particular, the salient phrases.

Chapter three discusses on the one hand, the impact that expropriation laws have had on the individuals enjoyment of his right to property by examining a particular past episode as a test case of how the law has affected the individuals concerned. On the other hand, Chapter three discusses the sources of compulsory acquisition laws generally, under the sub-heading of the doctrine of eminent domain and, in particular under the sub-heading of statutory sources in Zambia.

Chapter Four discusses the constitutionality of expropriation laws in Zambia. It focuses on how the rule of law is maintained to balance the constitutionally guaranteed right to property and the powers of the President to expropriate private property as embodied in expropriation enactments. This chapter in essence will discuss whether or not the state is in order to compulsorily take over property from

individuals and the extent to which the interests of an individual are regarded. The Chapter will further show and discuss instances in Zambia when discretionary powers granted to the President have been abused and employed in bad faith.

Chapter five, concludes the discussion of this essay by first of all, highlighting in summary, the salient points or hypotheses that can be drawn from the course of the discussion, in pursuance of which, an examination is made to determine whether or not the hypothesis around which this paper is built has been confirmed.

In closing the chapter, suggestions are made to remedy the short-comings that exist in the expropriation laws, in particular to the Lands Acquisition Act.

CHAPTER ONE

1. THE CONCEPT OF HUMAN RIGHTS

(i) Human Rights and Natural Rights

(a) Definition

From the sub-title it would appear that the terms human rights and natural rights relate to two entirely different and distinct concepts. However, it should be emphasised that these terms refer to one and the same type of rights, and reference for one or the other term owes a lot to the origins of the rights.[3]

Human or fundamental rights are the contemporary idiom for what have been known, traditionally, as natural rights. Natural rights have been defined differently by various legal scholars and such definitions is that human rights are "moral rights which every human being, everywhere, at all times, ought to have simply because of the fact that, in contradiction with other beings, he is rational and moral. No man may be deprived of these rights without grave affront to justice".[4]

(b) Substance of the concept of natural rights.

The concept of natural or human rights has from time of its emergence right down to the present day, concerned itself with the dilemma of attempting to balance the individual interests of the citizen against those of the community as a whole. The province of natural rights has always been the protection of individuals against the arbitrary or oppressive exercise of state power. Thus Lauterpacht argues that:
"The substance of natural rights has been the denial of the absoluteness of the state and its unconditional claim to obedience: the assertion of the value and of the freedom of the individual against the state; the view that the power of the state and of its rulers is derived ultimately from the assent of those who compose the political community; and the insistence that there are limits to the power of the state to interfere with man's rights to do what he conceives to be his duty."[5]

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[3] John Finnis, Natural law and Natural Rights Oxford: Clarendon Press, 1984) P. 198
[4] G. Ezejiofor, Protection of Human Rights under the Law (London: Butterworths, 1964) P. 3
[5] H. Lauterpacht, An International Bill of the Rights of Man (London: Butterworths, 1945) P. 17

Initially, the ideal of natural rights had a mere moral force owing to its close association with natural law. It was during the post-feudal era that natural rights took on statutory form, and later gained recognition in international law with the solemn United Nations Declaration of Human Rights in 1948.[6]

In order to understand and appreciate the concept of human and natural rights, a brief account of the historical phases of the same will be most appropriate.

(c) Brief Historical Account

In the following account of the evolution of natural rights, repeated reference will be made to the idea of natural law and not so much to the idea of natural rights. This is a result of the fact that natural rights developed from the crucible of natural law,[7] therefore; developments to natural law necessarily imply a corresponding development in natural rights. It has been suggested that the logical and most convenient point from where to commence a brief survey or account of the evolution of the twin ideas of "natural law" and "natural rights" is with the ideologies of the Greek City States.[8]

However, the paper takes an entirely different view, simply because, what existed during the times of the Greeks were simply rudimentary aspects of natural law. For the purposes of the research, therefore, it is convenient to begin with the Romans.

THE STOICS.

The first systematic formulation of the concept of natural law made its appearance with the Stoic following the demise of the Greek city States. The Stoic conception of natural law was that, it was universal in its application, that is, it applied to all mankind generally without reference to a person's state identity.

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[6] L.S. Zimba, The Constitutional Protection of Fundamental Rights and Freedoms in Zambia: An historical and Comparative Study (Ph.D, University of London 1979) PP22-23

[7] G. Ezejiofor, Protection of Human Rights under the Law (London: Butterworths, 1964) P. 3

[8] L.S. Zimba, The Constitutional Protection of Fundamental Rights and Freedoms in Zambia: An historical and Comparative Study (Ph.D, University of London 1979) PP22-23

To the Stoics, natural law was superior to any positive law and it embarked those principles of justice, which were discernible with the "eye of reason."[9]

By invoking and preaching the universality of natural law and its superiority to positive law, the Stoics were able to justify the idea of freedom and equality of all men in the Cosmo polis. It is not by chance, therefore, that the notion of the inalienability of human rights attaches to most contemporary human rights instruments. This is the result of the influence of natural law from early times and, as noted earlier, from the close relationship that natural law bears to natural rights. Thus Cicero's observation on natural law brings out the understanding of natural law that was typical of his time;

"It is universal, unchanging and everlasting ... It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed from its obligation by senate or people ... And there will not be different laws at Rome and at Athens or different laws now and in the future, but one critical and unchangeable law will be valid for all nations and all times."[10]

On this basis, the Stoics argue that human law which violates natural rights should be regarded as oppressive and invalid. Therefore, the compulsory acquisition of private property must be taken to violate the natural right to own property. The Zambian Lands Acquisition Act provides for compensation in the event of compulsory acquisition but this is potentially subject to the determination of the legislator. To the Stoics, this is a violation of natural rights.

The Middle Ages (1100 – 1500 AD)

From the Greeks and Romans, the concept of natural law as a law higher than all positive law and one, which all rulers must obey, was increasingly emphasised by philosophers of the middle-Ages. However, owing to the teachings of Machiavellie

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[9] G. Ezejiofor, Protection of Human Rights under the Law (London: Butterworths, 1964) P. 3

[10] G. Ezejiofor, Protection of Human Rights under the Law (London: Butterworths, 1964) P. 4

and the arbitrariness of the emergent nation states in the late 16th century, the idea of natural rights suffered a periodic eclipse, which was soon to subside during Reformation and its resulting religious struggles. The other reason for the rise of the doctrine of social contract which was formulated with the aid of the ideas of natural law.[11]

The American Revolution

The next phase in history when the concept of natural law and natural rights made a strong re-appearance was during the American Revolution. The revolution started in the colonial revolt of 1763, which was ignited by the imposition of taxes by the Crown without the consent of the colonists. In justifying their rebellion against King George III, they relied on the concept of natural law and natural rights and made use of John Locke's doctrine of the social contract; arguing that the King had violated the contract between himself and his subjects by derogating from their natural rights; particularly their right to private property, upon which taxes where imposed.

Employing the doctrine of social contract and the concept of natural rights, the American colonists concluded that any sovereign that failed to honour the contract to protect the natural rights of its subjects should be removed and replaced by another. This idea ultimately found its way into the American Declaration of Independence.[12]

Again, it can be noted that the Americans believe that the source of binding law must be rooted in God. Human law must therefore conform to eternal law. The obligation is an inherent part of the nature of things and since the nature of things is controlled by God, man has no control over them and hence no power to determine the basic outlines of obligation.

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[11] G. Ezejiofor, Protection of Human Rights under the Law (London: Butterworths, 1964) P. 4

[12] L.S. Zimba, The Constitutional Protection of Fundamental Rights and Freedoms in Zambia: An historical and Comparative Study (Ph.D, University of London 1979) PP. 22-23

The French Revolution

The second traumatic experience of the 18th century that sealed the double victory of natural law and natural rights was the French revolution.

During the second half of the 17th century, a number of destructive criticisms were levelled against the French monarch for following unbearable economic and social injustices to persist in their society. In their writings, the critics saw the coming of a new age in which right reason, natural and imprescriptible right to life, liberty and the pursuit of happiness would flourish. The critics of the French monarch strongly believed that: "It was the duty of governments to preserve these needs, and the rights necessary to meet these needs, were natural and inalienable. A government which failed to safe-guard them could not justify its existence."[13]

As in the American case, the French were also justifying revolt on the basis of natural and inalienable rights. It is said that when the criticism of the French regime failed to produce the desired reforms, the subjects of the French monarch unilaterally proclaimed a sovereign National Assembly in 1789 and in the same year prepared a list of inalienable rights of free citizens. In 1791 the Declaration of rights was annexed to the constitution and it was with this act that one of the most crucial epochs in the development of the concept of human rights was completed.[14a]

According the Finnis, the general feature of natural law is the coalescence of law and ethics and the general approach has been the identification of a legal system as the hierarchy of norms, which are traced from the eternal norm. The law of the state or man-made laws must be evaluated against the higher moral claims of the unwritten and unfaltering divine law for its validity. In so far as human law is morally obligating, it must be rooted in God. Natural law concept, then, is defined from a

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[13] G. Ezejiofor, Protection of Human Rights under the Law (London: Butterworths, 1964) P. 3

[14a] G. Ezejiofor, Protection of Human Rights under the Law (London: Butterworths, 1964) PP. 9-10

hierarchy of laws with natural law at the top of the hierarchy and human law at the bottom.[14b]

As shown earlier in the discussion on the substance of the concept of natural rights, it is admitted that "before the American and French Revolutions, human rights merely had what, for all practical purposes, was a normative binding force, but after Declarations and the Constitutional Bills of Rights, the concept assumed a positive importance."[15]

The justification for constructing a system of positive law to supplement "natural requirements of morality" is the need for compulsion, to force selfish people to act reasonably. Within various philosophies there has been a long and venerable tradition of using the concept of "Natural Law" in the definition and identification of fundamental rights. Roughly speaking, the idea has been that, apart from the actual positive law systems that obtain at different times and in different places, there exists a set of ideal norms or principles of a higher obligation, which are the same for all men at all times, which are concerned with the same problems that positive law attempts to solve, and to which positive law are, at circumstances of a particular time and place. This set of norms, therefore, is conveniently called natural law, and, on this view, the "natural" rights granted to individuals by the rules of natural law are properly also called "Fundamental". To use a modern idiom, they are the "deep structure" of which the positive legal rights generated by particular legal systems are the more – or less successful surface manifestations. On this premise it is safe to argue that a right to property as a natural right, is a recognised fundamental human right.

(d) Opposition to the concept of Natural Rights

The course of development of the concept of natural rights has not been a trouble free one, owing to its intimate association with the theory of natural law.

14b John Finnis, Natural Law and Human Rights (Oxford: Clarendon press, 1984), P. 198

[15] L.S. Zimba, The Constitutional Protection of Fundamental Rights and Freedoms in Zambia: An historical and Comparative Study (Ph.D, University of London 1979) PP. 22-23

During the course of its long history, the concept has frequently been opposed by its many opponents, sometimes with arguments "so powerful and destructive that only its inherent potency could have enabled it to withstand their onslaught."[16]

Even though the concept of natural rights appears to have survived its worst storm, one may infer in the lengthening of the lists of such rights the modern opposition to the concept of natural rights.[17]

Professor Ezejiofor forwards two reasons in an attempt to explain why the lists of natural rights have tended to lengthen. He argues that firstly it is probably because of the awareness of authors of these lists, of the very wide scope of interpretation permitted by such principles as "right to liberty" or "right to freedom" and hence they have tried to make them more precise by listing their applications more particularly; and also, that ... the view that a great proportion of the national wealth should not be enjoyed by only a handful of persons, has led to the challenge of the fairness of privileges and positions previously taken for granted.[18]

Regarding the reasons advanced by Professor Ezejiofor, it will be noted that when applied, Cicero's conception of natural law being, inter alia, unchanging and everlasting... not capable of being repealed in any part, and impossible to abolish entirely, in relation to the lists of natural rights properly so defined, then it follows that any attempt at circumscribing their application would be an opposition to the concept of natural rights as traditionally understood.

On the same footing, it can be argued that despite the above proposition, positive law derives its entire validity from natural law, suffice to say positive law is essentially a mere emanation of natural law, the making of statutes or of decisions does not freely

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[16] R. Dias Jurisprudence, 5th ed. (London: Butterworths, 1985), P 470

[17] G. Ezejiofor, Protection of Human Rights under the Law (London: Butterworths, 1964) P. 4

[18] R. Dias Jurisprudence, 5th ed. (London: Butterworths, 1985), P 470

create human rights but it merely reproduces the true law which is already somehow in existence.

On the other hand, however, it is safe to argue that, positive law is not a mere emanation from or copy of natural law because the legislator enjoys all the creative freedom of an architect and hence can recognise a right in one breath and take it away in another by way of wide derogations.

The writer takes the position that human rights law is derived from natural law by a process analogous to deduction of demonstrative conclusions from general principles, and that such laws are not positive only, but also have part of their 'force' from the basic principles of practical reasonableness. Therefore, the normative content or matter of positive law and natural law is the same as reason necessarily requires. Positive law simply ratify the law of reason, adding to it only the additional constraining or binding force of the threat of punishment.

Forced to take sides in this ancient debate, the writer adheres to the fact that an attempt to specify what is involved in comparing positive law with natural law may suggest a modified method of linking the fundamentality or the basis of fundamental rights with the doctrine of natural law.

It is a common place that there has been very little stability of content or emphasis in natural law thought throughout its long history. It has been politically conservative or radical, religiously committed or secular. As noted, there have been two schools of thought over the question of the technical validity of conflicting positive law.

Perhaps the one common thread that has run throughout this history is the idea that in principle it is possible to compare any given rule of positive law with the relevant principle of natural law, and discover whether there was conformity, neutral compatibility or conflict between the two, which is to say that natural law has always been conceived of as the standard by which positive laws are measured, even if there has been disagreement over the consequences of measuring. Indeed, natural law is of

little use as a concept unless it can be compared with the particular laws and institutions and ascertain their conformity or contradiction. But for the comparison to yield such ascertainment, the principles of natural law must be specific and detailed enough to make such a comparison genuinely possible.

(e) Human Rights in Modern Constitution

The American Bill of Rights of 1791, and the French Declaration of the Rights of man and of the citizen of 1789 set a precedent in the Constitutional protection of fundamental rights of individuals. Most countries on the European continent followed suit and these included communist countries.[19a]

From the mid-twentieth century, a number of African, Latin American and Asiatic states have gone for the idea of recognising fundamental rights by inclusion in provisions of the constitutions.

The resulting situation is that over half the world's constitutions contain lists of the fundamental rights, that is why the American and French Revolutions are considered as landmark events, marking off the beginning of constitutional development of Bills of Rights. Zambia has not been left out by the effects and hence the provision of part III of the Constitution of Zambia.

In 1948, the idea of human rights received universal affirmation with the adoption of the universal Declaration of Human Rights, by the General Assembly of the United Nations on 10th December 1948. Thus, in the universal Declaration of Human Rights under Article 17(1) and (2) everyone has the right to own property alone as well as in association with others and no one shall be arbitrarily deprived of his property respectively.

In conclusion, the Chapter endeavoured to define, explain and expose the current views concerning human rights. The concept of human rights and natural rights as it

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[19a] R. Dias Jurisprudence, 5th ed. (London: Butterworths, 1985), P 470

has been shown are related terms and are used synonymously to refer to the same rights, but in modern usage and parlance, it is more academic and fashionable to use the phrase human rights or fundamental rights.

It follows that at the centre of human rights and development in a contemporary society is the right to property. First recognised by natural law, it was enshrined by the Universal Declaration of Human Rights. Although the exact dimensions of this right may still be the subject of controversy, the right to property has generally been recognised as an inalienable human rights by virtue of which every person and all peoples are entitled.

However, it is sometimes argued that to prefer, and seek to embody in legislation, some conception or range of conceptions of human flourishing is unjust because it is necessarily to treat with unequal concern and respect those members of the community whose conceptions of human good fall outside the preferred range and whose activities are or may, therefore, be restricted by the legislation. As an argument warranting opposition to such legislation, this argument cannot be justified, it is self-stultifying. Those who put forward this argument prefer a conception of human good, according to which a person is entitled to equal concern and respect and a community is bad in which that entitlement is denied; moreover, they act on this preference by seeking to repeal the restrictive legislation which those against whom they are arguing may have enacted.

The main concern of natural rights as already pointed out has always been with the relationship between the state and the individual. In the beginning the concept merely had a normative force on the state, due to its close affinity to natural law. It follows that the development of natural rights has been a long one. The stoics, medieval philosophers, and the French and American Revolutions all had an influence on what have become human rights today. However, human rights having been based on a "philosophical law", had experienced a number of set-backs due to destructive criticism which were levelled against it, and which can still be said to continue to date.

Despite the criticism and the occasional set-backs, the idea of natural rights has found its place in most legislative instruments in several countries today and also in the international world order. The Chapter has, therefore, proved that the right to property is a recognised human right.

CHAPTER TWO

THE CONCEPT OF PROPERTY

Human rights, as shown in Chapter One have occupied a central place in contemporary national and international affairs for over half a century now. This stems largely from the realisation that the quest for economic and technological advancement in contemporary society can only be meaningful in an atmosphere where individuals are free to realise and actualise their potentialities and where the law provides total recognition of an individual's rights and in particular the right to property. The repression of civil and political rights not only militates against the realisation of these potentialities but invariably leads to social and economic stagnation. This argument is based on the proposition that property is the foundation and framework on which social, political and economic activities of a nation and the world at large are founded. It is, therefore true to say the right to property is a human right. It is precisely within this framework of thought that the chapter will proceed.

(i) Property in General

The Oxford Companion to Law defines property, in its rightful sense, as "the right of ownership," and in its transferred sense as "the object of the right of property."[19c]

Roman law defines property as "the right to use and abuse one's own within the limits of the law, - jus utendi et ubutendi re sua, quatenus juris ratio patitur."[20] In the sense of the Roman definition of property, the term "abuse" should not be taken to mean senseless and immoral abuse, but only absolute domain over the subject of such right. If we adopt the definition of property given by the Oxford Companion to Law, that is the "right of ownership," then it becomes necessary to define "ownership" as well.

The ideal definition of "ownership" is one advanced by Sir Frederick Pollock as the "entirety of the powers of use and disposal allowed by law".[21]

[19c] D.M. Walker, The Oxford Companion to Law, P. 1007
[20] P.J. Proudhon, What is Property? P.45
[21] J. Crossely Vaines, Personal Property,P. 40

When synthesised the definition of property and that of its reference term, ownership, property can be defined as being "the right over the entirety of the powers of use and disposal allowed by law.

An understanding of property in this sense will prove useful when discussing the constitutionality of expropriation laws in Zambia under Chapter V. For instance, where the state takes over property in immobilia, that is property in immovable things, the state does not shift the immobilia in space, it stays in the same place, but rather what is expropriated from the owner of the immovable property are his powers of use and disposal that he previously held.

From the above formulation of what constitutes property, it will be noticed that property as a legal term refers not to material things but to certain legal rights. Property rights are not to be identified with the fact of physical possession, since rights are intangible things, hence one may have constructive possession of intangible property, for instance, copy rights.[22]

Since the main concern of this chapter is private property, a distinction has to be made between private property and public property.

Ely's definition of private and public property brings out the difference between the two forms of property. Thus he postulates that: "by private property? We mean the exclusive right of a private person to control an economic good, and, by public property we mean the exclusive right of a political unit (city, state, nation, etc) to control an economic good."[23]

The distinction between the two forms of property lies in who is entitled to exercise that exclusive right to control an economic good: is it a private person or is it a political unit?

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[22] M. R.Cohen and F.S.Cohen, Reading in Jurisprudence and Legal Philosophy, P. 26

[23] Richard T. Ely, "Property and Contract in their relation to the distribution of Wealth," Quoted in M & F. Cohen, Readings in Jurisprudence and Legal Philosophy P.11

This distinction between private and public property leads to the fact that public property being an exclusive right of a political unit can not be the object of compulsory acquisition by the state since it is the "right" of the entire political unit and by necessary implication, its exercise or control is vested in the state or it's delegate authority. It only remains, therefore, that private property is the only possible object of compulsory acquisition.

(ii) Theories of Property

The aim of this sub-heading is to bring to the fore theories of property with the view to using the substance of these theories to determine whether the state is or is not in order to compulsorily take over private property from individuals.

It has been said that there are two types of theories of property: "one attempts to explain how property came to be, to describe the facts; the other posses an ethical judgment on those facts and attempts to justify (or condemn) the institution of private property.[24] There are a number of what may be refered to as sub-theories on the institution of property, but in essence they all relate to either one of the two main theories of property. One theory argues that property arose by the taking control of a res nullius –occupatio, that is he who reduces into possession a piece of property has the best of justifications for retaining control of the property.[25] The weakness of this view is that it is simplistic in it's conception of society. It is rare in today's world to find property over which no proprietary interest exists, especially if the property in issue is one of immense value. In the contemporary world order, it would be justifiable for the state to claim a better title to such property as against a person who claims to have title by first occupancy.

Another theory regards property as the result of individual labour. Zimba and walker ascribe to this view in the following words;

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[24] G.W. Paton, A text book of Jurisprudence, P.485
[25] G.W. Paton, A text book of Jurisprudence, P.485

"Property is a result of legitimate labour or arduous venture",[26] hence "there is much substance in the view that invention and industry should be rewarded by letting the creator keep what he has created or the proceeds thereof... property provides an incentive to work and private property is normally better cared for and managed than public property".[27]

Two pertinent doubts have been raised concerning this theory.[28a] The first states that in modern society it is not possible to pin-point in all cases what is the result of the labour of a particular individual in commerce due to specialisation and interdependence in management of property.

The second states that much of the wealth that really counts in the world today is not the result of labour at all, but some fortunate accident, such as the discovery of huge deposits of oils under property that at one time could have been considered waste land.

It may be argued that the above propositions justify state expropriation of property, since it is not the result of man's labour and its management by the state would be in the best interests of the community in which such wealth is found, rather than allow enormous wealth to benefit only a single individual.

Some legal philosophers theorise that private property is a creation of the state and achieved only after a long struggle with the clan.[28b]

If the incidences of ownership such as the right to exclude others, to charge the property as security for a debt, to alienate or devise by will, as the essential characteristics of private property, it is undeniable that the state is responsible for the creation of the institution of private property, since it provides the legal and

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[26] L. S.. Zimba, The Constitutional Protection of Fundamental Rights and Freedoms in Zambia: An historical and comparative Study (Ph.D., University of London 1979) P. 380
[27] D.M. Walker, The Oxford Companion to Law, P. 1008
[28]a G.W. Paton, A text book of Jurisprudence, P.486 – 487
[28b] G.W. Paton, A text book of Jurisprudence, P.488

administrative machinery by which these rights are enjoyed. A take-over of property by the state, under this view, is merely an operation of such state's machinery.

In opposition, on the other hand, the advocates of the social contract theory would not look too kindly to such an explanation, since in their view the state is seen as having emerged from the need to ensure individual security and the security of private property.

Having generally discussed the meaning of property and its theories, in the next section attention is devoted to a discussion of the meaning or definition of property under the Lands Acquisition Act.

(iii) The Meaning of Property under the Lands Acquisition Act

The main purpose of the Lands Acquisition Act is to make provision for the compulsory acquisition of land and any other property; and also to provide for matters incidental or connected with the compulsory acquisition of property.

Section 2 of the Act defines "property" as "including land, and includes any interest in or right over property, but excludes a pledge or other charge."

Property as defined under section 2 of the Act, does not lend a helpful hand to a person who does not have any prior knowledge of the principles of property. The definition is mostly inclusive rather than exclusive and "ipso facto" stretches the scope to what may be property.

A closer look at the definition of property under section 2 of the Act, compels an examination of the phrases used in the definition of property more critically.

(a) "Includes land". If property includes land, one may ask the question, what then is land understood to mean under the Act? Section 2 of the Lands Acquisition Act defines "land", as including "any interest in or right overland,..."

Land, therefore, as used under section 2 of the Act should be understood in a double sense as referring to the object of the right to property (physical land or real property) and also as an interest in or right over land (which is an incorporeal or intangeable property). An interest in land or right over land is therefore, land and this implies that land is not necessarily a corporeal asset under the definition provided by the Act, but it can also be in an incorporeal form.

(b) "Includes any interest in or right over property"

Property, as defined under section 2 of the Act, can also be an interest in or right over the subject matter of the right or it can be the subject matter of the right itself.

The significance of including incorporeal elements in the definition of property is better appreciated by relating the discussion to a factual situation: as for instance, where the state compulsorily acquires property from an individual or corporation, what the state does extinguish in actual fact is not the physical item compulsorily acquired, but the individual's or the corporation's claim of right over or interest in the property. This however, does not mean that the rights of such an owner are entirely lost, but it is suggested that when a person whose property has been the subject of compulsory acquisition is paid compensation for the expropriation, his property in the item is not extinguished or diminished but it simply changes form; that is, by the act of compensation it is either converted to cash or some other equivalent commodity.

Having expounded on the concept of property, it is worth showing how the right to property relates to human rights.

(iv) Right to Private property and Human Rights

Under this sub-heading, the paper proposes not to embark on a lengthy exposition of the meaning of property, substance or extra-legal implications of property, but rather, to examine how the right to property relates to human or natural rights.

The right to property is perhaps as old as the notion of natural rights itself. The earliest writers take the view that the right to property has occupied a central theme in those works. The following proposition is instructive on the same:
"The right to property is the great social main-spring: it is the giant whom primitive races imagined as crouching beneath volcanoes, and causing earthquakes by every moment. No great political revolution but is correlated with some modifications of the right which does not bring with it political transformation.[29]

This right, that is, the right to property as has already been alluded to has been a major catalyst for civil revolt against rulers throughout the ages.[30a]
Currently, the right to property is now enshrined in most domestic legislation of member countries of the United Nations such as Article 16 of the Constitution of Zambia and also in international human rights instruments such as the Universal Declaration of Human Rights of 1948 under Article 17.

According to Justice Jackson in Board of Education v. Barnette "The purpose of human rights is called to withdraw certain subjects from vicissitudes of political controversy, to place them beyond the reach of majority and to establish them as legal principles to be applied by the courts ... One's right to life, liberty to property, free speech... may not be submitted to vote – they depend on the out come of no elections".[30b]

To this extent, it is indubitable that human rights are so fundamental regardless of the decision and policies of the sovereign.

In most modern human rights instruments, the right to property is not guaranteed in absolute terms, but the trend these days has rather been to include exceptions allowing for lawful derogation from the right to property with the view to promoting the interests of society as a whole.

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[29] C.H. Letourneau, Property: Its Origin and Development, P. X
[30]a C.H. Letourneau, Property: Its Origin and Development, P. X1
30b (1943) 319 US 624

It has been accepted and acknowledged that property rights can not be guaranteed in absolute terms without due regard to the interests of the community. For instance, Letourneau recognises that: "...it can not be questioned that society has the right to modify it in its own general interests. Many moderate, even timorous writers have proclaimed this right.[31]

It is interesting to note that, although "property" has been included in the lists of many bills of rights as a natural and inalienable right of man, it has been alleged, in one of the most interesting treatise on property, that it "bears no resemblance whatsoever to the others, ..." that is, other natural rights. The said treatise, systematically questions the notion of right to property with a view to establishing that it is not related to natural rights. It is argued that the right to property differs from other natural rights because "for the majority of the citizens it exists only potentially, and as a dormant faculty without exercise." It follows, therefore, that for one to exercise this right, one must own property otherwise what one has is merely an expectation that should he come into ownership of property, he will be certain that no one will interfere with it.

It is argued, further, that even in the case where a man own some property, "it is susceptible of certain transactions and modifications which do not harmonise with the idea of natural right," such as disposal by way of sale, abandonment, or one may even lease one's property; something that can not be done with natural rights, properly so-called. Further, in practice, government, tribunals and positive laws do not respect it.

However, in contradiction with other natural rights such as liberty, equality before the law, or security, it is argued that one can neither sell nor alienate

one's liberty, thus any contract purporting to alienate or suspend one's liberty is null and void. This is still the case even where society seizes a male factor and deprives him of his liberty; the deprivation is a case of legitimate defence in order to secure the safety of society.[32]

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[31] G.W. Paton, A text book of Jurisprudence, P.378
[32] P.J. Proudhon, What is Property? P.45

Similarly, an examination of the right to equality before the law plainly reveals that this right is not subject to any reservations as to its absoluteness one occupying the most exalted station..."[33]

From the earlier discussion, it is apparent that although the right to property had not been given much expression in the Greek and the Roman philosophers of natural law, this right had been the provocative spark that ignited most major revolutions in world history.

Although property has been recognised in modern bills of rights as a human right, it cannot be denied that this controversial right needs to be regulated by positive law in contemporary society in order to secure the life of society as a whole and also to ensure an even distribution of development.[34]

The above view is justification enough behind the emergence of expropriation laws generally.

In conclusion, property can either be private or public property. This distinction lay in establishing who controls the property in question and on the basis of this distinction the chapter concluded that private property is the only kind of property that is capable of being compulsory acquired by the state. Finally, the chapter examined the definition of property under the lands Acquisition Act.[35] This was necessitated by the fact that this is the Act that confers the main powers of compulsory acquisition in Zambia and also because this is part of the discussion in chapter three of this paper. All in all, the chapter has established that only private property can be a subject of expropriation laws. Furthermore, the chapter succeeded in establishing the nexus between natural rights and property. This was intended to give effect to or where necessary criticise the view that the state can take over private property without violating the rights of the previous owner.

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[33] P.J. Proudhon, What is Property? P.45
[34] Leslie C. Zulu, Human Rights and state Trespass To Private property: The Zambia Experience. (Student Obligatory Essay, 1992) P.15
[35] Cap. 189 of the Laws of Zambia

CHAPTER THREE

EXPROPRIATION LAWS OF ZAMBIA AND THEIR IMPACT ON THE RIGHT TO PRIVATE PROPERTY.

The concept of law and social change has an economic ramification which has been utilized by the leaders of many states and in particular Zambia as the theoretical basis for the interventionist role they have taken in their economic policies. This has taken various forms and for Zambia, this paper particularly mentions, expropriation of property. The main concern of this chapter is to assess the impact that expropriation laws have on an individual's right to private property in Zambia. The chapter will start by tracing the sources of the power to expropriate private property in Zambia and then will proceed to show the impact that expropriation laws have on an individual. It should be mentioned that statutory sources are divided into primary and secondary sources.

SOURCES OF COMPULSORY ACQUISATION LAWS.

Sources of compulsory acquisition powers are statutory, unlike in the past when these powers derived mainly from the sovereign's right of eminent domain.[36] The paper will first discuss the power of eminent domain and proceed to discuss statutory sources of compulsory acquisition which is divided into secondary and primary sources.

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[36] J. A Umeh, Compulsory Acquisition of Land and Compensation in Nigeria (London: Sweet and Maxwell, 1973), P. 26

Doctrine of eminent domain

The doctrine of eminent domain relates to the right of the state or a corresponding socio-political authority to reassert its domain over any portion of the soil of the state, either on a permanent or temporary basis , on the grounds of public exigency and for the public good[37]. Thus the power of compulsory acquisition is a firmly established consequence of any state's right to exercise its right of eminent domain. In essence , the right of eminent domain is the power of the state to take over any kind of private property for the benefit of society. However , today this right of eminent domain only finds expression in statutes that confer the power of compulsory acquisition upon the state.

(a) **Statutory sources in Zambia**

(i) Primary sources

The Constitution being the *grund norm* of the state is considered the main stream from which all statutory powers derive their strength. Thus, the Constitution of Zambia and the Lands Acquisition Act of Zambia are considered as the primary sources of the power to expropriate private property in Zambia.

The Constitution of Zambia

The Constitution is the" base" of all compulsory acquisition in Zambia. This is provided for under Article 16(1) of the Constitution. P*rima facie* , Article 16(1) strictly prohibits the taking of possession of property of any description , or any interest in or right over such property. However , Article 16(1)excepts compulsory acquisition which is carried out under the authority of an Act of parliament that provides for the payment of

[37] H. C Black's Law Dictionary, (St. Paul Minn: West Publishing Co. 1951)

compensation for the property or interest or right to be taken possession of , or acquired. However , it should be emphasized that although compulsory acquisition that is effected under an Act of Parliament is an exception to the right to private property, the Constitution should not be considered as a source of power of compulsory acquisition, but rather as the authority for Acts of Parliament that are the sources of powers of compulsory acquisition.

Thus all other laws of compulsory acquisition derive their validity from the Constitution , but on condition that they provide for payment of compensation. Therefore , any law that purports to authorize the taking of property or rights over or interest in property without providing for payment of compensation is constitutionally invalid.

The Land Acquisition Act[38]

By the authority granted by the constitution , the Lands Acquisition Act provides the main source of power under which compulsory acquisition of private property in Zambia can be executed.

The lands Acquisition Act was enacted mainly to address the problem created by absentee landlords who left the country after Zambia attained independence in 1964. The Constitution (Amendment No. 5) of 1969 was put in place to address the problems created by absentee landlords who left large tracts of land which was unutilized and undeveloped. Following the said Constitutional Amendment, the Lands Acquisition Act was enacted in 1970. Absentee landlords were singled out as the candidates or target of

[38] Cap. 189 pf the Laws of Zambia

the Act. At one occasion on the National Resources debate Mr. Solomon Kalulu was reported to having said:

> *"we will spare no time in making sure that the teeth of that Act are put to use...It is evil to live in a country where parcels of land are possessed by absentee landlords living like dogs in a manger...the sooner this exercise was done the better".*[386]

Much of the area of emphasis described by Mr. Kalulu may come within the scope of the rationale of compulsory acquisition of private property, that is, public purpose.

The provisions of section 3 of the Lands Acquisition Act empower the president ... whenever he is of the opinion that it is desirable or expedient in the interests of the Republic so to do , to compulsorily acquire any property of any description. It may be argued , that section 3 of the Act leaves the power it confers open to abuse by the authority in whom it vests the exercise of such power since the exercise of such power is one that is to the subjective satisfaction of the president alone.

The meaning or implications of a grant of statutory power that is phrased in loose terms such as is the case in the Lands Acquisition Act was settled in the case of **Nkumbula v. The Attorney General .**[39] This was a case in which the Supreme Court of Zambia was called upon to , *inter alia* , construe the meaning of the words "in the opinion of the President". Baron J.P, delivering judgment of the court , said "... the words in the opinion of the President(under section 2(1) of the Inquiries Act, which empowers the

386. Hansard, 25 February, 1970

[39] Appeal No. 6 of 1972, Supreme Court of Zambia

president to appoint a commission of inquiry if in his opinion it is for the public welfare) clearly makes the matter one for the Subjective decision of the President and it has never been doubted that the person vested with the power acted in bad faith from improper motives or extraneous considerations or under a view of the facts or law which could not reasonably be entertained[40]. However, despite the fact that the exercise of a subjective power can only be challenged if any of the grounds set out in the judgment of Baron , J.P can be established, it is Submitted that it would not be easy for an individual whose property has been compulsorily acquired or taken over by the state to go behind the decision of the President and investigate the motive for the acquisition , or the considerations that the President addressed his mind to in order to prove his case. This is because the President has access to privileged information of the state at his disposal where as an individual may not have any access to the official documents containing the pre-acquisition correspondence[41]. Further, any investigation by an individual into the motives for, or considerations taken in to account before acquisition would easily be frustrated by the State.

This weakness in the law can thus be related to the fact that where the state compulsorily took over the property of one of its subjects under the purported exercise of statutory powers conferred upon it by an Act of parliament, but it is shown later that the state had not observed the requirements of the Act or that the state had exceeded the powers

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[40] Nkumbula V. The Attorney – General. 1972/SCZ/6 P. 6

[41] S.A De Smith, De Smith's Judicial Review of Administrative Action, (London: Stevens and Sons, 1980). P. 291

conferred by the Act, then the entire exercise of the power to compulsorily take over private property becomes unlawful.[42]

It is hereby submitted that , since section 3 of the Lands Acquisition Act does not make any provision for challenging the president's exercise of the power to acquire property by compulsion , and neither does case law make it any easier for a person to challenge the President's exercise of the power , it becomes particularly prone to abuse and has been abused in the past as was the case in **David Cerlisle Wise V. The Attorney –General** where it was held that the compulsory acquisition of the property in question was done *mala fide*.[43]

Lastly , the Lands Acquisition Act under section 10 rightly meets the constitutional requirement that demands the payment of compensation for property acquired compulsorily.

(ii)**Secondary Sources**

The sources that will be discussed under this sub-heading have been classified as "secondary" sources because they do not confer a direct source of authority for compulsory acquisition of private property. In one sense, their authority is secondary because, generally, the procedure under these sources is for the agency concerned to locate the property or land which it requires for a particular development project , ...then

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[42] H. J Brown, Encyclopedia of the Law of Compulsory purchase and Compensation, (London; Sweet ad Maxwell (1960) P 1005. also Webb and Others V. Minister of Housing and Local Govt.(1967) 1wlr 755C.A at 776

[43] HP/668 of 1989

the agency approaches the Lands Department to effect acquisition on its behalf ."[44] In another sense, it is because the Acts that are the secondary source of authority for compulsory acquisition were not enacted, specifically, to deal with matters of compulsory acquisition , that is these Acts were not enacted to provide powers of compulsory acquisition , but as a means of achieving the objective of the Acts, it may become necessary to compulsorily take over private property.

The secondary sources discussed under this chapter are; The Zambia (State Lands and Reserves) orders, 1928-1964, The Town and Country Planning Act , Cap.283 , The Mines and Minerals Act , Cap. 213, The Emergency Powers Act, Cap. 108 and the Preservation of the Public Security Act ,Cap.112

Zambia (State Lands and Reserves)Orders, 1928-1964

Under these orders , the powers to compulsorily acquire land vests in the President by virtue of Article 6A , paragraph (2) which allows the President to acquire land in Zambia. In this Article, the President or any person acting under the authority of the President, may set aside land in any Reserve for public purposes. The relevance of these regulations in the expropriation laws of Zambia is that they vest direct powers of expropriation in the President or his agents to set aside land for public purpose. In Zambia the colonial government divided land into state – land, trusts and reserves. The applicable law to state – land was the English land law. All land in the reserves and

[44] Ijeomah Rose Oparaocha, Compulsory Acquisition Laws: A Tool for Development in Zambia (Student Obligatory Essay, School of Law, 1980.81)

trusts areas was held under customary land law. However, the 1925 – 1964 orders applied to both state and reserve areas.

The Town and Country Planning Act [45]

By virtue of section 40 of this Act , the Minister of Local Government may recommend to the President that the land may be compulsorily acquired .The provisions of section 40, in particular , provide for compulsory acquisition of land , but this must be effected in accordance with the Lands Acquisition Act.

The powers of expropriation contained in this Act operate under the same principles and mechanism as the powers under the Lands Acquisition Act. Both Acts Vest the power of expropriation in the President alone.

The Mines and Minerals Act[46]

The relevant section under which compulsory acquisition is effected is section 79 (1), under which the President is empowered to make an order compulsorily acquiring private land or rights over or under private land for use by a person who holds a mining license. Although the President acquires the land in his name , the purpose is to provide for the use of a person who holds a mining license.As per requirement of the Constitution , the Mines and Minerals Act also provides for compensation to be paid in accordance with the provisions of section 80 of the Act. It can be argued, however, that this state of the law is

[45] Cap 283 of the laws of Zambia
[46] Cap 213 of the Laws of Zambia

rather dangerous because there is chance of placing an over emphasis on goals and ends set by the state more than values and culture.

Preservation of Public Security Act[47]

The Preservation of Public Security Act, like the Emergency Powers Act, is one of those Acts that have been classified as "secondary sources "because it was not specifically enacted to provide for power of compulsory acquisition *per se.* The main purpose of this Act is to make provision for the preservation of public security , but in the course of doing so , the Act provides for the taking of possession of property if such property would facilitate the preservation of public security.From the outset , it should be noted that the provisions of this Act come in to effect , as provided by section 3(1) , only when a declaration made under paragraph (b) clause(1) of Article 30 of the Constitution has effect , that is , when what is commonly referred to as a "threatened state of public emergency" exists. Having identified this Act as a secondary source of authority to compulsorily acquire property, one would wish to know how this Act makes provision for the above-mentioned authority or power. The Act empowers the President, for the preservation of public security, by regulation to make provisions, inter *alia*, for the prohibition, restriction and control of ... possession, acquisition, ... of movable property, and the. ...Occupation and use of immovable property.[48]

In the exercise of powers contained under sections 3,4 and 5 of the Preservation of Public Security Act, regulations may be made providing for the taking of possession of land and

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[47] Cap 112 of the laws of Zambia

[48] Section 3 (2) (c), Preservation of Public security peace Act. Cap 112 of the Laws of Zambia.

Buildings, and the acquisition of property other than land or buildings. The said regulations must provide for payment of compensation for property taken or acquired by the state there under. This development through legal enactment and enforcement can be equated with the increase in the state's power to use the law for the requisition of its security and economic goals.

The Emergency Powers Act[49]

As stated earlier in the discussion of the Preservation of the Public Security Act , the Emergency Powers Act is also a secondary source of compulsory acquisition powers. The purpose of this Act , was and is still to *inter alia* , empower the president , whenever an emergency proclamation is in force under Article 30(1)(a) of the Constitution , to make emergency regulations ,to specify the matters which may be provided for in emergency regulations. The authority to take possession or control , or acquire any property or under taking or any property other than land is conferred under section 3(2)(b), in the exercise of the general powers conferred by subsection (1) of section 3 of the Act. Under section 3(2)(f) , it is also a requirement of the Act that compensation should be paid to persons affected by the regulations.

Having identified the secondary sources of compulsory acquisition authority , the discussion proceeds to examine the impact that expropriation laws have had on an individual's right to property , by bringing out the implications of the law in instances where the question of Article 16 of the Constitution arose, and in particular the paper examines the case of the state's take over of private trading enterprises in 1988, in

[49] Cap 108 of the Laws of Zambia

exercise of powers contained under the Emergency (Essential Supplies and Services) Regulations,1988.

THE IMPACT OF EXPROPRIATION LAWS ON THE INDIVIDUAL'S RIGHT TO PRIVATE PROPERTY.

Despite being a good set of laws, expropriation laws have a negative impact on individuals right to property. This can well be illustrated by examining the state's take over of private trading enterprises in 1988.

In 1988, shortly before the Parliamentary and General Elections of that year , there was a critical shortage in the supply of essential commodities to the public , and the prices of those essential commodities that could be found were extremely high. The Government of the Republic of Zambia blamed the business community for the shortages and the ensuing high prices, alleging that traders were hoarding the essential commodities and supplying them to the black market instead.

In response to this, the President of the Republic of Zambia promulgated "The Emergency (Essential Supplies and Services)Regulations , 1988", in the exercise of powers contained in section 3 of the Emergency Powers Act. Arising out of the events that followed the promulgation of the Emergency (Essential Supplies and Services)

Regulations 1988 was the case of **Shilling Bob Zinka V. The Attorney –General**[50] which challenged the validity of the take over of trading enterprises by the State.

The facts of the case are that , on February 19th , 1988, the president promulgated the Emergency (Essential Supplies and Services)Regulations ,1988 contained in Statutory Instrument No. 38 of 1988.The Regulations were made under section 3 of the Emergency powers Act , and received the approval of the National Assembly immediately before they came into force. The Regulations provided, inter- alia , that "any property or undertaking, other than land belonging to any person or company whose license has been revoked by the President under the Trades licensing Act, may be acquired or taken possession of ,or control over , by the Republic.

On the following day, February 20, the President made Statutory Instrument No. 39 of 1988 under section 24 of the Trades Licensing Act (Revocation) order, 1988 under which a number of licences held by the named companies and individuals, including the appellant were revoked.

During the night of the said February 20th , about seven Zambia Police officers , led by a Chief Inspector , awakened the appellant who permitted them (on request) to search his house and two shops , one of which was in Mufulira Town Centre and the other at Mokambo , on the boarder between Zambia and Zaire now Democratic Republic of Congo. The police officers said that they were looking for essential commodities,

[50] Supreme Court of Zambia Judgement No. 9 of 1991 (Appeal No. 1988)

mandrax , cocaine and foreign currency, however nothing relevant was found in the appellant's house or in either of his two shops, but an inventory of commodities found in the Mokambo shop was made.

On February 21, the appellant surrendered his shop keys at the behest of the Zambia Police officers and members of the Special Branch in the Office of the President. On the 4th, the appellant brought a petition before the High court against the respondent but , on being heard , the petition was dismissed , hence the appellant's appeal to the supreme court.

The appellant advanced six grounds of appeal ,only one of which maybe taken to be relevant to this discussion. It was contended that the learned trial judge erred in holding that the Emergency (Essential Supplies and Services) Regulations ,1988, contained in Statutory Instrument No.38 of 1988 , were lawful. The appellant argued that the Regulations made under section 3 of the Emergency Powers Act, were unlawful and unconstitutional on the basis that the President had not at all issued a proclamation declaring that a state of public emergency existed under Article 30 (1)(a) of the Constitution as the said proclamation was a mandatory requirement.

The learned Solicitor- General on behalf of the state, conceded that there was no specific proclamation under Article 30 (1)(a) of the Constitution, but he counter- argued that the provisions of section 20(7) of the Interpretation and General Provisions Act[51],

[51] Cap 2 of the Laws of Zambia

And the Indian cases of **PR Naidu v. State of Uttar pradesh,**[52] **J K. Steel Limited v. Union of India A.I.R**[53]**, Hukumchad Mills v. State of Madhya Pradesh A.I.R**[54]**, Afzal ulla v. State of Up**[55]**,** were authorities to justify the President's exercise of his power under the law as the Emergency (Essential Supplies and Services)Regulations contained in Statutory Instrument No.38 of 1988 and purportedly made under section 3 (1) of the Emergency Powers Act could lawfully have been made under section 3(2) of the Preservation of Public Security Act.

The decisions of the Supreme Court of India in the above cited cases enunciated the principle that a wrong or inaccurate reference to a power under which certain actions are taken by the government, will not *per se* vitiate the actions done if the exercise of a power can be traced to a legitimate source.

The Supreme Court went on to look at some Constitutional and other statutory provisions that were germane to the matter at issue , namely , Article 30(1)(a) and (b) of the Constitution , sections 2 and 3 of the Emergency Powers Act, section 3(1) of the Preservation of Public Security Act after which it said that "it was abundantly clear that the Emergency Powers Act and Regulations made there under could be invoked only when a declaration of a threatened public emergency exists under Article 30 (1)(b) of the Constitution. In other words, each type of emergency under discussion requires its own

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[52] (1977) SC 854
[53] (1970) SC 1173
[54] (1964) SC 1329
[55] (1964)SC 263

specific proclamation as a condition precedent.[56]

The Court emphasized the fact that the only proclamation that existed so far in Zambia (that is, up to the second Republic) had been in terms of Article 30(1)(b) of the Constitution. Cases that had arisen under emergency legislation pertaining to the preservation of public security had been decided on the basis of the said proclamation. The Supreme Court further reasoned that as there was no proclamation declaring that a state of public emergency existed in the country under Article 30 (1)(a) of the Constitution , it followed that the President could not have validly promulgated the Emergency (Essential Supplies and Services)Regulations. There could thus have been no doubt that the President's reference to the Emergency Powers Act was wrong.

The question upon which the first ground of appeal rested was whether the President's wrong reference to the Emergency Powers Act vitiated the exercise of his power in that case. To answer this question, the Supreme Court went back to the submission of the Solicitor –General, which was simply that it could not vitiate the exercise of the President's power in that case. In support , the Solicitor –General relied upon section 20(7) of the Interpretation and General Provisions Act , which provides that;

> 20 (7)"Every statutory instrument shall be made under all powers there unto enabling , whether or not it purports to be made in exercise of particular power or particular powers.[57]"

The interpretation which the court placed upon the provisions of section 20(7) was that

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[56] Shilling Bob Zinka V,. Attorney General f Zambia, Judgment No. 9 of 1991, P j4
[57] Cap 2 of the laws of Zambia

every statutory instrument shall be deemed to be made under an existing enabling power and it was immaterial that the said statutory instrument purported to have been in exercise of a power or powers, that is , if a power exists and its exercise can be traced to a legitimate source, then , the fact that such power is incorrectly or erroneously expressed under a wrong source or power will not vitiate the exercise of the power in question. Therefore, the Supreme Court held, on the first ground of appeal that the power which the President purportedly exercised under the Emergency Powers Act could lawfully and validly have been exercised by him under section 3(2)(c),(d) and (e) of the Preservation of Public Security Act. In those circumstances, as the President's exercise of his power was traceable to a legitimate source, the fact that he purportedly exercised that power under a wrong source did not invalidate his action.

The principle in **Shilling Bob Zinka V. The Attorney –General** that ..."if a power exists and its exercise can be traced to a legitimate source, the fact that such power is incorrectly or erroneously exercised under a wrong source or power will not vitiate the exercise of the power in question"[58]. In view of the holding of the supreme court, the position of the law in relation to the view alluded to above, is that even where the state erroneously, does not adhere to the requirement of the Act by wrongly acting under another Act, such an error will not vitiate the exercise of the power in question if it can be traced back to a legitimate source , hence it is not bound to bring about any liability on the state such as trespass , since one of the conditions necessary to establish trespass is that the act complained of must be unlawful.

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[58] Shilling Bob Zinka V. the Attorney General of Zambia, P. j5

However , where the powers conferred under an enabling Act are exceeded , then the purported exercise of those powers is unlawful and any acts done in pursuance of such power is capable of bringing about liability on the state.

The inherent danger with such a state of law is that it is susceptible to abuse since the authorities in whom the exercise of statutory powers is vested may not act with due care in the exercise of their statutory powers. Whether or not it causes loss or inconvenience to individuals, their action will be justified since there exists a legitimate source under which the power could have been exercised. This view coupled with the point raised in the discussion of the Lands Acquisition Act as a source of expropriation power make the position even more grave.

Under the discussion of the Lands Acquisition Act, the paper alluded to the fact that discretionary powers are not challengeable unless it can be shown that the authority exercising such powers acted in bad-faith or from improper motives or extraneous considerations or under a view of the facts or the law which could not reasonably be entertained . Even though it is conceded that the wrong reference to a power does not necessarily vitiate the President's action, in the writer's opinion the view that the President's exercise of his powers in revoking trading licenses and the authorization of taking over trading enterprises as the effective way of ensuring the supply of essential commodities to the public, was an act that could not reasonably have been entertained. If the traders were, as alleged, involved in black market activities, they could have been effectively prosecuted under criminal law so as to curb their alleged black market

activities and not by invoking the powers contained under the emergency legislation. In the opinion of this writer, this amounted to a clear infringement of the rights of an individual who were victims of the action of the state, especially that the state had failed to prove its allegations and on many occasions had to return the property, which it compulsorily took over , to the original owners. The provision of the Constitution under Article 25 which permits derogation from fundamental rights and freedoms may be cited in support of the view that the President's exercise of his powers was an infringement of an individual's property rights under Article 16 of the Constitution. Article 25 of the Constitution provides in part that 'Nothing ...done under the authority of any law shall be held to be inconsistent with or in contravention of Article ...16... to the that extent it is shown that the law in question authorizes the taking, ...when a declaration under Article 30 is in force, of measures for arising the purpose of dealing with any situation existing or arising during that period, and nothing done by any person under the authority shall be held to be in contravention of any of the said provisions unless it is shown that the measures taken exceeded anything which , could reasonably have been thought to be required for the purpose of dealing with any situation in question.'

The writer's understanding of the provision of the above Article (relevant to the right to Property) is that any measures taken under the authority of any law shall not be considered to be inconsistent with or in contravention of Article 16 if it can be shown that the enabling law authorizes the taking of such measures for the purpose of dealing with any situation existing or arising during a period when a declaration under Article 30 is in force.

However , the measures referred to above will be considered to be in contravention of Article 26 if it can be shown that the said measures were in excess of any measures which could reasonably have been thought to be required for the purpose of dealing with the situation in question .Reasonableness is measured with regard to the circumstances prevailing at the time and upon a true construction of the Act.[59]

Can it then be said that the measures taken by the president , that is, the revocation of trading licenses and the authorization of taking over private shops under emergency legislation , could reasonably have been thought to be required for curbing black-marketeering and the critical shortage in supply of essential commodities? The answer to this question is definitely not in the affirmative, for there were many more reasonable measures for dealing with the situation that prevailed at that time. It may further be argued that , the fact that nothing relevant was found in the appellant's house or either of his two shops during the search , raises a strong presumption that the president in issuing the regulations under emergency legislation , acted in bad faith or from improper motives. If the appellant , like so many others like him , was involved in activities pre-judicial to the maintenance of essential supplies and services , and the measures that were taken by the state were reasonably expected to arrest such activities , then the appellant should have been found with at least some of the items that the police officers were looking for during the search of his home and two shops. The fact that none of the items that were sought after were found was indicative that the appellant was innocent and hence the taking possession of the appellant's two shops was a disturbance of his

[59] H. W. R Wade, Administrative Law, 6th ed. (Oxford: OUP., 1988) P. 403

possession and quiet enjoyment of his property against his will. This clearly amounted to trespass to the appellant's property, but the Supreme Court held that is was not.

However, where the measures taken were unreasonable, on a true construction of the enabling Act, then the exercise of the discretionary power was ultra vires, unlawful , and capable of inviting liability in tort for any act done in pursuance thereof. Discretionary powers are not unfettered, thus it is the area in which the deciding authority has genuinely freedom to decide provided the decision is within the law. If it passes those bonds, it acts ultra vires[60]. It is strongly contended that had the Supreme Court addressed its mind to the issue of reasonableness of the measures taken by the President, it would have been arrived at no other conclusion than that the Emergency (Essential Supplies and Services)Regulations , 1988 were unlawful since it was unreasonable for the state, in the "Wednesbury sense" to resort to curbing black marketeering by use of emergency legislation.

CONCLUSION

In discussing the chapter, a number of salient points emanated. The chapter's aim was to examine the impact that expropriation laws have had on the right of property as enshrined underArticle 16 of the Zambian Constitution. In pursuance of this aim, the paper firstly classfied the sources of expropriation laws in to primary and secondary sources. It can be recalled that the doctrine of eminent domain has , in recent times , merely been a justification for and not authority for compulsory acquisition. In relation to the

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[60] H. W. R Wade, Administrative Law, 6th ed. (Oxford: OUP., 1988) P. 407

examination of the impact of expropriation laws, the paper looked at the case of **Shilling Bob Zinka V. A-G** to illustrate the position of the law in one aspect. One of the issues in the case was the legality of the promulgation of the Emergency (Emergency Supplies and Services) Regulations, 1988.The Regulations and the acts done in the exercise of powers contained therein were saved by the construction placed upon section 20(7)of the Interpretation and General Provisions Act. However, having regard to the provisions of Article 26 of the Constitution , the eventual failure to find anything that tied the appellant (Bob Zinka) to the allegations made by the State and , the deprivation of property that the appellant suffered , it is difficult to arrive at any other conclusion apart from one that , this was a subtle derogation from the appellant's right to property as enshrined under the Constitution.The decision of the Supreme Court in the Zambian case adds a new dimension to the problem of protection of fundamental rights and freedoms under the law , namely , the right to property , since future cases that will have to be decided on similar issues will probably take the same direction as the Zinka case without having due regard to the rights to the rights of the individual.

CHAPTER FOUR

The right to private ownership of property is the most honourable of all fundamental rights in point of antiquity.[50] Hence, the philosophical and economic theories on the origin and justification of the right are legion, but this paper was not intended to examine these theories, but rather to consider the extent of the protection afforded by modern law to the right.

THE LEGAL RIGHT

The right to own property and protection against deprivation is a recognized legal right world wide and turning to the question of the protection of the right by the law, the dictum of Lord Camden C. J in **Entick V. Carrington** is frequently cited as an illustration of the law as the buttress of the right:

> "By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence. If he admits the fact, he is bound to show by way of justification, that some positive law has empowered or excused him."[51]

While this can be understood in a general sense to mean that the law will protect rights against unlawful interference, this is not the only problem today. Another problem is that of the protection against what maybe called lawful invasion, that is, their usurpation by legislation. Rights in property may be abolished, regulated or terminated by statute, and against these eventualities, there is no constitutional guarantee.

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[50] E.Y Exshaw, "The Right of Private ownership", J. W Bridge et al (eds) Fundamental Rights (London sweet and Maxwell, 1973) P. 47

[51] (1765) 19 st. Tr. 1030, 1067

It may then be asked, how does the right of private ownership differ in this respect from any other fundamental rights? The answer lies in the fact that, while in democracy fundamental rights tend to thrive and flourish, there is a marked tendency on the part of the sovereign parliament to restrict property rights. It is a case of the rights of a perpetual minority being at the mercy of politicians dependent on the pleasure of the majority.[52] How then is the right protected under a written constitution guaranteeing this and other rights? Naturally, the answer will depend on the strength of the constitutional guarantee, which can never be absolute. The provisions under Article 25, 16 and 17[53] are important and need consideration. What then is the effect of these articles as a whole? Attention may be drawn to the fact that the language of the constitution is in general form. It does not speak with the precision of a modern statute.[54] The value of the guarantee against deprivation of property has been lessened more by the terms in which it is expressed than by the operation of the qualifying clauses. Surprisingly, there are enumerated twenty-five circumstances under which a person may be lawfully deprived of his property. As such an individual can lawfully be deprived of his property by the state for instance in satisfaction of any tax, rate or due, by way of penalty for breach of any law, in execution of judgments or court orders, and where the property is any mineral, mineral oil or natural gases or any rights accruing by virtue of any title or licence for the purpose of searching for or mining any mineral, mineral oil or natural gases.

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[52] E. Y Ex Shaw, " The Right of Private ownership", J. W Bridge et al (eds.) Fundamental Rights (London Sweet and Maxwell, 1973) P. 73

[53] CAP 1 of the Laws of Zambia

[54] L.S Zimba, The Constitutional Protection of Fundamental Rights and Freedoms in Zambia; An historical and comparative study (PhD, University of London, 1979) P. 22

It is, therefore, true to argue that the guarantee against deprivation of property is merely one against legislation attempting to abolish the right of private ownership, because on a fair construction of Articles 25, 16, and 17 of the Zambian Constitution[55]. It is difficult to see what protection they afford to an individual against the compulsory acquisition of his property. The guarantee against deprivation of property, in the form in which it is expressed, is so far from being an effective protection of the property rights of the individual that it might not have been thought necessary to weaken it further by the insertion of the qualifying clauses. However, the ironical point emerges that, if the guarantee had been an effective one, the qualification upon it might have been construed as a somewhat limited one.[56] By virtue of the qualification, the exercise of the right to property may be delimited by legislation. This would not appear to justify any interference with the nature of the right itself or its expropriation.

COMPULSORY ACQUISITION OF PRIVATE PROPERTY: IS THE STATE IN ORDER?

The criteria for determining the issue of the validity of any law is embedded in the theory of the instrumental function of law. Thus, the purpose of any law is to secure social interests and where individual and social interests conflict, social interests must prevail. On the basis of this proposition, it can be concluded that derogating from the rights of an individual in general and property rights in particular is valid to the extent of protecting the interests of the general public. Suffice to say expropriation laws are enacted in the avowed interest of the entire public. Viewed from this perspective, it is necessary to say the

[55] CAP. 1 of the Laws of Zambia

[56] L. S. Zimba, The Constitutional Protection of Fundamental Rights and Freedoms in Zambia: An historical and Comparative study (PhD, University of London, 1979), P. 23

concept of law and society demand the enactment of legislation which goes to the basis of human existence and thus the state is in order to compulsorily take over property from individuals provided the individual is adequately compensated. To this effect Article 16 (1) of the Constitution of Zambia provides that:

> "16 (1) Except as provided in this Article, no property of any description shall be compulsorily taken possession of and no interest in or right over property of any description shall be compulsorily acquired, unless by or under the authority of an Act of Parliament which provides for payment of adequate compensation for the property or interest or right to be taken possession of or acquired."[57]

It can be deduced that payment of compensation to the private owner of property is a conditional precedent to taking over of one's property. It must be emphasized that in the same spirit, most statutes in Zambia that provide for expropriation of private property also provide for compensation in the face of compulsory acquisition and to protect against compulsory acquisition without compensation and if the acquisition is for the public benefit only. Thus section 3 of the Lands Acquisition Act provides that the President may, whenever he is of the opinion that it is desirable or expedient in the interest of the Republic so to do, acquire any property of any description[58]. The point to note is that the area of departure from the pattern of these statutes is that they provide a legal framework for acquiring property from an individual provided that the individual is adequately compensated and the acquisition of the property is in the interest of the public whenever

[57] CAP. 1 of the Laws of Zambia
[58] CAP 189 of the Laws of Zambia

the president deems it expedient. However, this proposition entail that the property rights of an individual are dependent on the discretionary powers of the president who sometimes in the exercise of his powers, the property rights of an individual are completely disregarded. This is due to the wide powers given to him by the expropriation enactments. It follows that time and again these enactments are abused and used for purposes not intended by the law.

In **David Wise V. The Attorney General,**[59] the state compulsorily acquired two farms belonging to Mr. and Mrs. Wise in Mazabuka under the provisions of the Lands Acquisition Act of 1970.The state later on sold the two farms to Raymond Barret, a private individual. The Plaintiff challenged the acquisition of the two farms in the bases of wrongfulness, irregularity and unlawfulness because it was done in bad faith. The court held that the said acquisition of the two farms was done in bad faith because it was done solely for the interest of an individual company and not for public purpose. The court further stated that the purported interest of the republic was too remote, and far – fetched in that case, and hence could not be sustained in law. Implicit that what the respondent company and its officers failed to acquire before the courts of law could not be allowed to be acquired through the intervention of the Executive acting in violation of the rule of law. On the basis of bad faith, the purported compulsory acquisition of the two farms was held to be null and void ab initic and the appellant's action succeeded.

[59] (1990/92) ZR 124

Furthermore, the issue of bad faith arose in **Zambia National Holdings Limited and United National Independence Party V. The Attorney General.**[60] In this case, the appellants petitioned the High court challenging a decision by the respondent to compulsorily acquire the appellant's land being stand No. 10934, Lusaka, also known as the New UNIP Headquarters. The issues raised challenged the constitutionality and legality of the compulsory acquisition and the refusal of the High court to grant an interlocutory injunction restraining the respondents from taking possession, occupation or entering upon the said land. The court, regarding *malafides* held that although the executive's statutory action could be challenged legally if made in bad faith, the present circumstances in the case under discussion did not disclose *malafides*. This ground of appeal failed on the basis that the action by the state demonstrated the highest regard for public interest by endowing that only properties acquired using state funds were compulsorily acquired.

In **May Vijaygiri Goswami V. Dr. Mohammed An war Esson and Commissioner of Lands,**[61] the appellant owned stand No. 8492 Lusaka. Following the deportation of her husband, the appellant lived abroad with him leaving the property abandoned and neglected. The land was re-possessed by the second respondent who served a notice of re-entry on a watchman for breach of the covenant to pay ground rent and allegedly for breach of the development clause. After re-entry, the land was swiftly allocated to the first respondent and a certificate of title issued to him. No compensation was paid. On appeal, the court ruled that the re-entry was lawful and service of notice proper, but that

[60] (1993/94) ZR 115 (Supreme Court)
[61] SCZ judgment No. 3 of 2001 (unreported)

compensation ought to have been paid to the dispossessed owner whether re-entry was for good or bad cause. The Lands Tribunal should therefore have ordered the government to pay compensation for the real value of the property.

It is rather confusing and unconvincing that the court did not declare the acquisition of the property illegal hence null and void on the basis that it violated the Lands Acquisition Act. The speed with which the entire transaction was done to deprive a citizen of her land and give it in record time to another person shows that there was injustice which the Lands tribunal should have taken into account to invalidate the re-entry and repossession. In **William Wise V. the Attorney General** [62] it was held that the letting of private property not for public use but to be leased out to private occupants for the purpose of raising money is an abuse of the power of eminent domain and may be redressed by an action at law like any other illegal trespass, done under an assumed authority. In Goswami's case, the acquisition of the property in question and letting it out to Dr. Mohammed Anwar Esson put the purpose for such compulsory acquisition in question suffice to say the transaction tainted the compulsory acquisition and is a pointer or indication that it could not have been done in good faith.

Furthermore, it is trite law that compensation is a condition to compulsory acquisition, which in his case was not fulfilled. Compensation meets the justice of the compulsory acquisition case and hence the Constitution of Zambia allows the dispossessed property owner access to the courts to determine the legality of the acquisition and the amount of compensation and the promptness of payments. On this basis, it is quiet difficult to

[62] (1990/92) ZR 124

perceive how the Supreme Court held the compulsory acquisition without compensation to be legal.

The authorities take advantage of the silence of the Lands Acquisition Act on the question of the purpose or purposes for which the state may compulsorily acquire property upon payment of compensation to employ the law for the purposes not intended by the law and to their own personal gain. However, this silence does not per se give the state a blanket right to compulsorily acquire property without any cause or purpose as is usually the case. The purpose for compulsory acquisition of property, upon payment of compensation must be a public one and what constitutes public use frequently and largely depends upon the facts surrounding the subject.

In conclusion, it is cardinal to point out that for the purposes of development and safeguarding the rights of the majority when they clash with that of an individual, it is inevitable that the interest of the majority must prevail. Thus, the state is in order to derogate from one's right to property. It must be emphasized here that its not a question of whether the state is in order or not to derogate from one's right to property but whether the wide discretionary powers given to the president are employed for the purposes intended by the law. The few cases discussed above show that the wide discretionary powers at the disposal of the president have been abused at most instances. The wide nature in which the expropriation laws have been enacted provide a very dangerous state of affairs that the status tend to over look the rights of the individual and maximizes the element of arbitrariness. It is therefore, submitted that the major area of concern is to discover the

legal mechanism for the safeguard of the right of the individual in the face of widely drafted legislation enacted to provide the legal basis for compulsory acquisition. In other words, the rule of law should not only be done but should also be seen to be done and maintained to balance the inherent arbitrariness embodied in the theory of instrumentalism of the law and the next chapter makes recommendations on how the same can be achieved.

CHAPTER 5

CONCLUSION

In concluding the subject matter of the paper , it is paramount to draw in summary form important points derived from the course of discussion. The paper will then proceed to look at the main hypothesis advanced with the view to ultimately draw conclusions whether or not the hypothesis has been confirmed. In so doing , the intention is to see how far the statement of the problem has been confirmed and to what extent reform can redress the situation.

In Chapter one, the paper adopted the definition of human rights as advanced by professor Ezejiofor that, "human rights are moral rights which every human being , everywhere, at all times, ought to have simply because of the fact that, in contradiction with other beings, he is rational and moral, and that no man may be deprived of them without going against the dictates of justice." In supporting this definition , the paper examined the substance of natural rights which were basically an attempt to balance the individual interests of the citizen against those of the community as a whole. However , it was concluded that property rights can not be guaranteed in absolute terms disregarding the interests of the community.

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In Chapter Two ,the paper embarked on an exposition of the meaning and substance of the right to property .A basic definition of property was synthesized from various concepts of property and in the final analysis the chapter ended with a discussion of the view that an act of expropriation does not alter the item so expropriated but rather the rights of the previous owner of the expropriated property are suspended and converted in to another form through payment of compensation . This view relates well with the Constitutional requirement that demands that every law that authorizes expropriation of private property should also make provision for payment of compensation.

In Chapter Three the sources of compulsory acquisition laws were identified as being the doctrine of eminent domain and statute, with eminent domain now finding contemporary expression in statutes that provide for compulsory acquisition. It was argued in this chapter that the compulsory acquisition power granted by section 3 of the Lands Acquisition Act leaves the power so granted open to abuse by the repository of such power due to the subjective nature of the power. Further more, the paper argued that it is not possible for a victim of compulsory acquisition to prove bad faith as a way of challenging the acquisition of his property since he lacks the resources that the state has at its disposal and also due to deliberate Government red-tape. It was noted that the provisions of the Lands Acquisition Act have defects as they do not provide the legal machinery for an aggrieved person to challenge the state's take over of his property. This in essence place the victim at a grave disadvantage since the law does not carter for his possible objections. In addition, chapter three dealt with the effect of compulsory acquisition laws on an individual's right to property. In this regard the case of Shilling

Shilling Bob Zinka v. The Attorney –General was taken as a test case. The supreme court holding that a wrong reference to a power will not invalidate that exercise of power if its exercise can be traced to a legitimate source compelled the writer to take the view that there is a danger in the state of the law as it was interpreted by the supreme court, particularly with regard to those authorities who exercise discretionary powers since they would not exercise their power with due care and diligence , knowing too well that in the event of an error they would be covered by another law. This is aggravated by the fact that most discretionary powers under Zambia's expropriation laws are not *per se* challengeable .Thus from the liberal view point of expropriation laws it can be noted that they leave too much room for the state to derogate from the property rights of individuals. This is the result of a lack of adequate procedural safeguards which should have been entrenched in these statutes to protect the property rights of individuals.

In Chapter Four the legal right against deprivation of property was discussed in depth. The paper further went on to show that the state is in order to compulsorily acquire one's property provided that one is adequately compensated and the acquisition of the property is done in the interest of the general public. Taking these conditional precedents as benchmarks, instances when it was alleged that the powers of the president were abused were discussed. And it was concluded that due to the wide nature of the powers of the president to compulsorily acquire property , time and again such powers have been put to use not intended by the law.

In the final analysis, the paper concludes that expropriation laws as they are, are so susceptible to misuse and that in certain cases they have been misused, with the ultimate being the State's take over of Trading enterprises in 1988 and the William Wise case. In this regard the hypothesis has been confirmed and hence despite the expropriation laws being a set of good laws, the Constitutional guarantee of the protection against deprivation of property is not adequately respected and observed because of the weakness in the expropriation laws of Zambia. It follows that to make the expropriation laws adequately protect individual's right to private property, the weaknesses in these laws need to be taken care of. Thus the paper makes the following recommendations.

RECOMMENDATIONS

The expropriation Laws of Zambia as discovered during the discussion have defects which require remedying if they are to serve the function for which they were enacted. It should be noted that most, if not all suggestions that are made relate to the Lands Acquisition Act[63]. This is because the Lands Acquisition Act is in effect the main source of compulsory acquisition and thus any reference to the 'Act' should be taken to mean the Lands Acquisition Act, unless otherwise stated.

Section 3 of the Act grants the president wide discretionary power and hence it is fair to argue that such wide power is too open to abuse as has been observed in cases like

[63] Cap.189 of the Laws of Zambia

William Wise V. The A-G.[64] In this regard, it is suggested that the particular provisions of the Act should be amended to prescribe the factors that the president should address his mind to before making a decision whether or not a particular property that is before his consideration should be expropriated. It follows that the innovation of making the determination of what constitutes desirable or expedient in the interest of the people a subjective discretion of the president does not on its own constitute a bad law but where an individual is vested with any subjective discretion by any law, the rights of the individual are invariably secured through the procedural rules[65]. And in most cases this is achieved only when the procedural rules are not one dimensional. It is only this way that the chances of arbitrariness are cured. The decision to acquire private property, as is provided for under section 3 belongs to the subjective jurisdiction of the president or the officials to whom it has been delegated. Being a one dimensional process it is quite susceptible to corrupt practices by whatever officials are charged with it as an individual whose interests are threatened by the compulsory acquisition is not given any right of hearing before the acquisition. The affected individual has got no locus standi before any board or any public authority that exercises the discretion. This procedure as it exists is purely one-dimensional and is far from achieving the equilibrium in the society that is supposed to be the function of law[66] . This procedure is a departure from the compliance with the principles of natural justice. Allowing an individual locus standi gives the individual some rights and involves him somehow in the mechanism of expropriation so that in the final analysis justice is not only done but is seen to be done. In this sense, it is

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[64] (1990/92) ZR 124

[65] Samuel Amoo, "Law and Development and the expropriation laws of Zambia", Muna Ndulo (ed), Law in Zambia (Nairobi: East Africa Publishing House, 1984),p.263.

[66] Samuel Amoo, "Law and Development and the expropriation laws of Zambia", p.264.

hereby submitted that in order to change the one-dimensional nature of the pre-expropriation procedure provided by the Lands Acquisition Act, the following recommendations be considered. Since, in practice the discretion vested in the president is exercised by the minister and the local government, a mechanism be established whereby the individual could make representations to the president regarding his objections to the compulsory acquisition. Alternatively, with the responsibility of hearing objections by the public to compulsory acquisition, the body should then make its hearings public[67].

It is also suggested that locus standi should extend to the expropriating authorities and the public. It follows that the formation of an independent tribunal to hear objections from concerned parties is much preferred as opposed to having the president hearing the objections. This preference is premised on the fact that having the president hearing the objections would be tantamount to making him judge in his own cause, since under the Act he is the acquiring authority, and this would be a violation of the rules of natural justice.

The law does not make it easy or possible for an individual whose property has been compulsorily acquired by the state to challenge the decision of the president or show his motives in order to prove his objection to the acquisition since he would not have access to the official documents relating to the acquisition. To remedy this short- coming, it is suggested that the expropriating authorities should make available for inspection any documents including maps and plans that they intend to use at the hearing. However, this

[67] Samuel Amoo, "Law and Development", p.264.

suggestion stands except in cases where the documents relating to the expropriation do not relate to matters of national security. This inspection of documents would in turn give the individual protection. It is also suggested that in cases where an abuse of authority is proved against an authority, such an authority should be held liable personally to the victim. Suffice to say immunities from government and public authorities in general should be removed so that they are legally responsible for any abuse of authority. Such an arrangement will bring in caution, foster diligence and care in the manner in which such powers can be exercised.

Lastly, the provisions relating to the procedure to be followed when compensation is to be paid is one- sided. Under section 10 of the Act, the Minister shall pay compensation on behalf of the government in respect of any property compulsorily acquired by the president. Prime facie, therefore, the decision as to how much shall be paid as compensation is that of the Minister. In case of a dispute arising as to the amount of compensation, section 11 provide that such dispute shall be referred to the court that shall determine the amount of compensation to be paid thereby resolving how much compensation is to be paid. Thus it can be argued that the initial procedure regarding the Minister determining compensation is not impartial. The establishment of a ministerial office as an adjudicating body in determining the amount of compensation to be paid amounts to the violation of the principles of natural justice. Section 11(1)[68] makes the government the judge in its own case. In this instance, it is imperative to think that an independently constituted compensation body should have been given that function to

[68] Cap. 189 of the Laws of Zambia.

provide the assurance that a certain amount of impartiality is administered. This will in turn cut down on time and costs that go with appeals to the court.

It has to be emphasized that this paper is not an exhaustive discussion of the matter of human right in relation to property. These two areas are so diverse and new views concerning them keep emerging especially with the novel judicial pronouncements that emerge every year in various jurisdictions, there is more room for continued research in this field.

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