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The Right to Property in Commonwealth Constitutions

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The right to property in Commonwealth constitutions

The right to property is an important part of most Commonwealth constitutions. This book examines the evolution of right to property and the changing trends in its interpretation by the courts. A number of specific issues are examined closely: Which interests are constitutionally protected as 'property'? When does the regulation of property amount to an acquisition of property? Are there limits on the purposes for which states may take the property of their subjects? What are the rules regarding compensation for property?

The analysis is both practical and theoretical, and it should be useful to both academic and practising lawyers.

Tom Allen is Reader at the Department of Law, University of Durham. He has published articles in leading journals and law reviews in England, Canada and the United States, and his work has been cited in courts throughout the Commonwealth.

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The Right to Property in Commonwealth Constitutions

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TO HELEN

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1 Introduction

It is difficult to imagine a state without stable rules regarding the allocation of resources. At the same time, the content and nature of these rules are as changeable as the economic, social and political circumstances in which they operate. A successful state must therefore recognise the institution of property, while also recognising the need to modify property rules and distributions in appropriate circumstances. In practical terms, the state must have the power to take, tax and regulate property without the consent of individual property owners, but the exercise of these powers must be subject to some sort of restraint.

This book concentrates on the constitutional law regarding the compulsory acquisition of property in the Commonwealth. Most Commonwealth countries include a right to property in a constitutional bill of rights.[1] These rights generally provide that property may not be acquired compulsorily except for a public purpose and upon payment of adequate compensation. The framing and interpretation of these rights to property raise a number of common issues across the Commonwealth, and this book seeks to describe the main issues and the different ways in which framers and judges have addressed them.

In the Commonwealth, comparative law has always played an important role in legal development. The use of comparative law in Commonwealth courts can be traced back to the colonial era, when the Privy Council held that a single common law applied to all common law

[1] See the following constitutional provisions: Australia, s. 51(xxxi); Bahamas, s. 27; Barbados, s. 16; Belize, s. 17; Botswana, s. 8; Cyprus, Art. 23; Dominica, s. 6; Fiji, s. 9; The Gambia, s. 22; Ghana, s. 20; Grenada, s. 6; Guyana, s. 142; Jamaica, s. 18; Kenya, s. 75; Malta, s. 37; Malawi, Art. 18; Malaysia, Art. 13; Mauritius, s. 8; Namibia, Art. 16; Nauru, s. 8; Nigeria, s. 42; St Christopher and Nevis, s. 8; St Lucia, s. 6; St Vincent, s. 6; Solomon Islands, s. 8; South Africa, s. 25; Tanzania, Art. 24; Tonga, Art. 18; Trinidad and Tobago, s. 4(a); Uganda, s. 26; Vanuatu, s. 5; Zambia, Art. 16; Zimbabwe, s. 16.

jurisdictions in the Commonwealth, except as specifically varied by legislation.[2] This established the practice of looking to judgments from a variety of jurisdictions as an aid to determining national law. The practice was also reinforced by the development of a Commonwealth legal community, tied together by factors such as similar methods of legal education and scholarship, and the movement of lawyers and judges between countries. Comparative method also played an important role in shaping Commonwealth rights to property. To take just one example, the Nigerian right to property of 1960 drew on earlier Indian legislation and the Indian independence Constitution, and, in turn, the Nigerian provisions subsequently provided the model for many other Commonwealth constitutions. Comparative method was not restricted to the Commonwealth: the influence of the United States' takings and due process clauses is apparent in some early constitutions, and aspects of the German right to property can be seen in the recent constitutions of Namibia and South Africa.

Comparative legal method continues to play an important role in Commonwealth law, despite the weakening of the formal links that once tied the member states to each other. In some respects, the continuing strength of the comparative method is puzzling. The differences between the legal systems of its member states are considerable, especially in relation to the elements of the legal system that are relevant to the right to property. In particular, one can find common law, civilian, customary and hybrid systems of private property in the Commonwealth, and the constitutional law of a given country could be presidential or 'Westminster', federal or unitary, bicameral or unicameral. The extra-legal variation is even more dramatic: free market, *dirigiste*, capitalist, socialist and 'welfare state' governments have all, at one time or another, been in power in the Commonwealth.

For some comparative lawyers, the depth of these differences would suggest that comparative analysis of Commonwealth law is likely to be of little value. Either it sends the legal analysis of any given nation's law in an inappropriate direction, or it gives a false impression of analytical rigour where there is none. This criticism is apt where explanations of differences in legal systems are offered. Exposing differences between legal systems without explaining why differences exist is unlikely to be very interesting, and seeking to explain differences without moving beyond the bounds of the legal system is unlikely to be very convincing.

[2] See *e.g. Robins* v. *National Trust Co. Ltd* [1927] A.C. 515 (P.C.).

It is also an apt criticism in relation to Commonwealth cases on the right to property. Although foreign cases are frequently cited in argument and decisions, there is often no rigour to the comparative method of judges. There are cases where courts attempt to lay down rules regarding the use of comparative law; for example, a judge may discourage comparisons with cases from jurisdictions where the right to property is drafted in different terms. However, there are also cases where these methodological concerns are ignored. Where comparative law is used, there is no real evidence of a method as rigorous as, for example, the methods of reasoning from cases decided within the jurisdiction or the methods of statutory interpretation.

Nevertheless, judges and advocates use comparative law for different purposes than do comparative scholars. Moreover, judges and advocates do not use comparative law in the same way that they use the rules of precedent or statutory interpretation. Comparative law performs a rhetorical function, rather than a deductive or predictive function. The advocate uses comparative law to support an argument that a provision should be read in a particular way, and the judge uses it to persuade his or her audience that he or she has read the provision properly. The same argument might not be accepted if it is supported only by, for example, an economic analysis of the effects of the same reading of the provision. In this sense, comparative law could be loosely described as part of the grammar of legal advocacy in the Commonwealth. In the face of the profound differences that exist between Commonwealth countries, this is therefore the defence of comparative study: despite the differences, even a cursory look through law reports of most jurisdictions reveals that comparative law regularly makes an appearance in judgments. Lawyers who are not aware of the comparative perspective on an issue deprive themselves of a valuable rhetorical technique.

Outline of chapters

This book seeks to give an overview of the right to property. No single theme dominates all chapters, and emphasis varies according to the subject matter of each chapter. However, it is possible to describe a number of the general themes and the chapters where they are discussed in greatest detail.

Chapter 2 examines the right to property at common law. In most of the Commonwealth, there is no real distinction between

unconstitutional legislation and ultra vires legislation. Hence, the idea of a constitutional right to property that does not give the courts the power to declare legislation ineffective may appear contradictory. However, constitutional law has also referred to the unwritten fundamental law of Britain and its colonies. In practical terms, adherence to fundamental law depends on the legislature's sense of the ethical limitations on its powers. In this sense, it binds the legislature without necessarily being enforceable by the executive or the judiciary. It would be inaccurate, however, to say that the executive and the judiciary play no part in enforcing fundamental law. The executive often has some discretion in determining how to implement legislation, and may consider fundamental law in exercising its discretion. Moreover, in the colonial period, the Crown had powers of disallowance and reservation, which were exercised in relation to colonial legislation. The exercise of these powers enabled the executive to ensure that colonial legislatures did not infringe fundamental law. The judiciary's role in enforcing fundamental law is generally limited to its discretion in relation to statutory interpretation, but this is certainly not insignificant.

In the English system, there are several principles of fundamental law that protect property. The first is the principle that only Parliament may authorise the compulsory acquisition of property or the imposition of taxes. This principle is rarely litigated, although there are some modern cases where governments have fallen foul of it.[3] The second is the principle that Parliament may authorise the compulsory acquisition of property only when it is in the public interest and only upon payment of compensation. Chapter 2 investigates how these principles find their expression in the courts, and it also investigates areas where fundamental law may continue to develop. In particular, the Supreme Court of Canada has held that, although Canada has the power to expropriate aboriginal lands, the power is held in a kind of trust relationship with aboriginal peoples. This relationship is not contained in the written constitution, and it can be overriden by express statutory provisions to the contrary, but where it applies, it requires Canada to provide compensation. Hence, it could be described as part of the constitutional law of Canada; it binds the legislature, and the courts

[3] See *e.g. Bowles* v. *Bank of England* [1913] 1 Ch. 57; *Congreve* v. *Home Office* [1976] Q.B. 629 and *Fitzgerald* v. *Muldoon* [1976] 2 N.Z.L.R. 615 (S.C.). For examples under written constitutions, see: *Deokinandan Prasad* v. *Bihar* A.I.R. 1971 S.C. 1409 and *Akoonay and Another* v. *Att.-Gen.* [1994] 2 L.R.C. 399 (C.A. Tanz.).

enforce it except in specific circumstances where the legislature has clearly indicated its intention to override it.

Chapter 2 also examines the Crown's prerogative powers over property, since the prerogative is the one exception to the principle that the executive may not take property without legislative authorisation. At one time, the prerogative was important to the Crown's finances, as the Crown held a variety of powers to claim certain types of goods and had certain privileges which benefited it financially. In the modern era, the question of the extent and scope of the prerogative powers over property has arisen only in relation to wars and emergencies, and it is this area that is examined.

Chapter 3 reviews the drafting of rights to property in written constitutions. The shortest right to property in the Commonwealth was that of the Government of Ireland Act 1920, which provided simply that the legislature of Northern Ireland did not have the power to 'take any property without compensation'. At the other extreme is Zambia's right to property, which runs to over 1,000 words. The prolixity of many of the provisions can be explained by a number of different factors. These are explained in greater detail in chapter 3, but in essence it seems that the drafters wrote the provisions for judges and lawyers rather than a general audience. There was also the British mistrust of written bills of rights, which stemmed partly from the belief that the generality of the language of most bills of rights reduced their effectiveness. For these reasons, it seemed appropriate to adopt the precise style of statutory drafting. By the 1980s, attitudes had changed, and there was a deliberate movement by drafters to greater generality.

Although the British resisted the inclusion of comprehensive bills of rights in written constitutions of colonies, they did advocate the inclusion of rights to property in the independence constitutions of their former colonies. There were two main reasons for this: the first was the fear that the newly empowered legislatures would authorise the confiscation of property held by Europeans and their allies amongst local property-owning classes, and the second was a general belief that the protection of property would contribute to the economic and political stability of the new nation. There was very little analysis of the potential impact of a right to property on the state's capacity to govern effectively, perhaps because the fundamental law regarding property was enforced by the executive in most colonies. Hence, it was already the case that legislation authorising the expropriation of property was subject to review on grounds that it did not serve a public purpose or

that it did not provide for payment of compensation. In this sense, the constitutionalisation of the right to property merely shifted the review jurisdiction to the courts.

In general, the British campaign for rights to property met with very little resistance from national leaders, and the impact of a right to property on a state's power to reform the economic system was often left unexamined. There were exceptions, of course; for example, in India and South Africa, the British had no influence on constitutional drafting. Even so, the debate in these countries tended to focus on the potential impact of a constitutional right to property on land reform rather than its impact on government generally. There are also a number of countries without constitutional rights to property. Singapore has a constitutional bill of rights, but it does not include a right to property. Other countries have enacted bills of rights that do include rights to property, but only give the judiciary a limited power to review legislation. New Zealand is one example, and the United Kingdom has recently enacted the Human Rights Act, which gives the European Convention on Human Rights (limited) effect in domestic law. Canada is in the unusual position of having a constitutional bill of rights (the Charter of Rights and Freedoms) which does not contain a right to property, and a statutory bill of rights (the Canadian Bill of Rights) which does contain a right to property. There are also a number of Commonwealth countries that either repealed or suspended the application of their constitutional bills of rights. Nevertheless, in most countries, the need to attract and retain investment made it prudent to enact constitutional provisions that secured property. The development of the international law of human rights gives further support to rights to property.[4] In any case, in many countries the struggle against colonial rule did not focus on specific constitutional rights or structures, but on achieving independence. Hence, the British were often able to take the initiative in drafting bills of rights and, with the Nigerian Bill of Rights of 1960, they arrived at a model which was subsequently used in most countries. The similarities between these provisions explain, in part, the importance of comparative law in their interpretation.

Chapter 4 examines the methods of interpretation most often used by

[4] Rights to property can be found in the Universal Declaration of Human Rights (Article 17), the European Convention on Human Rights (Article 1 of the First Protocol), the American Convention on Human Rights (Article 21) and the African Charter on Human and Peoples' Rights (Article 14).

the Commonwealth judiciary when dealing with constitutional rights to property. In very general terms, their methods fall into two categories: the legalist and the purposive. While legalist interpretation dominated constitutional law for many years, most Commonwealth judges now say that they interpret purposively. In practice, purposive interpretation seems to supplement, rather than supplant, legalist interpretation. Most courts use a purposive analysis only where ambiguities result from the application of the rules of grammar to the express language of the provision in question. In general, purposive interpretation is not used to uncover conflicts between the grammatical meaning of a provision and the actual intentions of the framers. Even in this limited sense, however, purposive interpretation takes on several forms. Some judges treat it as a variant of the 'mischief rule' of statutory interpretation, which requires the courts to identify the defect in law that led to the enactment of the provisions in question and then to interpret the provisions in the manner that remedies the defect. Constitutional bills of rights are usually drafted with much greater generality that most statutes in the Commonwealth, and so it is usually not possible to identify a specific mischief that a particular provision of the bill of rights addresses. However, it does show why many Commonwealth courts regard purposive interpretation as a type of historical interpretation, where judges seek to implement the actual intentions of the framers. Historical interpretation is not, however, the only form of purposive interpretation. Other judges relate purposive interpretation to the broad design of the constitution. For these judges, a constitution creates a structure of government, and hence constitutional interpretation should reflect and strengthen that structure. There are also a group of judges that regard their function as the protection of inherent or natural rights of individuals; for these judges, a purposive interpretation is one that is sensitive to the ethical purpose of protecting property.

Despite these differences, most Commonwealth judges take the view that a purposive interpretation of a bill of rights is a generous interpretation. In this context, a generous interpretation is one that favours broad readings of rights over narrow readings, and the protection of the individual over the needs of the state. For example, many judges have said that the right to 'property' extends to every type of property, including anomalous interests that might not qualify as property in some circumstances.[5] However, the courts do not take a

[5] See pp. 122–4, below.

consistent line on generous interpretation. For example, 'property' is usually interpreted broadly, but 'acquisition' is sometimes interpreted quite narrowly. Moreover, there are issues where generosity seems to be shown to the legislature rather than the individual. In particular, the interpretation of 'public purpose' requirements tends to favour the legislature. Indeed, on closer examination, it is not clear what 'purposive and generous' interpretation means in relation to the right to property. As chapters 5 to 8 demonstrate, when the courts discuss the various elements of the right to property – such as the meaning of 'property', 'acquisition', 'deprivation', 'public purpose' and 'compensation' – they often adopt the private law meanings of these terms and apply them to the facts in a fairly mechanical way. There are exceptions, of course, but the majority of decisions follow a predictable pattern: the judge declares that the constitution must be interpreted purposively and generously, and perhaps that 'property' must be given an expansive interpretation. But from this point onwards, there is no explanation of what that purpose may be, or even how generosity to the individual should translate in terms of the actual result. The judges tend to go immediately to private law cases on property and base their conclusions on those cases. In effect, they often treat the constitutional right to property in the same way as they treat statutory provisions on the expropriation of property. Indeed, the only clear judicial statement on the desirability of protecting property comes from the Supreme Court of Canada, which refused to find an implied right to property in the Charter, just as it had previously refused to find a substantive right to property in the statutory Bill of Rights.[6] Other courts often seem uninterested in identifying why property should be constitutionally protected. How they are then supposed to interpret the right to property 'purposively' is difficult to see; why it should be 'generous' is even more difficult to grasp.

Chapter 5 concentrates on two questions relating to the meaning of property. The first question is whether there is an essence or core to property that distinguishes interests that are constitutionally protected from those that are not. We might expect the response to this question to be informed by purposive interpretation. For example, if the purpose of the right to property is the attraction or retention of investment, then arguably the courts should focus on rights, which derive from investment. This would include most traditional forms of property,

[6] *Irwin Toy Ltd* v. *Att.-Gen. of Quebec* [1989] 1 S.C.R. 927 at 1003.

such as land, chattels, and intangible forms of property such as intellectual property and choses in action, although it might exclude unimproved land. It could also include goodwill or a trade position, or even any sort of interest or expectation obtained by private investment that can be turned to economic gain, such as an educational qualification. Alternatively, if the purpose of a right to property is the enhancement or protection of individual welfare and human dignity, the right to property should be interpreted in a manner that fulfils this goal. Social welfare entitlements would be given protection, at least to the extent that they maintain personal security and dignity, but perhaps property held by corporations or other artificial legal persons would not. There are constitutional cases where judges seem to be have a sense of the core values of property that they should be protecting, but, in general, the entire question is not addressed.

The second question asks whether obligations are part of property. The liberal conception of property describes it as a bundle of rights. The emphasis is therefore put on the social and economic power flowing from ownership of property, and not on the obligations that may flow from it. It is linked with the liberal theory of the constitution, which stresses the importance of limiting state powers so as to protect individual choices. Hence, liberals tend to regard property as an area of personal inviolability into which the state may not intrude. In general, liberal theory dominates the Commonwealth jurisprudence on the right to property, but there are signs of a communitarian approach. The communitarian conception of property treats obligations as an integral part of the relationship between the owner and others. It may appear that any differences are merely a question of description; that is, both liberals and communitarians would agree that the property rights of a gun owner do not include the right to use it to injure others. However, communitarians are generally more inclined to view the obligations broadly, and to emphasise the legitimacy of the state's role in enforcing those obligations. Hence, if obligations are treated as part of ownership, the enforcement of the obligation is not a deprivation of property. However, if obligations are external to ownership, there may be an argument that any enforcement of those obligations is a deprivation of property. As chapter 6 shows, this may affect the constitutionality of the limitation. Communitarians also tend to locate the source of property in the individual's relationship with the community, where ideas of reliance and dependence determine the allocation of resources; by contrast, liberals tend to locate the source of property in individual

choice or action, such as the first possession of an unowned object or a consensual transfer from one person to another. These differences have an important effect on the range of interests that are constitutionally protected under the right to property.

Chapter 6 is entitled 'Acquisition and deprivation'. The interpretation of these terms is critical because the right to property does not extend to every law or state action that has an adverse effect on property. The drafting of some provisions reflects an assumption that the right to property would apply only to the typical expropriation of land and other traditional types of property. Hence, many constitutions guarantee compensation only when property is compulsorily acquired or taken possession of; there is no express guarantee for the destruction or deprivation of property, or for injurious affection, or for economic losses caused by the regulation of property. This raises an important issue: does an 'acquisition of property' occur only when the state acquires precisely the same rights or interests as the individual? Or can it occur when the state indirectly secures the benefit of the property, without a formal acquisition?

Framers and courts also distinguish compensatable from non-compensatable state actions according to the purpose of the state's action. Examples are the seizure of property to satisfy a criminal fine, a tax liability or a judgment debt. In these cases, it is not necessary to determine whether the state's actions amount to an acquisition or merely a deprivation of property. This approach distinguishes between the powers held by the state. The power to acquire property for the state's use is the power of eminent domain, and it is treated differently from the state's police (or regulatory) power and its taxation powers. The exercise of the power of eminent domain requires compensation, but the exercise of other sovereign powers over property, such as police and tax powers, does not. Some constitutions include detailed provisions that describe purposes for which compensation need not be paid; under other constitutions, the courts have developed similar rules by implication.

Chapter 7 examines the principles regarding the purposes for which property may be taken. While most constitutions state that property may only be taken for a public purpose or in the public interest, there are very few cases where the courts have found that no public purpose exists for the taking. The courts do not wish to limit legislative power in the style of the Supreme Court of the United States in the late nineteenth and early twentieth centuries. In *Lochner* v. *New York* and other

cases, the Supreme Court struck down social welfare legislation intended to improve working conditions, on the basis that the legislation violated the Bill of Rights.[7] The Supreme Court eventually abandoned the restrictive doctrine in the Depression, after President Roosevelt's court-packing threat.[8] The restrictive doctrine did not depend on the 'public use' clause of the Fifth Amendment, but, for many modern courts, the Supreme Court's decisions demonstrate the danger of scrutinising the purpose of legislative action too closely. Hence, they tend to be very reluctant to question the legislature's determination that the expropriation of property is for a public purpose or is in the public interest. There are circumstances where even a compensated expropriation might infringe a bill of rights, but it is unlikely to be the right to property that is infringed. For example, the expropriation of property of religious institutions or objects of religious devotion might infringe a right to freedom of religion. Similarly, the expropriation of school property may infringe language or equality rights. These examples show that some types of property may carry significance such that a monetary payment is inadequate to make government action legitimate. At present, however, the public purpose requirement of the right to property is interpreted so broadly that it provides almost no practical limit on government action.

Chapter 8 closes the book with a review of the constitutional standard of compensation. In the last century, compensation awards for the compulsory acquisition of land were quite generous. The owner could expect to be indemnified for his or her loss, and an additional solatium was often paid to compensate for the fact that the 'sale' was compulsory. By the early twentieth century, British statutes limited compensation to objectively measured losses; in essence, market values were paid. This principle carries through to constitutional law, as most constitutions guarantee 'adequate compensation' for expropriated property and most courts assume that this requires payment of the market value of property. In the case of the typical expropriation of land for a specific project, it is likely that most governments would accept this principle. Controversy tends to arise when governments undertake radical reforms of the economic system. In these circumstances, governments

[7] *Lochner* v. *New York* 198 U.S. 45 (1905). See also *Hammer* v. *Degenhart* 247 U.S. 251 (1918); *Bailey* v. *Drexel Furniture Co.* 259 U.S. 20 (1922); *Adkins* v. *Children's Hospital* 261 U.S. 525 (1923).

[8] The restrictive doctrine was abandoned in cases such as *West Coast Hotel Co.* v. *Parrish* 300 U.S. 379 (1937) and *United States* v. *Carolene Products* 304 U.S. 144 (1938).

often take the view that full compensation should not be required. For example, governments may argue that individuals who would not have obtained their property but for the support of discriminatory colonial regimes have no moral claim to full compensation. In other circumstances, governments may recognise a moral claim to some compensation, but not necessarily full compensation. Some constitutions reflect this line of thought by giving the legislature some discretion in determining the principles on which compensation should be assessed. There are courts that have had difficulty accepting this idea; in particular, the Indian Supreme Court became locked in a conflict with the Parliament over the meaning of 'compensation'. Nevertheless, these constitutions raise questions over the traditional, 'all-or-nothing' approach to compensation, where only a small number of individuals qualify for compensation, but those individuals are very generously compensated. An alternative approach would concentrate on proportionality rather than indemnification. Compensation would be one element in achieving a balance between individual and community interests. This balance might not require full compensation in every case, but equally it might require some compensation in a greater number of cases than does the traditional approach.

2 The right to property at common law

In most Commonwealth countries, the courts have the power to review legislation. A constitutional right to property enables the courts to declare legislation invalid in certain circumstances. In this sense, there is no constitutional right to property in countries where the courts do not have the power to review legislation, or where there is no right to property in the written constitution. In a more traditional sense, however, the idea of fundamental rights encompasses more than justiciable rights under written constitutions. In the English system, lawyers have long recognised a fundamental right to property that formed part of the constitution. Plainly, the fundamental right did not empower the courts to review legislation, but it has an important impact on state powers over property. This chapter examines the fundamental right to property partly because it is important in its own right, and partly because it provides the background to the entrenched Commonwealth rights to property. It begins by examining the unwritten right to property as an ethical limitation on Parliament, and how the unwritten right is reflected in the presumptions of statutory interpretation. It then concludes with a brief examination of the Crown's prerogative powers over property.

Parliament and property

The idea that state power was limited by fundamental law was accepted by the majority of writers in England in the Middle Ages and through to the seventeenth century.[1] The principles of fundamental law were ill

[1] See generally: John Wiedhofft Gough, *Fundamental Law in English Constitutional History* (Oxford: Clarendon Press, 1955); F. A. Mann, 'Outlines of a History of Expropriation', (1959) 75 *Law Quarterly Review* 188; William B. Stoebuck, 'A General Theory of Eminent

defined, but the 'majority of writers and speakers seem to have taken their existence for granted, and to have treated their meaning as so obvious and familiar as to present no problems'.[2] One of the rights of fundamental law was the right to property.[3] While the state had the power to acquire property compulsorily, it could only do so on payment of compensation and for a public purpose. Parliament held the general power to acquire property compulsorily although, as explained below, the prerogative powers of the Crown enabled it to acquire property in specific circumstances. In a famous passage, William Blackstone explained how the sanctity of property could be reconciled with the supremacy of Parliament:

> So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. In vain it may be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even a public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law. In this, and similar cases the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does, is to oblige the owner to alienate his possession for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution and which nothing but the legislature can perform.[4]

Domain', (1972) 47 *Washington Law Review* 553; P. J. Marshall, 'Parliament and Property Rights in the Late Eighteenth-century British Empire', in John Brewer and Susan Staves (eds.), *Early Modern Conceptions of Property* (London and New York: Routledge, 1995), pp. 530–44. In the United States, the idea of fundamental law influenced the development of judicial review of legislation (see E. S. Corwin, 'The "Higher Law" Background of American Constitutional Law', (1928) 42 *Harvard Law Review* 149 and J. A. C. Grant, 'The "Higher Law" Background of the Law of Eminent Domain', (1931) 6 *Wisconsin Law Review* 67), but the English idea of fundamental law was more concerned with 'the principle that politics is subordinate to ethics' than judicial review: Gough, *Fundamental Law*, p. 206.

[2] Gough, *Fundamental Law*, p. 2.

[3] *Ibid*., p. 54.

[4] William Blackstone, *Commentaries on the Laws of England*, I (London: Dawsons of Pall Mall, 1966; reprint of Oxford: Clarendon Press, 1765), p. 135.

The compulsory acquisition of property occurred relatively infrequently in Blackstone's time. The frequency increased with industrialisation, especially during the railway booms of the nineteenth century. Railway companies often obtained powers of compulsory acquisition by petitioning for private Acts of Parliament.[5] The petitions went before special committees of both Houses, where the procedure was quasi-judicial and often adversarial. At these proceedings, two fundamental principles of the right to property governed the decision to grant the compulsory powers. First, as Blackstone states, compensation had to be paid. In general, legislation required the parties to refer disputes over compensation to a sheriff's jury. In the early nineteenth century, there was a feeling in Parliament that juries tended to favour the railways over the landowners. In fact, juries probably awarded landowners more than the market price would have been in the absence of a railway purchaser.[6] Nevertheless, Parliament's concern resulted in the Land Clauses Consolidation Act of 1845, which provided a standard set of clauses for legislation authorising the compulsory acquisition of land.[7] The Act extended the powers typically given to railway companies in relation to the entry, survey and purchase of lands, but also gave the landowner the option of referring the issue of compensation to arbitration instead of a jury. Secondly, the parliamentary procedures for obtaining a private Act ensured that a public case had to be made that the conferral of the powers was in the public interest.[8] Plainly, public interest had a broad meaning: railway companies obviously hoped to earn profits for private shareholders, yet the services they provided were sufficiently important to constitute a public benefit.

The principle of parliamentary sovereignty excluded the development of a justiciable right to property, but the principle that property should be taken only for a public purpose and upon payment of compensation remained significant. Indeed, historical studies show that Parliament

[5] See generally, Rande W. Kostal, *Law and English Railway Capitalism, 1825–1875* (Oxford: Oxford University Press, 1994).

[6] *Ibid*., p. 161. [7] 8 Vict., c. 18.

[8] Michael Taggart, 'Expropriation, Public Purpose and the Constitution', in Christopher Forsyth and Ivan Hare (eds.), *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC* (Oxford: Clarendon Press, 1998), pp. 102–3. Kostal, *Railway Capitalism*, p. 180, refers to the Report of the House of Lords Select Committee on Compensation for Lands taken for or Injured by Railways, published in *H.C. Parl Papers* (1845), X, pp. 417–73, where it was said, at p. 420, that 'Public Advantage . . . is the only Ground upon which a Man can justly be deprived of his Property and Enjoyments'.

invariably compensated for the expropriation of land.[9] Of course, it is difficult to establish that Parliament did not award compensation on the basis of political expediency rather than principle,[10] but it is also difficult to imagine how the institution of private property could exist without at least some limitation on the state's expropriatory powers.[11] Moreover, despite the controversy over limits on Parliament, it is clear that constitutional principles did limit the powers of colonial legislatures over property. These limitations were not enforced by judicial review, but through a system of executive review. Local governors had the power to disallow legislation or to reserve it for Royal Assent in London. Reserved legislation would then be considered in London, by the Crown on the advice of its ministers in London. In addition, the Crown also had a separate power of disallowance. The Crown exercised its powers on both political and constitutional grounds; the governing principle of constitutional law held that no colonial legislature had the power to pass legislation repugnant to the law of England. Although the extent of this doctrine was uncertain, it was assumed that fundamental laws, such as the Magna Carta and the principle that property could not be expropriated without payment of compensation, did extend to the colonies.[12] There were a number of colonial laws that affected property rights in a manner that led the Crown to exercise the power of disallowance.[13] These forms of control were used fairly often in the nineteenth century (and earlier) and continued to be regarded as a useful means of control in this century, to the point that powers of disallowance were included in some constitutions as a means of protecting fundamental rights, including the right to property.[14]

Property rights and statutory interpretation

Blackstone stresses the long-standing principle that expropriation must be authorised by the legislature. While the Crown's prerogative powers

[9] See Stoebuck, 'General Theory', pp. 575–6.

[10] For example, in 1766, Lord Mansfield denied 'the proposition that parliament takes no man's property without his consent: it frequently takes private property without making what the owner thinks a compensation'. William Cobbett, *The Parliamentary History of England*, XVI, (London: T. C. Hansard, 1813), p. 172.

[11] Mann, 'Outlines', p. 193.

[12] See Joseph Henry Smith, *Appeals to the Privy Council from the American Plantations* (New York: Columbia University Press, 1950), pp. 530–1; and Marshall, 'Parliament and Property Rights'.

[13] See Alpheus Todd, *Parliamentary Government in the British Colonies*, 2nd edn (London: Longmans, Green, and Co., 1894), pp. 174–99, 529–35.

[14] See pp. 38, 46, below.

allow it to take property in certain circumstances, the general rule applies in the overwhelming majority of cases. Indeed, administrative law of compulsory acquisition is still largely a law of statutory interpretation, as the limits of acquiring authority's powers are determined by the original grant of the expropriatory power by the legislature. It is through the interpretation of statutes that modern courts implement the traditional idea of a fundamental right to property.

Presumptions of interpretation and compensation

In *Attorney-General* v. *De Keyser's Royal Hotel Ltd*, the House of Lords stated that 'unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation'.[15] Accordingly, the absence of a right to compensation raises a presumption that the legislature did not intend to authorise the taking. Plainly, this presumption can be rebutted by clear evidence that the legislature did intend to authorise a taking. However, in such cases the courts may find an implied right, if the statutory language permits.[16] One of the strongest statements to this effect is that of Upjohn L.J. in *Burmah Oil* v. *Lord Advocate*: 'it is clearly settled that where the executive is authorised by a statute to take the property of a subject for public purposes the subject is entitled to be paid unless the statute has made the contrary intention quite clear'.[17] The important point is that the entitlement arises under the statute; that is, '[c]ompensation claims are statutory and depend on statutory provisions'.[18] In the absence of a statutory claim for compensation, there is no common law right to compensation for an authorised taking of property.

The only suggestion to the contrary was made by Ritchie J., in the Supreme Court of Canada's decision in *Manitoba Fisheries* v. *The*

[15] [1920] A.C. 508 at 542 *per* Lord Atkinson.

[16] See *e.g. Commissioner of Public Works* v. *Logan* [1903] A.C. 355 (P.C.); *Re Collins and Water Commissioners of Ottawa* (1878) 42 U.C.Q.B. 378 at 385 *per* Harrison C.J.; *Consett Iron Co. Ltd* v. *Clavering Trustees* [1935] 2 K.B. 42.

[17] [1965] A.C. 75 at 167, referring to *London and North Western Railway Co.* v. *Evans* [1893] 1 Ch. 16 at 18 *per* Bowen L.J.; see also Mann, 'Outlines', p. 199n.

[18] *Sisters of Charity of Rockingham* v. *The King* [1922] 2 A.C. 315 (P.C.) at 322; see also *Burmah Oil* v. *Lord Advocate* [1965] A.C. 75 at 118 *per* Viscount Radcliffe; and Anon., 'The Burmah Oil Affair', (1966) 79 *Harvard Law Review* 614, p. 633: 'Whatever the common law might say about the right to compensation for takings, the right to collect that compensation from the public treasury historically arose not from the common law but from the action of Parliament.' Arguably, this position has been considerably weakened by the decision of the majority in *Burmah Oil*, since the decision allowed a claim to compensation that was not based on statute; see pp. 30–3, below.

Queen.[19] It concerned legislation that gave a state corporation the exclusive right to export fish. The plaintiff, which had owned and operated a fish exporting business, was therefore put out of business, without compensation for the loss of its goodwill.[20] Ritchie J., for the Court, held that plaintiff was entitled to compensation, although his explanation is somewhat confusing. He stated that '[t]here is nothing in the Act providing for the taking of such property by the Government without compensation and as I find that there was such a taking, it follows, in my view, that it was unauthorized having regard to the recognized rule [in *De Keyser's Hotel*]'.[21] As such, he seems to treat the compensation claim as a claim for damages for unlawful action. However, in the rest of his judgment, he assumed that the legislature did have the power to create the state monopoly. If so, perhaps he was implying a statutory right to compensation, along the lines of Upjohn L.J.'s dicta in *Burmah Oil*. But even this is questionable, as Ritchie J. was quite emphatic that the statute did not provide compensation. It therefore seems that Ritchie J. may have meant that the property owner has a common law right to compensation for an authorised taking; while this right can be abrogated by statute, it arises independently of statute.[22] If this was his intention, it would represent a departure from the general common law position. By contrast, under French law, the courts can order compensation for exceptional damage caused by administrative action under the principle of *égalité devant les charges publiques*.[23] Although it has been argued that a similar principle should apply in the English system, the point is controversial.[24] Indeed, in Canada, lower

[19] (1978) 88 D.L.R. (3d) 462 (see also: David Phillip Jones, 'No Expropriation Without Compensation: A Comment on *Manitoba Fisheries Ltd* v. *The Queen*', (1978) 24 *McGill Law Journal* 627 and Barry Barton, '*The Queen in Right of British Columbia* v. *Tener*', (1987) 66 *Canadian Bar Review* 145, p. 149).

[20] Private operators were prohibited from exporting fish unless they were issued a licence by the Corporation, or they received an exemption from the Governor in Council. The plaintiff's requests for a licence or an exemption were refused. (Similar claims have also arisen under written constitutions, where courts have held that the written constitutions require compensation for goodwill on the basis that goodwill is property. See *e.g. R. C. Cooper* v. *Union of India* [1970] 3 S.C.R. 530 at 602, 608 and *Selangor Pilot Association (1946)* v. *Government of Malaysia and Another* [1978] A.C. 337 (P.C. Malaysia).)

[21] (1978) 88 D.L.R. (3d) 462 at 473.

[22] This conclusion is strengthened by noting that many of Ritchie J.'s supporting authorities were Commonwealth cases on written rights to property.

[23] See generally Sue Arrowsmith, *Civil Liability and Public Authorities* (Winteringham, South Humberside: Earlsgate Press, 1992), pp. 240–50.

[24] Harry Street, *Governmental Liability: A Comparative Study* (Cambridge: Cambridge University Press, 1953), pp. 78–9 and Arrowsmith, *Civil Liability*, pp. 246–7.

courts have assumed that Ritchie J. did not intend to depart from the traditional position. In *Cream Silver Mines Ltd* v. *British Columbia*, the British Columbia Court of Appeal stated that any right to compensation must be found in a statute. Otherwise, 'the Crown would be, in law, obliged to pay compensation for all ''takings'', for all types of ''property'' and no matter how the ''taking'' occurs, unless the enabling legislation expressly denies compensation'.[25] Clear evidence of the legislature's intention to provide compensation should be found before the court imposes a duty to compensate.[26]

While *Manitoba Fisheries* is a very strong example of the judicial protection of property through statutory interpretation, most courts take a moderate position, as exemplified by *Secretary of State for Defence* v. *Guardian Newspapers Ltd*.[27] In this case, the United Kingdom's Secretary of State for Defence asserted that it had a proprietary right to photocopies of confidential information that had been leaked to *The Guardian* newspaper. The newspaper resisted the claim to the photocopies on the basis of section 10 of the Contempt of Court Act 1981 (U.K.), which states that the court has the discretion not to order a newspaper to disclose the identity of an informant. (The newspaper claimed that the photocopies could be used to identify the person who had leaked them.) The Secretary of State argued that the Act did not specifically authorise the interference with proprietary rights and hence it did not allow the newspaper to retain the photocopies. Lord Scarman, who rejected this suggestion, gave the presumptions much less importance. In his view, 'there certainly remains a place in the law for the principle of construction . . . that the courts must be slow to impute to Parliament an intention to override property rights in the absence of plain words to

[25] (1993) 99 D.L.R. (4th) 199 at 208. See also *British Columbia Medical Association* v. *British Columbia* (1984) 15 D.L.R. (4th) 568 at 572: the same court stated that, although there was a presumption in favour of compensation, '[t]he rule is not merely a mechanical matter of examining the legislation and asking whether there is an express written reference to the fact that the taking is to be without compensation, in words that say ''without compensation of any kind'', or some equivalent; and that, failing such words, compensation must be paid. Rather, it is the intention of the Legislature that is being sought. The Legislature will not be presumed to have countenanced an injustice, unless the contrary intention appears. But the rule does not override the legislative intention. It is not a device by which the courts can enable a claimant to outwit the Legislature.' Cf. Heald J.'s dissenting opinion in *Miller* v. *The Queen* (1986) 31 D.L.R. (4th) 210 (Federal C.A.) at 224, where he states that '[i]t is not a question of *implying* a general right to compensation. The legal right to compensation exists unless a clear and unequivocal contrary intention is expressed in the relevant legislation.'

[26] (1993) 99 D.L.R. (4th) 199 at 208.

[27] [1985] A.C. 339 (H.L.).

that effect. But the principle is not an overriding rule of law: it is an aid, amongst many others, developed by the judges in their never-ending task of interpreting statutes in such a way as to give effect to their true purpose.'[28]

Fundamental law and 'property'

The principles of fundamental law were subject to interpretation by courts, the executive and the legislature, since each of them had a role in ensuring that they were upheld. As in the case of judicial interpretation of written rights to property, there are circumstances where policy or practical politics relieve the state from any duty to compensate. These cases can lead to a re-evaluation of right to property (written or unwritten), but in most cases the decision-makers resolve these issues by a creative interpretation of the right. In particular, the duty to compensate is usually presented as a conclusion from the 'fact' that property has been taken, but finding that property has been taken is often the consequence rather than the cause of a decision not to compensate. One historical example concerns European occupation of aboriginal lands. It was generally argued that aboriginal peoples had, at most, a possessory interest in the land they occupied; hence, the Crown could assume ownership of land as *terra nullius*.[29] In such cases, many lawyers and parliamentarians argued that no constitutional principle had been violated, not on the basis that no principle governed the acquisition of property, but, rather, on the basis that ownership of the land was not acquired from the aboriginal peoples. It was not the extent of the constitutional duty to compensate that was in dispute, but the extent of the property interest itself. A modern example of this type of reasoning concerns social welfare entitlements. In general, Commonwealth courts do not treat social welfare entitlements as property, with the result that the extinction of a social welfare entitlement does not give rise to the constitutional right to compensation for expropriated property.[30] It is apparent that the characterisation of the entitlements as something other than property follows from the decision that no compensation should be paid. As in the case of aboriginal property, the

[28] *Ibid*. at 363 (dissenting on another point).

[29] James Tully, 'Aboriginal Property and Western Theory: Recovering a Middle Ground', in Ellen Frankel Paul, Fred D. Miller, Jr and Jeffrey Paul (eds.), *Property Rights* (Cambridge: Cambridge University Press, 1994), pp. 153–80 (see particularly pp. 158–69).

[30] See pp. 153–60, below.

conception of property is modified to determine the scope of the state's constitutional obligations.

The common law emphasis on property also extended to the idea that expropriation should take the form of a compulsory sale of property.[31] This left it uncertain whether the duty to compensate would apply where the facts did not fit easily into the form of a sale. These questions are important in cases where property rights and values are affected without a change in title. Legislatures often do not provide compensation for injurious affection or losses caused by regulation, which suggests that Blackstone's comments apply only to the ordinary expropriation of property. By contrast, the courts require clear evidence that regulation is intended to extinguish vested rights, even where there is no transfer of property to the state.[32] Moreover, they have shown considerable activism in applying compensation provisions to all types of infringements of property, whether or not the infringement could be described as an acquisition of property. The clearest example relates to injurious affection. Legislation often requires compensation for injurious affection, but there is no general principle that it must do so.[33] While many cases of injurious affection would also be cases of common law nuisance, no claim in tort is available if the nuisance is an inevitable consequence of carrying out works authorised by the legislation.[34] Hence, any claim for compensation must be conferred by legislation. While this would appear to work to the disadvantage of property owners, the courts are quite generous in construing statutes so as to find a right to compensation. The clearest example concerns section 68 of the Land Clauses Consolidation Act of 1845. As worded, it appears to require compensation for injurious affection, but only when land is severed and the remaining section of land depreciates as a result of the execution of works on the expropriated section.[35] However, the English

[31] See Mann, 'Outlines', p. 196.

[32] See *e.g. Bond* v. *Nottingham Corporation* [1940] 1 Ch. 429 and *Colonial Sugar Refining Co.* v. *Melbourne Harbour Trust Commissioners* [1927] A.C. 343 at 359 *per* Lord Warrington.

[33] See *e.g. British Columbia* v. *Tener* (1985) 17 D.L.R. (4th) 1 (S.C.C.) *per* Wilson J.

[34] *City of Manchester* v. *Farnworth* [1930] A.C. 171 (H.L.) at 183 *per* Viscount Dunedin; cf. *Tock et al.* v. *St John's Metropolitan Area Board* (1989) 64 D.L.R. (4th) 620 (S.C.C.).

[35] Section 68: 'If any Party shall be entitled to any compensation in respect of any lands, or of any interest therein which shall have been taken for or injuriously affected by the execution of works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special Act, or any Act incorporated therewith . . . such party may have the same settled . . .' The entitlement to compensation follows from section 63: 'In estimating the purchase-money or compensation to be paid by the promoters of the undertaking regard shall be had . . .

courts extended section 68 to circumstances where no land was taken from the claimant. There is little doubt that the interpretation goes beyond the plain meaning of the section; indeed, Lord Wilberforce once stated that the judicial construction of section 68 gives it a 'meaning having little perceptible relation to the words used'.[36]

This tension between the views of Parliament and the judiciary on the limits of a duty to compensate also arises in cases involving the interpretation of constitutional rights to property. The language of some Commonwealth constitutions suggests that compensation is not payable for the regulation or injurious affection of property, because the right to compensation arises only on the 'compulsory acquisition of property'. Nevertheless, courts have shown that they are willing to require compensation in the absence of an outright acquisition of property.[37]

Statutory interpretation and the purpose of acquisition

The courts will not allow powers of expropriation to be exercised for any purposes except those authorised by the legislature.[38] Where legislation fails to specify a purpose, the courts presume that the power may be exercised only for a public purpose or in the public interest.[39] This raises the question of private benefit, since legislation often confers compulsory powers of acquisition on privately owned companies. In such cases, the courts presume that the legislature does not intend to allow the expropriation of property for private benefit alone.[40] They also construe the powers given to profit-seeking

not only to the value of the land to be purchase or taken by the promoters . . . but also to the damage, if any, to be sustained by the owner of land by reason of the severing of the land from the other lands of such owner, or otherwise injuriously affecting such other lands by the exercise of the powers of this or the special Act or any Act incorporated therewith.'

[36] *Argyle Motors (Birkenhead) Ltd* v. *Birkenhead Corporation* [1975] A.C. 99 at 129. See Law Reform Commission (Australia), *Lands Acquisition and Compensation*, Report No. 14 (Canberra: AGPS, 1980), p. 159n: 'The correctness of the interpretation is very doubtful . . . It was plainly a procedural provision, not intended to confer substantive rights . . . The interpretation can best be regarded as a generous judicial response to an obvious injustice.'

[37] See pp. 163–71, below.

[38] See: *Municipal Council of Sydney* v. *Campbell* [1925] A.C. 338 (P.C. Aust.); *Galloway* v. *London Corpn* (1866) L.R. 1 H.L. 34; *Donaldson* v. *South Shields Corpn* (1899) 79 L.T. 685 (C.A.), and see generally Taggart, 'Expropriation', pp. 106ff.

[39] See *e.g. Administrator, Transvaal* v. *J. Van Streepen (Kempton Park) (Pty) Ltd* 1990 (4) S.A. 644 (A).

[40] See *e.g. Council of the Shire of Werribee* v. *Kerr* (1928–30) 42 C.L.R. 1 at 33 *per* Higgins J.

undertakers narrowly, in comparison with powers given to local authorities or government bodies.[41] This does not mean, however, that there cannot be an interference with one person's title that benefits another: so long as there is a public benefit that falls within the statutory purposes, the expropriation should stand. For example, in *Administrator, Transvaal* v. *J. Van Streepen (Kempton Park) (Pty) Ltd*, the South African court considered legislation that authorised the expropriation of a private rail link for the construction of a public highway.[42] The state sought to minimise the amount of compensation by providing the owner with a new rail link to be constructed on land expropriated from other owners. The other owners challenged the expropriation, on the basis that it was not authorised by the statute. In fact, the statute did not specify the purposes for which property could be taken, but the owners argued that this did not mean that property could be taken for any purpose whatsoever. In this respect, the court agreed: Smalberger J.A. stated that, as a matter of statutory interpretation, it is presumed that legislation only allows property to be taken for a public purpose or in the public interest. The owners also argued that the 'public' element could not be satisfied because the construction of the rail link was intended for private benefit. Smalberger J.A. agreed that the transfer of land from one private person to another could not be treated as a 'public purpose'. However, Smalberger J.A. also held that, as the construction of the public highway was unquestionably in the public interest, and as the construction of the new rail link indirectly facilitated the construction of the highway, the expropriation of land for the link was also in the public interest.[43]

While *Van Streepen* demonstrates that a public interest test is very broad, it also suggests that the transfer of property from one private person to another cannot satisfy a public purpose test. Since many Commonwealth constitutions incorporate a public purpose test, it would suggest that the administrative law interpretation of public purpose would find its way into constitutional law. In fact, this has not occurred. The courts apply constitutional public purpose tests as broadly as Smalberger J.A. applied the public interest test in *Van Streepen* and, in any case, in constitutional cases the courts tend to show a high degree of deference to legislatures when it comes to determining

[41] See *e.g. Galloway* v. *London Corpn* (1866) L.R. 1 H.L. 34 and *Rolls* v. *London School Board* (1884) 27 Ch.D. 639.

[42] 1990 (4) S.A. 644 (A).

[43] *Ibid*. at 661. See Taggart, 'Expropriation', for other examples.

whether an expropriation serves a public purpose or is in the public interest.[44]

The police power

The common law purpose tests are fairly narrow in approach, as they concentrate solely on the reasons for taking the property. There is little inquiry into the reasons for compensation; that is, the courts do not ask whether it may be in the public interest not to compensate. For example, it may be in the public interest to order the forfeiture of property used in the commission of a criminal offence, but it is plainly not in the public interest to award compensation for the forfeited property. In the United States, the courts distinguish between different sovereign powers over property: the police power allows the state to restrict the exercise of property rights and to destroy property without compensation, whereas the power of eminent domain allows the state to expropriate but only with compensation. Although commentators differ on how the courts should distinguish between the police power and eminent domain, one important test looks to the reason for the exercise of the power.[45] For example, there is no constitutional duty to compensate where the interference is intended to protect public health or safety, as such action falls within the police power. In England, the supremacy of Parliament makes it unnecessary to distinguish between its sovereign powers over property. Hence, there has been no real need for the courts to refine the presumptions of interpretation to distinguish between the purposes that require compensation and those that do not. However, the distinction is more important under Commonwealth constitutions with a right to property. Eventually, Commonwealth courts developed doctrines that perform a function similar to that of the American police powers doctrine, but this is one area where the common law provided very little assistance.

Fundamental law: recent developments

While the relaxation of the presumptions of statutory interpretation suggests that importance of property in fundamental law is declining, there is one area where one could argue that new principles of a fundamental law of property are developing. The Canadian Supreme

[44] See chapter 8.

[45] *E.g.* compare Joseph L. Sax, 'Takings, Private Property and Public Rights', (1971) 81 *Yale Law Journal* 149 and William B. Stoebuck, 'Police Power, Takings and Due Process', (1980) 37 *Washington and Lee Law Review* 1057.

Court has described the relationship between Canada and its aboriginal peoples as a new type of fundamental law.[46] The leading cases are *Guerin* v. *The Queen*,[47] *R.* v. *Sparrow*[48] and *Delmaguukw* v. *British Columbia*,[49] where the Supreme Court held that aboriginal rights may be infringed, but only if the infringement furthers a compelling and substantial objective and it is consistent with the fiduciary relationship between the Crown and the aboriginal peoples.[50] In *Delmaguukw*, the Court was cautious about specifying the precise content of the fiduciary duty, but stated that it 'may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their lands'.[51] In most cases, this involvement would be 'significantly deeper than mere consultation'.[52] There would also be a duty to provide 'fair compensation' in the ordinary case where aboriginal title to land is infringed.[53] The fiduciary duty is therefore quite significant, as the Canadian Charter of Rights and Freedoms does not include economic or property rights and the Supreme Court has refused to find such rights as implied rights.[54] Like duties and rights in fundamental law, the fiduciary duty can be abrogated by express legislation; however, the Court would be reluctant to ascribe such an intention to the legislature.

The fiduciary principles follow from the Supreme Court's declaration that there is a 'special trust relationship of the government *vis-à-vis* aboriginals'.[55] In Canada, the existence of a fiduciary duty owed to aboriginal peoples was first raised in *Guerin*. It was rejected by the English court in *Tito* v. *Waddell (No. 2)*,[56] although the idea has a long history in the United States.[57] The precise basis of the fiduciary

[46] See generally: Michael J. Bryant, 'Crown–Aboriginal Relationships in Canada: The Phantom of Fiduciary Law', (1993) 27 *University of British Columbia Law Review* 19; David Tan, 'The Fiduciary as an Accordion Term: Can the Crown Play a Different Tune?' (1995) 69 *Australian Law Journal* 440; Brian Slattery, 'First Nations and the Constitution: A Question of Trust', (1992) 71 *Canadian Bar Review* 261; Tom Allen, 'Fiduciary Principles, Federalism and Constitutional Law', (1995) *Proceedings of the Seventh Annual Conference of the African Society of International and Comparative Law* 403.

[47] (1984) 13 D.L.R. (4th) 321. [48] (1990) 70 D.L.R. (4th) 385.

[49] (1997) 153 D.L.R. (4th) 193.

[50] *Ibid*. at 260–6; see also Bryant, 'Crown–Aboriginal Relationships', p. 38.

[51] (1997) 153 D.L.R. (4th) 193 at 265. [52] *Ibid*. [53] *Ibid*.

[54] See *e.g. Irwin Toy Ltd* v. *Att.-Gen. of Quebec* [1989] 1 S.C.R. 927 at 1003.

[55] *R.* v. *Sparrow* (1990) 70 D.L.R. (4th) 385 at 413. [56] [1977] Ch. 106.

[57] Beginning with *Cherokee Nation* v. *Georgia* 30 U.S. (5 Pet.) 1 (1831); *Worcester* v. *Georgia* 31 U.S. (6 Pet.) 515 (1832). See generally: Reid Peyton Chambers, 'Judicial Enforcement of the Federal Trust Responsibility to Indians', (1975) 27 *Stanford Law Review* 1213; Camilla Hughes, 'The Fiduciary Obligations of the Crown to Aborigines: Lessons from the United States and Canada', (1993) 16 *University of New South Wales Law Journal* 70.

relationship is still being worked out by the courts. At present, it is difficult to draw general principles from the cases, because they are from different jurisdictions and concern different historical backgrounds. Some authorities locate the source of the fiduciary relationship in undertakings by the state to act in the interests of the aboriginal peoples. However, this can conflict with the principle in *Tito* v. *Waddell (No. 2)*: undertakings given by political officers may give rise to a 'trust in the higher sense', or a political obligation, but that does not necessarily translate into a justiciable legal obligation.[58] Consequently, some further explanation for enforcing undertakings given to aboriginal peoples must be given. Moreover, the courts must decide whether multiple undertakings were given, possibly with each leading to different fiduciary duties to different aboriginal groups, or whether there was an 'omnibus undertaking . . . to act in the best interests of aboriginal peoples in the treatment of their lands, and, in turn, self-management of those lands'.[59] In *Sparrow*, the court stated that the fiduciary relationships arose from '[t]he *sui generis* nature of Indian title, and the historic powers and responsibilities assumed by the Crown constituted the source of such a fiduciary obligation'.[60] As explained by Professor Slattery:

> The fiduciary relationship is grounded in practices and traditions that developed during the early years of contact between the Crown and aboriginal nations from the early 1600s to the late 1700s. The legal principles underlying these practices were reflected in the provisions of the Royal Proclamation 1763, and have become part of the common law of Canada.[61]

If the historic pattern of Crown–aboriginal relations is important, it is

[58] For other examples of cases considering 'trusts in the higher sense', see *Penikett* v. *Canada* (1987) 45 D.L.R. (4th) 108 (C.A. Yukon) (leave to appeal to S.C.C. refused 46 D.L.R. (4th) vi); *Sibbeston* v. *Canada* (1988) 48 D.L.R. (4th) 691 (C.A. Northwest Territories); and *Phillip Brothers* v. *Republic of Sierra Leone* [1995] 1 Lloyds Rep. 289 (C.A.).

[59] Bryant, 'Crown–Aboriginal Relationships', p. 34. Bryant argues that omnibus undertaking is correct, and as such, it does not depend on the terms of any particular treaty and it could extend to aboriginal nations that did not reserve any rights under a treaty.

[60] (1990) 70 D.L.R. (4th) 385 at 408. In *Guerin* (1984) 13 D.L.R. (4th) 321 at 340, Dickson J. stated that the Royal Proclamation signified that the Crown took responsibility 'to act on behalf of the Indians so as to protect their interests in transactions with third parties'. However, the obligation did not arise from the Proclamation itself; according to Dickson J., it merely recognised and acknowledged an undertaking that already existed.

[61] Slattery, 'First Nations', p. 275; see also Bryant, 'Crown–Aboriginal Relationships', pp. 28–9.

obviously not a single general undertaking that determines the fiduciary obligation. Indeed, any such general undertaking does not appear to have been made (even by implication) as part of any single transaction at any precise moment in time. In fact, it is doubtful that there was an actual undertaking; at best, one might say that the history of Crown–aboriginal relations is such that the Crown *should* be subject to an undertaking, even if no particular undertaking can be found.[62] In essence, the basis of the fiduciary obligation is the vulnerability of the aboriginal nations to the legal powers of the state.

Private lawyers usually describe vulnerability as a vulnerability to a legal power possessed by the fiduciary. In Canada, the system of reserves carried the common feature that the aboriginal peoples were generally not permitted to deal with their land without the consent of the state.[63] Moreover, the power of the federal government extended beyond its power to control the alienation of reserve lands, as legislation often gave governments wide discretionary powers over aboriginal welfare. In such cases, the vulnerability of aboriginal peoples to the legal powers of the state is so great that the courts impose the fiduciary obligations in order to exercise some supervision over the exercise of the power. The legal powers of the state are only one aspect of vulnerability; plainly, economic and cultural vulnerability are also significant. This aspect of relations with aboriginal peoples is not always explored in the cases, perhaps because the vulnerability to the state's legal powers is clear. Nevertheless, some courts have adverted to it in justifying the imposition of a fiduciary duty.[64]

Do the Canadian decisions have any significance elsewhere in the Commonwealth? There is little doubt that the Crown made similar undertakings with, and assumed similar powers over, the aboriginal peoples throughout the old Empire, and in many states these peoples are still in a position of vulnerability, whether arising from legal or extra-legal factors. Arguably, the nature of the relationship between aboriginal peoples and the Crown puts the Crown under a fiduciary obligation with respect to its undertakings and powers. If so, there is a possibility that these obligations were assumed by the states as they gained independence. In Australia, the possibility of a *Guerin*-style

[62] Slattery, 'First Nations'.

[63] This was the pattern throughout the British Empire; see generally Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989), pp. 221–35.

[64] See *e.g. Guerin* (1994) 13 D.L.R. (4th) 321 at 334 and *Mabo* v. *Queensland (No. 2)* (1992) 175 C.L.R. 1 at 203 *per* Toohey J.; cf. *United States* v. *Mitchell* 103 S. Ct. 2961 (1983) at 2970–2.

fiduciary relationship was left open in *Northern Land Council* v. *The Commonwealth (No. 2)*[65] and by the majority of judges in *Mabo* v. *Queensland (No. 2)*.[66] However, in *Mabo*, Toohey J. considered the issue fully and decided that the relationship between Australia and its aboriginal peoples is a fiduciary relationship.[67] He stated that the source of the fiduciary duty lay either in the peculiar vulnerability of aboriginal peoples, or possibly in the specific dealing between the government and the aboriginal peoples which occurred after the annexation of land. The courts of New Zealand have also considered the application of fiduciary principles to aboriginal law. In *New Zealand Maori Council* v. *Attorney-General*,[68] the Court of Appeal held that the Treaty of Waitangi between the Maori and the British 'created an enduring relationship of a fiduciary nature akin to a partnership, each party accepting a positive duty to act in good faith, fairly, reasonably and honourably towards the other'.[69] Several years later, in *Te Runanga o Wharekauri Rekohu Inc.* v. *Attorney-General*, it stated that its position was 'strengthened' by the decisions in *Sparrow* and by Toohey J.'s judgment in *Mabo*, with the result that 'there is now a substantial body of Commonwealth case law pointing to a fiduciary duty'.[70] So far as the position in New Zealand was concerned, the Court stated that 'the Treaty of Waitangi is major support for such a duty'.[71]

It is unclear whether courts of other countries would find the fiduciary analysis useful in relation to property rights. For example, the question of aboriginal rights arose recently for the first time in the Malaysian courts, but the issues were resolved by reference to the constitutional right to property.[72] There was no discussion of fiduciary obligations but, given the applicability of the right to property, it was unnecessary. Nevertheless, the fiduciary relationship extends to situations that lie outside the constitutional right to property of most jurisdictions.[73] For example, in *Sparrow*, the affected interest was a

[65] (1987) 61 A.L.J.R. 616; see generally Tan, 'Fiduciary as an Accordion Term'.
[66] (1992) 175 C.L.R. 1.
[67] *Ibid.* at 199–205. For a full discussion, see Lisa di Marco, 'A Critique and Analysis of the Fiduciary Concept in *Mabo* v. *Queensland*', (1994) 19 *Melbourne University Law Review* 868.
[68] [1987] 1 N.Z.L.R. 641.
[69] As explained by Cooke P. in *Te Runanga o Wharekauri Rekohu Inc.* v. *Att.-Gen.* [1993] 2 N.Z.L.R. 301 at 304; see also *New Zealand Maori Council* v. *Att.-Gen.* [1989] 2 N.Z.L.R. 142.
[70] [1993] 2 N.Z.L.R. 301 at 306. [71] *Ibid.*
[72] *Adond Bin Kuwau and Others* v. *Kerajaan Negeri Johor and Another* 1996 M.L.J. LEXIS 1154; 1997–1 M.L.J. 418 (H.C. (Johor Bahru)).
[73] See also *Charan Lal Sahu* v. *Union of India* [1990] L.R.C. (Const.) 638 (S.C. India).

non-exclusive licence to fish in certain waters, which would probably be classified as a non-proprietary interest under other constitutions.[74] In deciding whether a fiduciary relationship exists, it would be useful to ask whether the aboriginal people participated in a recent act of constitution-making. If so, their participation suggests that there is less reason for the courts to use fiduciary principles to find an unwritten constitutional obligation. In other words, the new constitutional order may substitute new obligations for the old fiduciary obligations (to the extent that they existed).[75] If there was no opportunity for effective participation, the argument for a fiduciary relationship is stronger. The relative power of the affected group in the new state should also be considered. The cases in the United States, Canada and Australia all occur in a situation where the aboriginal peoples are a minority, and their economic, cultural and political life are at risk in the modern state.

The royal prerogative and property

The Crown's prerogative powers over property allowed it to claim certain goods, such as unowned goods, treasure trove, royal minerals, waifs and deodands, without payment of compensation.[76] There were also prerogative rights and privileges relating to property and civil obligations, such as the Crown's immunity from civil suit and the preference given to the Crown on the bankruptcy of a debtor. In the modern state, the practical importance of the prerogative powers is marginal. Where the Crown holds a statutory power over property that overlaps with a prerogative power, the courts treat any interference with property as an exercise of the statutory power.[77] Consequently, the Crown cannot avoid the restrictions on a statutory power by purporting to exercise a more lenient prerogative power. One remaining area where prerogative power over property may be significant concerns the power to act in response to an emergency. Even these powers are rarely the subject of litigation, but some idea of their scope can be determined

[74] See p. 134, above.

[75] Note that in Canada, section 35 of the Constitution Act 1982 recognises and affirms aboriginal rights.

[76] See generally Joseph Chitty, Jr, *A Treatise of the Law of the Prerogatives of the Crown* (Farnborough, Hants.: Gregg International Publishers, 1968; reprint of London: Joseph Butterworth and Son, 1820).

[77] *Att.-Gen.* v. *De Keyser's Royal Hotel Ltd* [1920] A.C. 508.

by examining the cases on the Crown's power to seize or destroy property without authority of the legislature in wartime. There are two issues to consider: the purposes for which the power may be exercised, and the duty to provide compensation for the exercise of the power.

The extent of the prerogative

The extent of the wartime prerogative was disputed in World War I and the period immediately following it.[78] During the war, the Crown purported to rely upon the prerogative to requisition property that was not for immediate use by the armed forces in battle. So, for example, land was requisitioned for the Shoreham aerodrome, De Keyser's Hotel was requisitioned for administrative offices and rum was requisitioned for military use.[79] While the courts heard a number of cases on requisitions, the focus was on compensation rather than circumstances in which the Crown could exercise the prerogative.[80] Hence, it was not clear whether the Crown could exercise the prerogative in the absence of a military emergency. The question was not addressed until 1964, in relation to Burmah Oil's claims for compensation for the destruction of oil wells, pipelines, refineries and other property that they held in Burma in the early part of World War II. In 1942, the British military forces destroyed the property in order to prevent it from falling into the hands of the Japanese invaders.[81] There was no statutory authorisation for the destruction; however, in *Burmah Oil* v. *Lord Advocate*,[82] the House of Lords held that the Crown had lawfully exercised its 'right and duty to protect its realm and citizens in times of war and peril'.[83] It therefore appears that the prerogative extends to 'economic warfare'[84] such as trade sanctions and blockades, and more broadly to 'circumstances of sudden and extreme emergency which put safety in peril'.[85]

Their Lordships agreed that the Crown '*must* have a prerogative right to take whatever step is necessary for the protection of the state and in

[78] See generally Gerry A. Rubin, *Private Property, Government Requisition and the Constitution, 1914–1927* (London and Rio Grande: The Hambledon Press, 1994).

[79] See *ibid*., chs. 4, 6 and 12.

[80] See, in particular, *Att.-Gen.* v. *De Keyser's Royal Hotel Ltd* [1920] A.C. 508 and see Rubin, *Private Property*, pp. 16–19.

[81] The property was not destroyed during battle nor to hamper the Japanese advance into Burma, but to prevent the Japanese from gaining materials for its armed forces and to enable the British to secure the defence of India.

[82] [1965] A.C. 75. [83] *Ibid*. at 143 *per* Lord Pearce. [84] *Ibid*. at 103 *per* Lord Reid.

[85] *Ibid*. at 115 *per* Viscount Radcliffe.

order to wage war successfully against its enemies'.[86] The necessity that justified executive action was not the sort of necessity that would have justified action by a private person; nor was it simply a matter of military urgency. Lord Radcliffe referred to the *Ship Money* case, where it was said that the prerogative is available when 'the course of justice is stopped, and the courts of justice shut up'.[87] In that sense, the necessity arises from both the military and the constitutional circumstances; that is, there is a need for immediate action that only the Crown has time to consider properly.

The practicality of obtaining prior legislative authority for the destruction of the property did not arise on the facts of *Burmah Oil* (and it was ignored in the World War I cases), but a similar issue arose before the United States Supreme Court in *Youngstown Sheet & Tube Co*. v. *Sawyer*.[88] During the Korean War, President Truman ordered the seizure of a number of steel mills for operation under federal direction, in order to prevent a strike by steelworkers. He acted without statutory authority, but he justified his actions on the basis that 'a work stoppage would immediately jeopardize and imperil our national defense' and endanger the 'soldiers, sailors, and airmen engaged in combat in the field'.[89] In effect, the president claimed an inherent power similar to the prerogative power at issue in *Burmah Oil* and the World War I cases. However, the majority in the Supreme Court held that the president's actions amounted to a usurpation of legislative authority. Congress had not specifically prohibited the president from acting, but it had declined to authorise his actions. In terms of the *Ship Money* and *Burmah Oil* cases, it seemed that there was no real obstacle to obtaining Congressional approval; in that sense, there was no need for independent executive action. As put by Justice Frankfurter, '[Congress] evidently assumed that industrial shutdowns in basic industries are not instances of spontaneous generation, and that danger warnings are sufficiently plain before the event to give ample opportunity to start the legislative process into action.'[90] For the Supreme Court, the mere fact that obtaining legislative approval may result in some delay is not sufficient

[86] *Ibid*. at 166 *per* Lord Upjohn (emphasis added).

[87] *Ibid*. at 115, referring to the argument of Mr Oliver St John, *Proceedings in the Case of Ship Money, between the King and John Hampden* (1637) 3 St. Tr. 829 at 984.

[88] 343 U.S. 579 (1952). See generally Maeva Marcus, *Truman and the Steel Seizure Case: The Limits of Presidential Power* (New York: Columbia University Press, 1977).

[89] Appendix to opinion of the court, 343 U.S. 579 (1952) at 590–1.

[90] *Ibid*. at 601–2.

to justify executive action without approval: that is the price to be paid for a constitution based on the separation of powers.

Compensation and the prerogative

Prior to *Burmah Oil* v. *Lord Advocate*, it was not clear whether there was a general rule requiring compensation for the exercise of a prerogative power. There was no doubt that the Crown had to pay for property taken under some of its prerogative powers. For example, in the *Saltpetre* case it was said that the Crown was entitled to enter and dig for saltpetre on private land and to erect fortifications and bulwarks for the 'necessary defence of the realm'.[91] However, the Crown was required to repair any damage done and return the property to its initial state.[92] In any case, the Crown ordinarily compensated for the exercise of prerogatives, including the wartime prerogative at issue in *Burmah Oil*. Whether it made these payments *ex gratia* or *ex lege* remained an open question (although it was discussed at length in the World War I cases).[93] Obiter dicta from the Court of Appeal suggested that compensation is not payable when land or goods are requisitioned by the Crown;[94] however, Crown lawyers withdrew one appeal from the House of Lords on receiving an intimation from their Lordships that the Court of Appeal would be reversed and that compensation would be required.[95]

In *Burmah Oil*, the House of Lords decided, by a 3–2 margin, that compensation was payable for the destruction of the appellant's property.[96] Their Lordships acknowledged that the English cases provided no clear statement either way. Nevertheless, the majority believed that the 'great justice' of the case lay on the side of compensating the property owner.[97] They found support in the practice of Parliament and the Crown, as well as the writings of civilian lawyers. Vattel, in particular, argued that the state should compensate for all property used in the

[91] (1606) 12 Co. Rep. 12 at 13. [92] *Ibid*.

[93] See *Att.-Gen*. v. *De Keyser's Royal Hotel Ltd* [1920] A.C. 508 and Rubin, *Private Property*, p. 145.

[94] *The Zamora* [1916] 2 A.C. 77 at 100 *per* Lord Parker.

[95] Rubin, *Private Property*, p. 52, referring to *In the Matter of a Petition of Right* [1915] 3 K.B. 649.

[96] However, they did not decide upon the amount of compensation. There were suggestions that compensation would be modest; see *e.g*. Lord Reid [1965] A.C. 75 at 113: 'it will be necessary to consider whether compensation must not be related to their loss in the sense of what difference it would have made to them if their installations had been allowed to fall into the hands of the enemy instead of being destroyed.'

[97] [1965] A.C. 75 at 169 *per* Lord Upjohn; see also at 102, 110–11 *per* Lord Reid and at 162–3 *per* Lord Pearce, and contrast Viscount Radcliffe, at 132.

war effort, except where property was destroyed in battle.[98] Accordingly, the majority in *Burmah Oil* held that government should compensate for property destroyed simply to weaken the enemy economically, as in this case. Compensation would not have been payable if the property had been destroyed in battle, but the destruction was merely preparatory to battle.

Whether the other courts would accept the principle of *Burmah Oil* is uncertain. The historical arguments were evenly balanced on either side,[99] and the ethical argument did not persuade the United States Supreme Court in *Caltex* v. *United States*.[100] In *Caltex*, American forces destroyed oil terminal facilities in Manila in order to prevent them from falling into the hands of the invading Japanese forces. The Supreme Court held that the Fifth Amendment does not require compensation in such circumstances: 'in wartime many losses must be attributed solely to the fortunes of war, and not to the sovereign'.[101] In Britain, Parliament took the same position, and it reversed the *Burmah Oil* decision with the passage of the War Damage Act 1965.[102]

The prerogatives in the colonies

In the colonial era, all the prerogative powers applied in all colonies, protectorates and territories where the common law was in force.[103] If common law was not in force, only 'those fundamental rights and principles on which the King's authority rests, and which are necessary

[98] M. de Vattel, *Le Droit des Gens en Principes de la loi Naturelle*, Book III, ch. XV, para. 232 (1758, reprinted Washington D.C.: Carnegie Institute of Washington, 1916).

[99] Lord Upjohn, *ibid*. at 168, states that the English authorities 'permit the conclusion' that compensation is required; see also Lord Reid, at 106–7. Lord Pearce, at 156, was more confident: 'the express practice of Parliament for 250 years and more has clearly shown that there is no concurrent necessity to deprive the subject of compensation.' Contrast Viscount Radcliffe, at 118–19: 'There is not in our history any known case in which a court of law has declared such compensation to be due as of right. There is not any known instance in which a subject, having suffered from such a taking, has instituted legal proceedings for the recovery of such compensation in a court of law. No payment has been identified as having been made by the Crown in recognition of a legal right to such compensation, irrespective of the institution of legal proceedings for its recovery. Lastly, no text writer of authority has stated that there is this legal right under our law.'

[100] 344 U.S. 149 (1952).

[101] *Ibid*. at 155–6.

[102] Although the War Damage Act 1965 does not amend the Compensation (Defence) Act 1939, under which compensation is payable for acts of destruction that occur in Great Britain.

[103] Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (London: Stevens & Sons, 1966), pp. 557–63.

to maintain it' were available.[104] The reasoning of *Burmah Oil* strongly suggests that the wartime prerogative applied to all territories.[105] It is therefore likely that the courts of other Commonwealth nations would accept that the wartime prerogative would apply, except to the extent that they have been excluded by statute or by constitution.[106]

It is uncertain whether the entrenchment of a constitutional bill of rights affects the prerogative powers over property.[107] Most of the written rights to property provide, in one form or another, that a deprivation or acquisition of property may only occur under authority of law. Although the point has not arisen, it appears that the reference to 'law' is not limited to statutory law; that is, the entrenchment of the right to property did not destroy the prerogative powers. Moreover, since the state must compensate for the exercise of the prerogative power, the right to compensation for the acquisition of property should be satisfied.[108] However, many constitutions also contain provisions allowing derogations from some or all of the provisions on fundamental rights during an emergency. These provisions vary considerably in their scope: while most constitutions do not allow derogations to the right to property, there are exceptions.[109] Even those emergency provisions that apply to the right to property state only that nothing done under the authority of an emergency law can be challenged as an infringement of a fundamental right. This does not change the content of the law authorising action in the emergency; hence, any requirement for compensation under the law should still apply. In general, therefore, the entrenchment of a right to property does not seem to change the position that the prerogative power exists unless excluded by

[104] *Ibid*., p. 557.

[105] Cf. *Burmah Oil* v. *Lord Advocate* [1965] A.C. 75 at 98–9 *per* Lord Reid at 113 *per* Viscount Radcliffe at 164 *per* Lord Upjohn, on the availability of the prerogative under Scottish law.

[106] In fact, in most countries, emergency legislation does provide for their exclusion.

[107] Cf. R. W. Baker, 'The Compulsory Acquisition Powers of the Commonwealth', in Mr Justice Else-Mitchell (ed.), *Essays on the Australian Constitution* (Sydney, Melbourne and Brisbane: The Law Book Co. of Australia, 1961), pp. 194–6 and *Johnston Fear and Kingham & The Offset Printing Co. Pty Ltd* v. *The Commonwealth* (1943) 67 C.L.R. 314 at 318–19 *per* Latham C.J. on the prerogative's separate existence from section 51(xxxi) of the Constitution.

[108] There may even be some doubt that an acquisition of property has occurred; see *Caltex* v. *United States* 344 U.S. 149 (1952).

[109] See *e.g.* Trinidad and Tobago, s. 7(3); The Gambia, s. 35(2); Ghana, s. 31(10); Belize, s. 18(1); Uganda, s. 46. See generally Margaret De Merieux, 'The Regimes for States of Emergency in Commonwealth Caribbean Constitutions', (1994) 3 *Journal of Transnational Law & Policy* 103.

legislation, and that the state must compensate for its exercise. To be sure, there are exceptions, as some constitutional emergency provisions give the executive the authority to enact emergency provisions directly; that is, without the authority of the legislature. Under these provisions, the executive may be in a position to bypass the general requirement for legislative authority, and in circumstances other than those already covered by the existing prerogatives.

Conclusions

From this brief review of the common law of expropriation, it is apparent that the fundamental law of England included a 'right' to property along the lines of the modern justiciable rights to property. Fundamental law, while not justiciable in the modern sense, was significant in a number of ways. Statutes were limited by judicial interpretation and, at least in relation to colonial statutes, subject to review by the executive. Issues that arose over the extent of fundamental law are mirrored in the jurisprudence on constitutionally entrenched rights to property. Analysis focuses on the interpretation of 'property', the nature of the interference with property and the purpose of the interference. Neither English fundamental law nor Commonwealth constitutional law includes anything like the French principle of *égalité devant les charges publiques*. The constitutional framers did not attempt to draft a radically different right in the written constitutions; the constitutional status of the principles changed, but their content did not.

3 The development of written rights to property

Introduction

The fundamental rule of English law that property could be taken only for a public purpose and on payment of compensation eventually found its way into the written constitutions of most Commonwealth states. The development of rights to property has been somewhat disjointed, as some constitutions reflect the style of drafting of the Fifth and Fourteenth Amendments of the United States Bill of Rights, while many others are based on early Indian legislation. Some important elements of recent constitutions borrow heavily from the European Convention on Human Rights, and the Irish and German constitutions have been influential on the drafting of Commonwealth rights to property. Consequently, the style, detail and structure of rights to property vary considerably across the Commonwealth.

This chapter therefore describes the different formulations of written rights to property in the Commonwealth. Unlike the remaining chapters of this book, it concentrates on the framing and drafting of constitutions rather than their subsequent interpretation by the judiciary. It begins with the protection of property under the federal constitutions of Canada and Australia. While these constitutions do not contain rights to property, they do reflect the idea of constitutional supremacy and the importance of limiting legislative power. In Australia, in particular, the conferral on the Commonwealth of a limited power to acquire property has had the same effect as the entrenchment of a right to property.

It then considers the early formulations of rights to property in the Government of Ireland Act 1920. Despite the traditional British antipathy to justiciable bills of rights, Parliament included minority and

property rights in the 1920 Act. However, within a relatively short period, the British were opposing demands for bills of rights from Indian leaders. Nevertheless, their opposition did not extend to rights to property, and the Government of India Act 1935 contained a right to property which has proved quite significant. Subsequently, it provided the model for India's independence Constitution, and elements of it can be found in the rights to property of many other Commonwealth constitutions.

The formulation of the right to property in the Indian Constitution is examined in some depth because it had tremendous impact in India and the Commonwealth generally. It was the first constitution of a Commonwealth country to be drafted entirely by its own nationals, and the first to attempt to balance the demand for radical social and economic reform against the conservativism of an entrenched right to property. It cannot be regarded as a success; the judiciary clashed with the legislature and executive over the protection of property and the conflicts eventually developed into a serious constitutional crisis. Parliament amended the right to property several times in response to adverse judicial rulings and finally repealed it in 1978.

The chapter then shifts attention back to the British role in drafting constitutions of the newly independent states of the post-World War II period. Where the British were able to do so, they imposed constitutional arrangements on the new nations. Initially, the British resisted demands from national leaders for justiciable bills of rights. However, by the end of the 1950s, the British modified their position and advocated the inclusion of justiciable bills of rights in independence constitutions, even, in some cases, in the face of resistance from national leaders.

The chapter then briefly reviews the right to property in the Malaysian Constitution and the European Convention on Human Rights, as they provided different models for many later constitutions. The 1960 Nigerian Bill of Rights was based on the Convention, and most of the Commonwealth bills of rights of the next two decades followed it quite closely, so it is examined in some detail. While most countries have followed the Nigerian model, there have been several notable exceptions. First, Trinidad and Tobago opted for a bill of rights based on the Canadian Bill of Rights of 1960. The Trinidadians favoured the Canadian model because it expresses rights with greater generality and fewer limitations than the Nigerian model. More recently, the bills of rights of Namibia and South Africa drew inspiration from the Nigerian model,

but they differ from it in many important respects. The process of drafting the South African Constitution, in particular, resembles that of the Indian independence Constitution: it was a national effort, and sought to balance economic reform against the desire to attract and retain investment.

Property rights in the colonies

In the colonial constitutional system, colonial legislatures were supreme within their area of competence.[1] Hence, a grant of legislative power generally included the power to regulate and expropriate property.[2] However, legislative powers were limited by the Crown's powers of disallowance and reservation, which were often used to prevent legislative action inimical to property interests. Accordingly, the framers of early constitutions gave the executive primary responsibility for controlling legislative abuses of individual rights. In particular, the British North America Act 1867 gave the imperial government the powers of reservation and disallowance over Canadian legislation, and it gave the Canadian government similar powers over provincial legislation.[3] Sir John A. Macdonald, Canada's first prime minister, stated that provincial legislation would be disallowed where it affected the interests of the dominion as a whole and where it was 'illegal or unconstitutional', wholly or in part.[4] For Macdonald, 'illegal' and 'unconstitutional' had different meanings: legislation was illegal if it was ultra vires the legislature, but it was unconstitutional if it violated the fundamental law of England.[5] Accordingly, Macdonald's government frequently disallowed provincial legislation where it appeared to

[1] See: *R.* v. *Burah* (1878) 3 A.C. 889 (P.C.); *Hodge* v. *The Queen* (1883) 9 A.C. 117 (P.C.).

[2] See *Hodge* v. *The Queen*, and cf. *Bata Shoe Co. Guyana Ltd and Others* v. *Commissioner of Inland Revenue and Att.-Gen.* (1976) 24 W.I.R. 172 (C.A. Guyana).

[3] See the British North America Act 1867, ss. 55, 56, 57 and 90. The imperial powers fell into disuse after 1878, but between 1867 and 1920 Canada exercised the power of disallowance ninety-six times: see Eugene A. Forsey, 'Disallowance of Provincial Acts, Reservation of Provincial Bills, and Refusal of Assent by Lieutenant-Governors since 1867', (1938) 4 *Canadian Journal of Economics and Political Science* 47, p. 50. For conventions regarding the exercise of the powers, see James Russell Mallory, *Social Credit and the Federal Power in Canada* (Toronto: University of Toronto Press, 1954), pp. 9–10.

[4] See Forsey, 'Disallowance', p. 49 and Mallory, *Social Credit*, p. 13.

[5] See Forsey, 'Disallowance', pp. 13–14 and Richard Risk and Robert C. Vipond, 'Rights Talk in Canada in the Late Nineteenth Century: "The Good Sense and Right Feeling of the People" ', (1996) 14 *Law and History Review* 1. See also *Webb* v. *Outrim* [1907] A.C. 81 at 88–9, where the Earl of Halsbury expresses a similar view of 'unconstitutional' and 'ultra vires' legislation.

threaten property interests. These powers fell into disuse as the faith in democracy increased, but as late as 1937, the Dominion government used the powers against Albertan legislation that threatened the interests of the chartered banks.[6]

In an indirect manner, the federal structure of the Empire and of some of its dominions also gave the judiciary a limited power to review legislation that infringed property rights. This derived from the ultra vires theory of judicial review, as the courts would strike down legislation that had been made under a power reserved by the constitution to another legislature. The real issue for courts in such cases is the interpretation of provisions that distribute powers over property. In Canada, for example, the British North America Act 1867 contains nothing resembling a right to property; however, the courts have often declared legislation affecting property invalid on the ground that it serves a purpose reserved to the other level of government.[7]

Australia

The movement to a modern bill of rights took a further step with the enactment of the Australian Constitution in 1900. Section 51(xxxi) gives the Australian Parliament the following power to acquire property:

> The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to –
> (xxxi) the acquisition of property on just terms from any State or person for any purpose in respect of which Parliament has power to make laws.

While section 51(xxxi) confers a power to acquire power, the Commonwealth has other powers that enable it to acquire property.[8] Section 51(xxxix) gives the Commonwealth Parliament the power to enact laws with respect to 'matters incidental' to any of its other powers. In *W. H. Blakeley & Co. Pty Ltd* v. *The Commonwealth*,[9] the High Court stated that the incidental power includes the power to acquire property. The Court also observed that the incidental power has no 'just terms' condition, so a generous construction of the incidental power would allow the

[6] See generally Mallory, *Social Credit*.

[7] See *e.g. Churchill Falls (Labrador) Corporation Ltd* v. *Att.-Gen. of Newfoundland* (1984) 8 D.L.R. (4th) 1 and *Att.-Gen. of Canada* v. *Att.-Gen. of Quebec* [1947] A.C. 33.

[8] See generally R. W. Baker, 'The Compulsory Acquisition Powers of the Commonwealth', in Mr Justice Else-Mitchell (ed.), *Essays on the Australian Constitution* (Sydney, Melbourne and Brisbane: The Law Book Co. of Australia, 1961), pp. 196–7.

[9] (1953) 87 C.L.R. 501.

Commonwealth to avoid paying compensation entirely. The High Court refused to allow this: 'the acquisition of property could not be left to the incidental powers because it was desired to limit the power of acquisition by imposing a condition that it must be exercised upon just terms'.[10] The Court recognised that section 51(xxxi) provided a type of constitutional right; indeed, it stated that the effect of section 51(xxxi) could have been achieved by drafting a right to property, but the framers had chosen to draft the 'right' in terms of a limited power.[11]

There are two aspects of the Australian 'right' to property that are worth noting. First, the Australian courts do not regard every acquisition of property by the Commonwealth as an acquisition under section 51(xxxi). For example, it is clear that the Commonwealth acquires property that has been forfeited due to its use in the commission of a crime. However, the High Court has stated that there is no acquisition under section 51(xxxi).[12] Consequently, there is no requirement for 'just terms'. The courts determine whether an acquisition is under section 51(xxxi) or some other power by the general principles of the characterisation of legislation. As purposes and effects of legislation determine the characterisation of legislation, there are implicit limitations on section 51(xxxi). This raises an interesting point about the Australian Constitution, as it assumes that the sovereign power over property can be subdivided into a number of different powers, depending on the purpose and effect of the interference with property rights. The power to acquire property under section 51(xxxi) is the power of eminent domain, and it is distinct from powers such as those over forfeiture, taxation and bankruptcy. The guarantee of compensation applies only to the exercise of the power of eminent domain. Some courts do not accept that the right to property applies only to eminent domain. In particular, under the European Convention on Human Rights, on which the Nigerian-model constitutions are loosely based, a forfeiture of property is still within the broad scope of the right to property. However, there is no infringement of the right if the forfeiture procedure fairly balances the public and private interests.[13]

The second point is that the scope of the individual's rights also depends on the interpretation of its defining terms: 'property', 'acquisition' and 'just terms'. Section 51(xxxi) does not seem to be concerned

[10] *Ibid*. at 521. [11] *Ibid*.

[12] *Re Director of Public Prosecutions, ex parte Lawler* (1994) 179 C.L.R. 270.

[13] See *e.g. Handyside* v. *U.K.* A 24 (1976); 1 E.H.R.R. 737 and *AGOSI* v. *U.K.* A 108 (1986); 9 E.H.R.R. 1.

with the justification for the acquisition of property. Nor, for that matter, is there any express reference to a doctrine of proportionality. In this sense, the limitations on the right to property are internal, as they are determined by a construction of the defining terms. This does not mean that the justification and proportionality of takings are irrelevant under the Australian Constitution, but these factors tend to arise in relation to the meaning of the relevant terms. For example, in the common law, property rights are not absolute, and the Australian courts use the limitations inherent in the conception of property as a limitation on the constitutional right to property.[14] As explained below, later Commonwealth constitutions make greater use of external limitations, such as a distinct principle of proportionality, in order to determine the extent of the right to property.

Government of Ireland Act 1920

The Government of Ireland Act 1920 created the Northern Ireland legislature. In section 5(1), the Act restricted the subordinate legislature's powers over religious matters and property, as follows:

> In the exercise of their power to make laws neither the Parliament of Southern Ireland nor the Parliament of Northern Ireland shall make a law so as either directly or indirectly to [discriminate on the basis of religion] . . . or take any property without compensation.

The structure of section 5(1) represents a further step to the modern right to property. As such, it was an important step; however, it seems to have been taken without much consideration. The Home Rule Bill 1893 had contained a right to property inspired by the United States Bill of Rights,[15] but the bill was not enacted by Parliament. The first home rule bill to be enacted was the Government of Ireland Act 1914, but it was never brought into operation.[16] Section 3 of the 1914 Act prohibited

[14] See *e.g. British Medical Association* v. *The Commonwealth* (1949) 79 C.L.R. 201 and *Commonwealth* v. *Tasmania* (1983) 158 C.L.R. 1.

[15] See Parl. Deb., vol. 13, ser. 4, cols. 1082–155; clause 5 of the Bill provided that 'The power of the Irish Legislature shall not extend to the making of any law whereby any person may be deprived of life, liberty, or property, without due process of law, or may be denied the equal protection of the laws, or whereby private property may be taken without just compensation.' See also A. G. Donaldson, 'The Constitution of Northern Ireland: Its Origins and Development', [1955–6] *University of Toronto Law Journal* 1, pp. 13–15.

[16] Its operation was suspended on the outbreak of World War I and it was repealed by the 1920 Act before coming into operation.

the legislature from enacting legislation that discriminated on the basis of religion, but there was no reference to the taking of property without compensation. The Government of Ireland Act 1920 repealed the 1914 Act, although section 5(1) repeats most of section 3 of the 1914 Act. The final five words of section 5(1) were added as a private member's amendment, which the Government accepted.[17] Rather than being added as a separate provision, the protection of property was simply tacked on to the end of the section. As one might expect, adding a general protection of property to the end of a provision that dealt quite specifically with religious discrimination created some confusion for the courts. In *O'Neill* v. *Northern Ireland Road Transport Board*,[18] the Attorney-General for Northern Ireland argued that 'take any property' must be read *ejusdem generis* with the rest of section 5, hence that it applied only to the taking of ecclesiastical property. After some hesitation, the Court of Appeal in Northern Ireland held that 'take any property' applied to all property.[19]

Section 5(1) was similar to section 51(xxxi) of the Australian Constitution, in the sense that it did not contain express limitations on the right to property. Hence, limitations were internal or implied.[20] The Act's reference to direct and indirect takings is unusual; no other Commonwealth constitution makes any reference to such a distinction, although most courts treat the right to property (and other guarantees) as extending to both direct and indirect takings.[21]

Parliament repealed the protection of property in 1962 in response to fears that the courts would use it to restrict the regulation of land use and other types of property.[22] The timing is somewhat ironic: at this time, Parliament regularly supported rights to property in the independence constitutions of many of its former colonies without any discussion of the restrictive effect that it might have on economic development in these countries. Moreover, the judicial interpretation of

[17] Parl. Deb., vol. 43, ser. 5, cols. 44–8. (Article 8 of the Constitution of the Irish Free State is very similar to section 5 of the Government of Ireland Act 1920, except that Article 8 does not include the final five words.)

[18] [1938] N.I. 104.

[19] *Ibid.*, at 116. Section 2 of the Northern Ireland Act 1947 assumes that the decision is correct.

[20] See *e.g. Belfast Corpn* v. *O.D. Cars Ltd* [1960] A.C. 490 (H.L.).

[21] But cf. *Selangor Pilot Association* v. *Government of Malaysia and Another* [1978] A.C. 337 (P.C. Malaysia).

[22] See the Northern Ireland Act 1962, s. 14.

section 5(1) was no more generous to property owners than the rights contained in the newer constitutions.[23]

India

Government of India Act 1935

The Indian National Congress began to campaign for a justiciable bill of rights in the 1920s.[24] However, the Parliamentary Joint Committee on Indian Constitutional Reform rejected its demands, on the contradictory basis that a bill of rights would either restrain the legislature excessively, or fail to constrain it altogether.[25] Despite its reservations, the Parliamentary Committee did recommend the inclusion of a right to property 'in order to quiet doubts which have been aroused in recent years by certain Indian utterances'.[26] The Committee was not concerned solely with British interests: the protection of certain Indian property-holding classes was equally important. The primary source of revenue during British rule was land revenue, which was collected by Indian intermediaries. The most important group of intermediaries was the *zamindars*.[27] The *zamindar* system dated back to the Mogul rulers, who

[23] The decision in *Belfast Corpn* v. *O.D. Cars Ltd* [1960] A.C. 490 (H.L.) prompted the repeal, although it upholds the planning regulations in question; see H.L. Deb. vol. 236, ser. 5, cols. 1127–50 and H.L. Deb. vol. 237, 5 ser., cols. 376–84. (*Belfast* v. *O.D. Cars* is discussed in greater detail in chapter 5; see pp. 125–6, below.)

[24] The demand for equality *vis-à-vis* the British can be traced back to the formation of the Indian National Congress in 1885, but the specific demand for a bill of rights came later. See generally Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford: Clarendon Press, 1966), pp. 52ff and see, in particular, the All Parties' Conference, Report of a Committee to Determine Principles of the Constitution for India (New Delhi: Michiko & Panjathan, 1928), pp. 89–90.

[25] Joint Committee on Indian Constitutional Reform, Report of the Joint Committee on Indian Constitutional Reform (1934), Vol. I, Part I, para. 366: 'either the declaration of rights is of so abstract a nature that it has no legal effect of any kind, or its legal effect will be to impose an embarrassing restriction on the powers of the Legislature and to create a grave risk that a large number of laws may be declared invalid by the Courts because inconsistent with one or another of the rights so declared.' The Simon Commission expressed similar beliefs: see the Report of the Indian Statutory Commission, Cmd. 3569 (1930), para. 36. However, the White Paper, Proposals for Indian Constitutional Reform, Cmd. 4268 (1933), p. 37, para. 75, gave some limited support for minority and property rights.

[26] The Joint Committee on Indian Constitutional Reform, Report of the Joint Committee on Indian Constitutional Reform (1934), Vol. I, Part I, para. 366.

[27] For a general background, see Herbert Christian Laing Merillat, *Land and the Constitution in India* (New York and London: Columbia University Press, 1970), ch. 1.

granted *zamindars* certain powers over land in exchange for an obligation to remit fixed amounts of revenue to the rulers. The Permanent Settlement fixed the amount of revenue for specific land and allowed *zamindars* to retain any additional amounts they were able to obtain from their tenants. Under the British system, the rights and interests of *zamindars* were such that they claimed to be owners or landlords of the lands for which they collected taxes.

The *zamindar* system did not operate throughout India, but where it did operate the mutual dependence of the British and *zamindars* was very strong. The British support for the right to property was therefore a statement of support for the *zamindars*. Accordingly, the Parliamentary Committee recommended that no bill extinguishing or modifying the tenures of *zamindars* and other intermediaries could be introduced without the prior consent of the governor-general or provincial governor.[28] In addition, the Committee also recommended that a more limited right should be provided in the case of the typical compulsory acquisition. It proposed that property could be taken only for a public purpose and upon payment of compensation to be assessed by an independent authority.[29]

The British Government accepted the Committee's recommendations. The Attorney-General, Sir Thomas Inskip, was responsible for drafting the right to property in the Government of India Act of 1935. The relatively simple models of the constitutions of Australia and Northern Ireland were rejected in favour of the following:

299. (1) No person shall be deprived of his property in British India save by authority of law.

(2) Neither the Federal nor a Provincial Legislature shall have power to make any law authorising the compulsory acquisition for public purposes of any land, or any commercial or industrial undertaking, or any interest in, or any company owning, any commercial or industrial undertaking, unless the law provides for the compensation for the property acquired and either fixes the amount of compensation, or specifies the principles on which, and the manner in which, it is to be determined.

(3) No Bill or amendment making provision for the transference of public ownership of any land or for the extinguishment of modification of rights therein, including rights or privileges in respect of land revenue, shall be introduced or moved in either Chamber of the Federal Legislature without the

[28] Parliamentary Joint Committee on Indian Constitutional Reform, Report, paras. 370–1; bills affecting the Permanent Settlement would be reserved for consideration by the British Government (see para. 372).

[29] *Ibid*., para. 369.

previous sanction of the Governor-General in his discretion, or in a Chamber of a Provincial Legislature without the previous sanction of the Governor in his discretion.

(4) Nothing in this section shall affect the provisions of any law in force at the date of the passing of this Act.

(5) In this section 'land' includes immovable property of every kind and rights in or over such property, and 'undertaking' includes part of an undertaking.

Subsections (1) and (2) appear to state the right to property twice. However, subsection (1) embodies the fundamental principle of the common law that the executive may not extinguish property rights without authority of the legislature. Subsection (2) was intended to apply only to the compulsory acquisition of land and undertakings: this was intended to exclude injurious affection, the regulation of property, or any law that did not require a transfer of title to the state. It did not extend to all types of property because the Attorney-General believed that there would be a risk that a general guarantee would compromise laws relating to taxation.[30] Why it was so difficult to formulate a compensation guarantee for all types of property is not clear; the United States Bill of Rights, the Australian Constitution and the Government of Ireland Act 1920 were examples of property guarantees that did not restrict taxation. The inclusion of the reference to the acquisition of land for 'public purposes' arose over a similar concern. The Attorney-General explained to the House of Commons that the guarantee did not apply to acquisitions for private purposes in order to ensure that the execution of civil judgments would not be affected.[31] Again, there was no difficulty with this issue in countries with general guarantees. The Attorney-General was asked why the legislation did not make specific exceptions for taxation or civil judgments, if this was the concern. He replied that these were illustrative of a general concern that the right to property might limit the powers of the legislature excessively, but gave no indication of the other types of cases that might arise.[32]

The Attorney-General argued that the Parliamentary Joint Committee's recommendation for an independent assessment of compensation was unnecessary, although ultimately he assented to the requirement in subsection (2) that the legislature should fix the amount or principles of compensation. In the Government's view, the executive would be in the best position to protect property against the Indian legislatures.[33] Subsection (3) therefore provided that the executive would have the

[30] H.C. Deb., vol. 300, 5 ser., cols. 1075–9 (1934–5).
[31] *Ibid*. [32] *Ibid*. [33] *Ibid*., col. 1044.

power to disallow legislation that failed to provide adequate compensation. In essence, Inskip placed more faith in executive control over the legislature than judicial control. Even here, it seems that the mistrust of Indian legislatures was still very strong; the reliance on executive control reflected a faith in British governors rather than a constitutional theory that the executive should control such matters.

Section 299 raised few questions of interpretation in the courts. As in Australia and Northern Ireland, the internal, definitional limitations of the right to property were important; hence, laws adjusting the rights of landlords and tenants were not compensatable because they did not amount to a 'compulsory acquisition of land'.[34] In any case, the absence of a minimum justiciable standard of compensation limited the impact of section 299. Some states passed legislation that allowed the acquisition of land for less than its market value.[35] As seen below, the formula in subsection (2) was borrowed by a number of other Commonwealth constitutions for this reason.

Constituent Assembly

The Constituent Assembly convened in 1946 with the responsibility for framing the independence Constitution. There was never any doubt that the Constitution would include a justiciable bill of rights, but there was some uncertainty over the content of the bill of rights. Indian leaders had previously demanded social and economic rights of the same status as civil and political rights.[36] However, while it was clear that the Constituent Assembly would make the civil and political rights justiciable, the status of the social and economic rights was more controversial.[37] Eventually, the Assembly settled on non-justiciability, partly in the belief that the details of socialist schemes should be left to

[34] *Singh* v. *The United Provinces* [1946] A.C. 327 (P.C.), at 335–6.

[35] See Austin, *Indian Constitution*, p. 94. But see *N. B. Jeejeebhoy* v. *Assistant Collector, Thana Prant, Thana* A.I.R. 1965 S.C. 1096, where the Indian Supreme Court held that an acquisition under pre-Constitution law (*i.e.* where section 299 of the Government of India Act 1935 applied) would require compensation that was a 'just equivalent'.

[36] See *e.g.* A Bill to Constitute within the British Empire a Commonwealth of India, 16 Geo. 5, clause 8(d) and (e). The Bill was drafted by a group of Indians under the direction of Mrs Annie Besant and introduced into Parliament by George Lansbury and supported by other Labour Party members. See also the Report of the 45th Indian National Congress, 1931, pp. 139–41 (the 'Karachi Resolution').

[37] See Austin, *Indian Constitution*, pp. 77–9. The division between justiciable and non-justiciable rights was also debated; *e.g.* the right to free primary education started as a justiciable right, but was later a non-justiciable directive principle, and the right to equality before the law began as a directive principle but was later made justiciable.

the legislature. The principles were therefore included as Part IV to the Constitution, entitled 'Directive principles of State policy'. Article 37 provided that the directive principles were not enforceable by any court, but were 'nevertheless fundamental in the governance of the country' and that it 'shall be the duty of the State to apply these principles in making laws'. In relation to property reform, the most important principles were contained in Article 39, which commands the state to 'direct its policy towards securing that . . . the ownership and control of the material resources of the community are so distributed as best to subserve the common good . . . [and] that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment'.[38]

Although there was a consensus that the constitution should include a justiciable bill of rights, there was a lengthy debate over the inclusion and form of the right to property. The nationalist movement drew its political strength from tenant farmers who, not surprisingly, favoured the abolition of the *zamindar* system, either without compensation to *zamindars* or with compensation to be determined solely by the legislature.[39] There was a fear that a compensation guarantee would hinder social and economic reform, especially since the directive principles would be non-justiciable. Eventually, the Assembly decided to retain the formula used in the Government of India Act 1935, despite the fact that section 299 had been intended to protect the *zamindars*. Article 31, the right to property, provided as follows:

31. (1) No person shall be deprived of his property save by authority of law.

(2) No property, movable or immovable, including any interest in, or in any company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principle on which, and the manner in which, the compensation is to be determined and given.

(3) No such law as is referred to in clause (2) made by the Legislature of the State shall have effect unless such law, having been reserved for the consideration of the President, has received his assent.

(4) If any Bill pending at the commencement of this Constitution in the Legislature of a State has, after it has been passed by such Legislature, been reserved for the consideration of the President and has received his assent, then, notwithstanding anything in this Constitution, the law so assented to shall not

[38] Article 39(b) and (c).

[39] Austin, *Indian Constitution*, p. 91.

be called in question in any court on the ground that it contravenes the provisions of clause (2).

(5) Nothing in clause (2) shall affect –

(a) the provisions of any existing law other than a law to which the provisions of clause (6) apply, or

(b) the provisions of any law which the State may hereafter make

(i) for the purpose of imposing or levying any tax or penalty, or

(ii) for the promotion of public health or the prevention of danger to life or property, or

(iii) in pursuance of any agreement entered into between the Government of the Dominion of India or the Government of India and the Government of any other country, or otherwise, with respect to property declared by law to be evacuee property.

(6) Any law of the State enacted not more than eighteen months before the commencement of this Constitution may within three months from such commencement be submitted to the President for his certification; and thereupon, if the President by public notification so certifies, it shall not be called in question in any court on the ground that it contravenes the provisions of clause (2) of this article or has contravened the provisions of subsection (2) of section 299 of the Government of India Act 1935.

In their original form, Articles 31(1) and (2) of the independence Constitution were substantially the same as section 299(1) and (2), except that the Indian framers extended the compensation guarantee to all types of property. Sir Thomas Inskip's belief that it would be impossible to find a means of exempting taxation was addressed directly, by including the specific limitations in Article 31(5). The Assembly considered framing the rights in absolute terms, which would have left it to the judiciary to develop specific limitations to the rights. However, it ultimately decided to include the express limitations of Article 31(5).[40] In fact, the Supreme Court subsequently held that Article 31(2) did not apply to taxation in any case, as it applied the American doctrine that the compensation guarantee only applies to the exercise of the power of eminent domain.[41] The use of express limitations was therefore, to some extent, redundant. Nevertheless, express limitations would subsequently prove popular with framers of other constitutions: the Nigerian-model constitutions reflect the Indian example by including comparatively detailed limitation clauses.

The scope of judicial review of compensation under Article 31(2) became one of the most controversial issues in Indian constitutional

[40] *Ibid*., pp. 68ff.

[41] *Bihar* v. *Singh* A.I.R. 1952 S.C. 252.

law. It appears that the members of the Constituent Assembly did not expect it to become so controversial. Jawaharlal Nehru informed the Assembly that '[e]minent lawyers have told us that on a proper construction of this clause, normally speaking, the Judiciary should not and does not come in'. The courts would become involved only where 'there has been a gross abuse of the law, where, in fact, there has been a fraud on the Constitution'.[42]

Despite the flexibility thought to lie in Article 31(2), the Assembly also added Article 31(5)(a), which stated that Article 31(2) did not apply to existing legislation, and Article 31(4), which stated that the right to property did not apply in respect of bills pending when the Constitution came into effect or enactments made within eighteen months of the effective date. Article 31(4) was intended to protect *zamindari* bills that were making their way through state legislatures or would soon do so. While it would appear that its importance would decline over time, the technique of exempting specific legislation from one or more fundamental rights also set an important precedent in the Commonwealth. In India, subsequent amendments would use a similar device to exempt specific legislation from the scope of Article 31(2).

The protection of property rights also came under Article 19. Article 19(1) guaranteed rights of freedom of speech, assembly, association, movement, residence and the right to practise a profession. In paragraph (f), it also provided a positive guarantee of 'the right to acquire, hold and dispose of property'. However, Article (5) provided that Article 19(1)(f) 'shall not affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by [subclause (f)] either in the interests of the general public or for the protection of the interests of any Scheduled Tribe'.[43] The relationship between Articles 19(1)(f) and 31(1) is plainly not as clear as it could have been, but it appears that they were intended to allow the regulation of property that was both reasonable (Article 19(1)(f)) and according to law (Article 31(1)).

Amendments

The courts almost immediately indicated that they would use the fundamental rights to restrict the new Government's reforms. In

[42] Constituent Assembly Debates, vol. 9, no. 31, pp. 1192–5, quoted in Austin, *Indian Constitution*, p. 99.

[43] This also applied to the rights to free movement and residence.

Kameshwar Singh v. *State of Bihar*,[44] it was held that legislation that provided a graduated scale of compensation for *zamindari* holdings infringed Article 14 as unequal treatment.[45] The use of Article 14 surprised Parliament and the Bihar legislature, as it was thought that the legislation would be protected under Article 31(4). Parliament therefore passed the First Amendment to the Constitution, which added Article 31A to the Constitution. It declared that laws providing for the acquisition of an 'estate' or rights therein, or the modification or extinction of such rights, could not be challenged under *any* of the fundamental rights in Part III of the Constitution. 'Estate' was defined so as to apply to the interests of the *zamindars* and other intermediaries. The First Amendment also added the Ninth Schedule to the Constitution, which listed thirteen state land reform laws that were immune from challenge under the fundamental rights.

Within a few years, the Supreme Court's interpretation of Article 31(2) appeared to threaten the Government's economic reforms. In *State of West Bengal* v. *Bela Banerjee*,[46] the Court held that Article 31(2) guaranteed a 'just equivalent' to the owner. The Court's reasoning is examined in more detail in chapter 8 but, briefly, it held that Article 31(2) did not allow the legislature to act irrationally or arbitrarily, and that the provision of anything short of a 'just equivalent' would be irrational or arbitrary.[47] In 1955, Parliament passed the Fourth Amendment to reverse these decisions and add seven new enactments to the list in the Ninth Schedule. It substituted the following for the original Article 31(2):

> (2) No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the compensation, or specifies the principle on which, and the manner in which, the compensation is to be determined and given; and no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate.

Most of the changes to Article 31(2) were intended to simplify the language without changing the meaning; however, the final part of the clause was intended to reverse *Banerjee*.

[44] A.I.R. 1951 Patna 91.

[45] 'The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.'

[46] A.I.R. 1954 S.C. 170.

[47] See p. 225, below.

The Fourth Amendment confirmed the distinction between acquisition and deprivation by adding a new clause (2–A), as follows:

(2–A) Where a law does not provide for the transfer of the ownership or right to possession of any property to the State or to a corporation owned or controlled by the State, it shall not be deemed to provide for the compulsory acquisition or requisitioning of property, notwithstanding that it deprives any person of his property.

This was intended to reverse the decisions in *Dwarkadas Shrinivas* v. *Sholapur Spinning and Weaving Co. Ltd*,[48] *State of West Bengal* v. *Subodh Gopal Bose*[49] and *Saghir Ahmad* v. *The State of Uttar Pradesh*,[50] where the Court held that Article 31(2) could be applied to regulations that restricted the exercise of property rights. As explained above, it had been thought that the regulation of property would only be subject to Articles 19(1)(f) or possibly 31(1), but not Article 31(2). Other provisions of the Fourth Amendment went further, to enable the states to take over the management of companies. This was a response to *Dwarkadas Shrinivas*, where the Supreme Court held that regulations authorising the government to appoint a private company's board of directors contravened Article 31(2). The following was substituted as Article 31–A(1), with retroactive effect:

(1) Notwithstanding anything contained in Article 13, no law providing for

(a) the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights, or

(b) the taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property, or

(c) amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporation, or

(d) the extinguishment or modification of any rights of managing agents, secretaries and treasurers, managing directors, directors or managers of corporations, or of any voting rights of share-holders thereof, or

(e) the extinguishment or modification of any rights accruing by virtue of any agreement, lease or licence for the purpose of searching for, or winning, any mineral or mineral oil, or the premature termination or cancellation of any such agreement, lease or licence,

shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Art. 14, Art. 19 or Art. 31:

[48] A.I.R. 1954 S.C. 119 at 128.
[49] [1954] S.C.R. 587.
[50] [1955] S.C.R. 707.

Provided that where such law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.

On the face of it, the Fourth Amendment appeared to take much of the force out of Article 31(2). However, in 1965 the Supreme Court held that Article 31(2) still required payment of a just equivalent for expropriated property.[51] Moreover, it also interpreted 'estate' in Article 31A in a manner that caused the Government to fear that its land reform programme would be severely compromised.[52] The conflict between the Court and Parliament intensified, as Parliament's reform programmes broadened. The abolition of the *zamindari* system was more or less complete by 1955, and attention had shifted to the imposition of ceilings on large landholdings, the resettlement of insecure tenants, the consolidation of scattered holdings and the development of village councils for planning and management of land.[53] All agricultural holdings were targeted, rather than just the *zamindari* and intermediary estates. In order to safeguard its programmes, Parliament passed the Seventeenth Amendment in 1964. It extended the meaning of 'estate' to all types of agricultural holdings and added forty-four enactments to the Ninth Schedule.

The extension of the Ninth Schedule alarmed the Supreme Court. In *Golak Nath* v. *State of Punjab*,[54] the Court held that fundamental rights, including the right to property, were part of an unamendable core of the Constitution. Only a new Constituent Assembly had the authority to repeal or abrogate the fundamental rights and hence the First, Fourth and Seventeenth Amendments were declared unconstitutional, although only with prospective effect. The Congress Party campaigned in the next election on a platform of social reform and criticised the Court for interfering with its plans. In 1967, it returned to power with strong majorities in both Houses. Parliament then passed the Twenty-fourth Amendment, which declared that all fundamental rights were

[51] *Vajravelu* v. *Special Deputy Collector, West Madras* A.I.R. 1965 S.C. 1017; see p. 226, below.

[52] *Kunhikoman* v. *Kerala* A.I.R. 1962 S.C. 723. Article 31A left 'estate' undefined; there was no doubt that it applied to *zamindari* and other intermediary holdings, but there were a number of landholdings of uncertain status. Although the Government feared that its programmes would be compromised, some Supreme Court decisions were quite favourable to the Government: see *e.g. Atma Ram* v. *Punjab* [1959] Supp. (1) S.C.R. 748 and see generally Rajeev Dhavan, *The Supreme Court of India: A Socio-legal Analysis of its Juristic Techniques* (Bombay: N. M. Tripathi Pvt. Ltd, 1977), pp. 146–68.

[53] See generally Merillat, *Land and the Constitution*, ch. 8.

[54] [1967] 2 S.C.R. 762.

subject to amendment, and the Twenty-fifth Amendment, which confirmed the First, Fourth and Seventeenth Amendments. It also added Article 31–C, which excluded judicial review of any legislation that included a declaration that it was enacted in furtherance of the directive principles. The validity of these amendments was challenged in *Kesavananda* v. *State of Kerala*.[55] This time, the Supreme Court achieved a compromise: it held that there was an unamendable core to the Constitution, but the right to property was not part of it. The conflict between the Supreme Court and the legislature and executive was then overtaken by the state of emergency, during which the Supreme Court showed considerably less enthusiasm for challenging the Government. When free elections were restored, the Janata Government took power and repealed Article 31.[56]

While the repeal of Article 31 plainly reduces the importance of the Indian law of constitutional property in the Commonwealth, it has been described in some detail because the Indian experience has had, and continues to have, a profound impact on the drafting and interpretation of other Commonwealth rights to property. Some countries use the compensation formula of Article 31(2), and in some cases the formula was adopted in order to accommodate ambitious nationalisation programmes.[57] The Indian Constitution used specific savings clauses extensively, in both Article 31(4) and the Ninth Schedule; subsequently, other countries would adopt override clauses, which fulfil a similar function.[58] There were the specific derogations in Article 31(5); the Nigerian Constitution and those modelled upon it also contain specific derogations, although more detailed than that of India. Article 19(5), by allowing 'reasonable' limitations on the exercise of property rights, was the first open invitation to Commonwealth courts to treat the balancing between public and private interests as a separate issue in determining whether the Constitution was violated. The principles of balancing and proportionality are now a central part of Commonwealth jurisprudence. Finally, the directive principles were an important

[55] (1973) 4 S.C.C. 225.

[56] Article 300A, outside the chapter on fundamental rights, now provides that 'No person shall be deprived of his property save by authority of law.'

[57] Examples are Zambia and Guyana: see generally Samuel Amoo, 'Law and Development and the Expropriation Laws of Zambia', in Muna Ndulo (ed.), *Law in Zambia* (Nairobi: East African Publishing House, 1984), pp. 245–70, and Francis Alexis, *Changing Caribbean Constitutions* (Bridgetown, Barbados: Antilles Publications, 1984), pp. 162–70.

[58] See *e.g.* the Canadian Charter of Rights and Freedoms, s. 33, and the Constitution of Trinidad and Tobago, s. 13.

innovation. For this reason, Indian law remains a rich source of comparative law for other Commonwealth framers and judges, despite the repeal of the right to property.

The European Convention on Human Rights

The British continued to take a negative position on bills of rights in the early 1950s.[59] Their constitutional experts espoused the cynical views of the Simon Commission and the Joint Parliamentary Commission on India. Indeed, even though the British were involved in the drafting of the European Convention on Human Rights, it appears that senior officials and the Lord Chancellor privately expressed many of the same reservations that British officials had expressed in relation to bills of rights for colonies and newly independent states.[60] Nevertheless, the Convention subsequently provided the model for the Nigerian Bill of Rights, and its influence can be seen in the Canadian Charter of Rights and Freedoms and the bills of rights of Namibia and South Africa.

The Convention contains a right to the 'peaceful enjoyment of possessions' in Article 1 of the First Protocol, as follows:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Other Convention rights also protect property in certain circumstances. For example, Article 6 provides that '[i]n the determination of his civil rights and obligations . . . everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'. Interests that might be too speculative to be protected as property – such as undetermined contractual or tortious

[59] For example, in 1953, the colonial secretary told Nigerian leaders that he would not accept a justiciable bill of rights for Nigeria: see Gaius Ezejiofor, *Protection of Human Rights Under the Law* (London: Butterworths, 1964), p. 180. Similarly, Ghanaian representatives requested a justiciable bill of rights but the British refused: James S. Read, 'Bills of Rights in "The Third World": Some Commonwealth Experiences', (1973) 6 *Verfassung und Recht in Uberesse* 21, p. 28.

[60] Anthony Lester, 'Fundamental Rights: the United Kingdom Isolated?' [1984] *Public Law* 46, p. 50.

claims – receive some protection under Article 6 as 'civil rights and obligations'.[61]

The Protocol has had little direct impact on property rights in the Commonwealth. Although the United Kingdom declared that the Convention applied to many of its colonies and dependencies, the declaration did not extend to the Protocol and the Protocol has not provided the model for Commonwealth rights to property. It was not until 1966 that Britain itself allowed the right of individual petition to the European Commission on Human Rights and that it accepted the jurisdiction of the European Court of Human Rights. The Convention only became part of domestic law with the enactment of the Human Rights Act of 1998.

Section 3 of the Human Rights Act 1998 states that, so far as it is possible to do so, all legislation must be read and given effect in a way which is compatible with the Convention rights. The effect of this provision could be very far-reaching, although plainly its scope remains to be determined by the courts. At present, English courts generally presume that Parliament does not intend to legislate contrary to the United Kingdom's obligations under international treaties or in a manner that abrogates fundamental rights and freedoms. However, the presumptions are rebutted by clear language to the contrary. Arguably, the Act does not carry matters further, since section 3 allows the courts to bring legislation into conformity with Convention rights only 'so far as it is possible to do so', and section 4 states that the Act does not affect the validity, continuing operation or enforcement of legislation that is incompatible with Convention rights. Nevertheless, section 3 may have the effect of reversing a recent decline in the strength of the presumptions in favour of property owners.[62]

Section 3, if applied generously, could improve the position of property owners in two ways. In some cases, it may encourage the court to restrict a statutory power over property; in others, it may lead the court to allow the action but impose an implied statutory duty to compensate the victim. Overall, section 3 should reduce the likelihood of a court finding that a statute authorises an uncompensated acquisition of property. Nevertheless, where the court decides that the

[61] See *e.g. Wiesinger* v. *Austria* (1993) 16 E.H.R.R. 258: Article 6 was infringed when proceedings for the consolidation of land lasted over nine years, although the consolidation legislation did not infringe Article 1 of the First Protocol.

[62] See *Secretary of State for Defence* v. *Guardian Newspapers Ltd* [1985] A.C. 339 (H.L.) at 363; discussed above, pp. 19–20.

legislation is clear, section 3 provides no further assistance.[63] In such circumstances, section 6(1) might be relied upon. It declares that '[i]t is unlawful for a public authority to act in a way which is incompatible with a Convention right'. Section 6(2) states that an administrative act is not unlawful under subsection (1) if 'as a result of one or more provisions of primary legislation, the authority could not have acted differently'. Hence, only a statutory obligation to act in a manner which infringes Convention rights would not be covered by section 6; any statutory power or discretion is subject to the restriction that it may not be exercised in a manner that infringes Convention rights. Many statutes merely empower public authorities to acquire property; arguably, these authorities cannot use such powers without complying with the Convention, even if the empowering statute does not seem to require compensation.

Sections 3 and 6 broaden the circumstances in which an infringement of property rights may be found unlawful; however, they do not broaden the remedies available to an individual who suffers a loss because of unlawful action. While there may be remedies in tort or restitution in some circumstances, under English administrative law there is no general right to compensation for losses caused by ultra vires or invalid administrative acts. For example, there is no right to compensation for an unlawful refusal to grant planning permission or the imposition of ultra vires planning restrictions.[64] However, section 8 of the Human Rights Act 1998 states that a court may award damages for unlawful acts of a public authority. The court may make an award if it is 'satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made'. Section 8 does not describe 'just satisfaction' in further detail, although it does require the court to take into account the principles applied by the European Court of Human Rights to Article 41 of the Convention.[65] While neither section 8 of the

[63] Section 4 of the Act enables the courts to declare that the legislation is incompatible with a Convention right. A declaration of incompatibility confers no rights on the individual, but it does allow the relevant minister the power to amend the legislation by ministerial order: see section 10.

[64] See *e.g. Dunlop* v. *Woollahra Council* [1982] A.C. 158 and *Rowling* v. *Takaro Properties Ltd* [1988] A.C. 473. There may be a claim for the tort of misfeasance in public office, if it could be shown that the relevant officials knowingly exceeded or abused their powers, but cases of actual knowledge of unlawfulness are likely to be rare. See *Bourgoin* v. *Ministry of Agriculture* [1986] Q.B. 716.

[65] Article 41: 'If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned

Act nor Article 41 of the Convention import the tort rule that damages should compensate fully for loss, there is no doubt they leave property owners better off than the common law position.

Plainly, the impact of the Human Rights Act 1998 on British law depends on the content of the right to property under the Convention. Some indication can be provided by the United Kingdom's past record before the European Court of Human Rights and the Commission with respect to the right to the enjoyment of possessions. Indeed, the Court's decision on compensation for the nationalisation of the aircraft and shipbuilding industries was probably more favourable to the state than the corresponding decision of the Indian Supreme Court on the nationalisation of the major commercial banks.[66] The impact of the Convention on leasehold reform, planning regulations and rent controls has been generally favourable to the Government.[67] The British courts are not bound to follow the decisions of the European Court of Human Rights; indeed, there is a strong argument that the British courts should take a more generous view of Convention rights, since they are not laying down principles for application across Europe.[68]

Malaysia

The Malayan Constitution of 1957 gave the first sign of a clear shift in British policy regarding bills of rights.[69] A Constitutional Commission, chaired by Lord Reid, put forward a draft constitution written primarily by Sir Ivor Jennings. Despite Jennings's well-known scepticism of bills of rights, the independence Constitution includes a chapter on fundamental rights. The chapter contains both justiciable and non-justiciable rights, and it includes a justiciable right to property. Article 13 provides as follows:

13. (1) No person shall be deprived of property save in accordance with law.

(2) No law shall provide for the compulsory acquisition or use of property without adequate compensation.

allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.'

66 Compare *R. C. Cooper* v. *Union of India* [1970] 3 S.C.R. 530 with *Lithgow* v. *U.K.* A 102 (1986); 8 E.H.R.R. 329 (and see also *A, B, C and D* v. *U.K.* (1967) 10 *Yearbook* 506).

67 See *e.g.*: *James* v. *U.K.* A 98 (1986); 8 E.H.R.R. 123; *Gillow* v. *U.K.* A 109 (1986); 11 E.H.R.R. 325; *Kilburn* v. *U.K.* (1986) 8 E.H.R.R. 81; and *Powell* v. *U.K.* (1987) 9 E.H.R.R. 241.

68 See Ian Leigh and Laurence Lustgarten, 'Making Rights Real – The Court, Remedies and the Human Rights Act', forthcoming.

69 Malaya was renamed Malaysia in 1963.

Article 13 exhibits the same basic structure as section 299 of the Government of India Act and Article 31 of the Indian independence Constitution. As explained above, the Supreme Court of India interpreted Article 31(1) and (2) in a manner that suggested that the regulation of property would be compensatable in many circumstances. It is not clear whether the Commission believed that the Malaysian courts would adopt equally broad interpretations of Article 13. In any case, the interpretation of Article 13 did not give rise to same controversy in Malaysia: in *Selangor Pilot Association* v. *Government of Malaysia and Another*,[70] the Privy Council stated that regulation did not fall under Article 13(2) unless it amounted to a 'colourable device' for taking property without compensation.

The Nigerian-model bills of rights

By the end of the decade, British feeling had shifted in favour of bills of rights. Instead of accepting bills of rights grudgingly, and then only in non-justiciable or limited forms, British officials began to support stronger forms of bills of rights.[71] In 1958, the Willinck Commission recommended that the Nigerian Constitution should include a bill of rights as a means to protect minorities. Although the Commission did not believe that a bill of rights would stop a government 'determined to abandon democratic courses', it did believe that a bill of rights would be valuable in preventing a steady deterioration in standards of freedom and individual rights.[72] Subsequently, the British pressed for the inclusion of bills of rights in other independence constitutions. The protection of minorities remained an important concern in many cases,[73] but there was also a growing belief that bills of rights would ensure a measure of political stability.[74] Outside Britain, the degree of local

[70] [1978] A.C. 337.

[71] See generally Randolph Hahn, 'Commonwealth Bills of Rights: Their Nature and Origin', D.Phil. thesis, University of Oxford (1986), ch. 2.

[72] Report of the Commission appointed to enquire into the fears of Minorities and the means of allaying them (The 'Willinck Commission') Cmnd 505 (1958), p. 97; see also Report by the Nigeria Constitutional Conference, Cmnd 207 (1957), p. 32.

[73] See *e.g.* the Secretary of State for the Colonies on the value of bills of rights in protecting minorities in Malaya (H.C. Deb., vol. 573, 5 ser., col. 640) and Trinidad and Tobago (H.C. Deb., vol. 662, 5 ser., col. 542). See generally Hahn, 'Commonwealth Bills of Rights', pp. 246–53.

[74] For example, in Nyasaland, the British sought to protect the European minority, but also believed that a bill of rights 'is essentially a means of establishing that confidence which is essential at this time of major social and political change, a confidence which

interest in bills of rights varied.[75] In some countries, national leaders opposed the inclusion of a bill of rights, often for the same reasons that the British had once given; that is, a bill of rights would prove ineffective to protect rights.[76]

The right to property attracted very little specific attention. The British were plainly concerned with the protection of European interests, but they also argued that the protection of property would contribute to economic and political stability.[77] In general, national leaders did not object to the inclusion of property rights. The possibility that a bill of rights, and especially a right to property, might provide a judiciary with the power to block economic reform was scarcely acknowledged, despite the example of India. One exception is Jamaica: the right to property was very controversial, but the fear of losing foreign investment persuaded national leaders to acquiesce to its inclusion.[78] A more general objection to the liberal values of the

will also assist Nyasaland's external credit, political and financial': Report of the Nyasaland Constitution Conference, Cmnd 1887 (1963) p. 7, quoting the First Secretary of State's description of the Government's position on the inclusion of a bill of rights.

[75] For example, the Willinck Commission reported that the only real demand for a Nigerian bill of rights came from certain Christian groups (p. 97), although the Secretary of State for Colonies told Parliament that the bill of rights represented the wishes of the Nigerians (H.C. Deb., vol. 625, 5 ser., col. 1793). See generally: Hahn, 'Commonwealth Bills of Rights', ch. 2; Simbi Mubako, 'Fundamental Rights and Judicial Review: The Zambian Experience', (1983–4) 1 & 2 *Zambia Law Review* 97; M. Sornajah, 'Bills of Rights: The Commonwealth Debate', (1976) 9 C.I.L.S.A. 161.

[76] See *e.g.* Proposals for the Republican Constitution of Malawi, Government White Paper 002, 1965, p. 14; Proposals of the Tanganyikan Government for a Republic, Government Paper No. 1, 1962, p. 6; and Report of the Presidential Commission on the Establishment of a Democratic One-Party State, 1968, pp. 31–2.

[77] See *e.g.* the Report of the Kenya Constitutional Conference, Cmnd 960 (1960), pp. 9–10, reporting a statement made by the secretary of state on the importance of property rights: 'Only by this means will it be possible to maintain confidence, and to encourage development and investment, including the attraction of overseas capital, not only in the immediate future but also in the long term. Accordingly, Her Majesty's Government think it right to include provisions founded on the principle that there should be no expropriation of property except to fulfil contractual or other legal obligations upon the owner, or for purposes to the benefit of the country (due regard being paid to human needs and individual hardship, confidence and stability, and advantage to the country's economy). Full and fair compensation should be given to the owner of any property expropriated, together with the right of recourse to the courts (including the normal channels of appeal) for judicial determination of his rights, and of the amount of compensation to be paid to him.' See also Report of the Kenya Independence Conference, Cmnd 2156 (1963), p. 210.

[78] See *e.g.* Trevor Munro, *The Politics of Constitutional Decolonization: Jamaica 1944–62* (Mona, Kingston, Jamaica: Institute of Social and Economic Research, University of the West Indies, 1972) pp. 156–62 and Hahn, 'Commonwealth Bills of Rights', p. 182n.

Nigerian-model bill of rights was made in Tanganyika. The Report of the Presidential Commission on the Establishment of a Democratic One-Party State stated that 'Tanganyika has dynamic plans for economic development . . . Decisions concerning the extent to which individual rights must give way to the wider considerations of social progress are not properly judicial decisions. They are political decisions best taken by political leaders responsible to the electorate.'[79] Tanganyika's position was exceptional. The belief that bills of rights (and especially the right to property) could be incompatible with economic reform grew in strength in the 1970s, but in the 1960s it was rarely voiced.

The Nigerian property provisions

The Willinck Commission recommended that the European Convention on Human Rights could provide a model for the type of rights that could be included in a bill of rights, although the Commission stated that 'we do not necessarily recommend the exact wording of the Convention'.[80] The Convention appealed to both the British and the Nigerians because it was more precise than other bills of rights and it contained express limitations on the rights.[81] Ultimately, however, the Nigerian Bill of Rights departed from the Convention in many respects; indeed, the Nigerian right to property owes more to the Indian precedents than it does to the Convention. Nigeria's independence Constitution provided that

31. (1) No property, movable or immovable, shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria except by or under the provisions of a law that –

(a) requires the payment of adequate compensation therefor; and

(b) gives to any person claiming such compensation a right of access, for the determination of his interest in the property and the amount of compensation, to the High Court having jurisdiction in that part of Nigeria.

(2) Nothing in this section shall affect the operation of any law in force on the thirty-first day of March, 1958, or any law made after that date that amends or replaces any such law and does not –

(a) add to the kinds of property that may be taken possession of or the rights over and interests in property that may be acquired;

[79] *Report of the Presidential Commission on the Establishment of a Democratic One-Party State*, 1965, p. 31.

[80] *Minorities Commission*, p. 97.

[81] Hahn, 'Commonwealth Bills of Rights', p. 37.

(b) add to the purposes for which or circumstances in which such property may be taken possession of or acquired;
(c) make the conditions governing entitlement to any compensation or the amount thereof less favourable to any person owning or interested in the property; or
(d) deprive any person of any such right as is mentioned in paragraph (b) of subsection (1) of this section.

(3) Nothing in this section shall be construed as affecting any general law –
(a) for the imposition or enforcement of any tax, rate or due;
(b) for the imposition of penalties or forfeitures for the breach of the law, whether under civil process or after conviction of an offence;
(c) relating to leases, tenancies, mortgages, charges, bills of sale or any other rights or obligations arising out of contracts;
(d) relating to the vesting or administration of property of a person adjudged bankrupt or otherwise declared bankrupt or insolvent, of persons of unsound mind, of deceased persons and of companies, other bodies corporate and unincorporated societies in the course of being wound up;
(e) relating to the execution of judgments or orders of courts;
(f) providing for the taking of possession of property that is in a dangerous state or is injurious to the health of human beings, plants or animals;
(g) relating to enemy property;
(h) relating to trusts and trustees;
(i) relating to the limitation of actions;
(j) relating to property vested in bodies corporate directly established by any law in force in Nigeria;
(k) relating to the temporary taking of possession of property for the purposes of any examination, investigation or enquiry; or
(l) providing for the carrying out of work on land for the purposes of soil-conservation.

(4) The provisions of this section shall apply in relation to the compulsory taking of possession of property, movable or immovable, and the compulsory acquisition of rights over and interests in such property by or on behalf of the state.

The Nigerian Bill of Rights subsequently provided the model for many other Commonwealth bills of rights.[82] However, modifications were made, both to the bills generally and to the right to property

[82] See the bills of rights of Antigua and Barbuda, Bahamas, Barbados, Belize, Botswana, Dominica, Fiji, Guyana, Jamaica, Kenya, Kiribati, Malta, Mauritius, St Christopher and Nevis, St Lucia, St Vincent, Sierra Leone, Solomon Islands, Tuvalu, Vanuatu, Zambia, Zimbabwe. The current bills of rights of some other Commonwealth members, such as The Gambia, Ghana, Malawi, Nauru and Uganda, are loosely based on the Nigerian model. The bills of rights of the United Kingdom's dependent territories also follow the Nigerian model.

specifically. It is therefore worth examining the Nigerian right to property and the subsequent modifications under several headings.

Opening provisions

The Ugandan Bill of Rights of 1962 followed the basic structure of the Nigerian Bill of Rights. However, it added the following as an introductory provision to the entire bill of rights:

> Whereas every person in Uganda is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely:
>
> (a) life, liberty, security of the person and the protection of the law;
> (b) freedom of conscience, of expression and of assembly and association; and
> (c) protection for the privacy of his home and other property and from deprivation of property without compensation,
>
> the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.[83]

Other Nigerian-model constitutions contain similar opening provisions. Most of these provisions follow the Ugandan model very closely, but there are some variations. For example, the Mauritian Bill of Rights begins by stating that '[i]t is hereby recognised and declared that in Mauritius there have existed and continue to exist . . . each and all of the following human rights and fundamental freedoms . . .'.[84] There are also some significant differences in the reference to the deprivation of property: Belize's opening provision refers to the 'arbitrary deprivation of property', but makes no reference to compensation;[85] the Jamaican and Maltese provisions refer to the right to the 'enjoyment of property' rather than the deprivation of property without compensation;[86] and

[83] Uganda, 1962 Constitution, s. 17. (Section 20, the corresponding provision of the present Ugandan Constitution, provides that '(1) Fundamental freedoms and rights of the individual are inherent and not granted by the State. (2) The rights and freedoms of the individual and groups enshrined in this Chapter shall be respected, upheld and promoted by all organs and agencies of Government and by all persons.')

[84] Mauritius, s. 3.

[85] Belize, s. 3(d).

[86] Jamaica, s. 18; Malta, s. 32.

the Zimbabwean provision refers to the 'compulsory acquisition of property without compensation'.[87]

The effect of the Nigerian-model opening provisions is controversial. Early cases suggest that it is a mere preamble without independent effect, but more recent cases state that it does have independent effect.[88] Most opening provisions declare that the bill of rights protects against the 'deprivation of property without compensation', but the right to property protects against the taking of possession or compulsory acquisition of property. Hence, holding that the opening provision does have independent effect broadens the circumstances in which compensation is payable.[89] At the same time, the Nigerian right to property does not explicitly invite the court to balance the public and private interests in property cases. The opening provision clearly does so, which may give rise to further limitations on the right to property.[90]

'Property'

The Nigerian reference to movable and immovable property was simplified in the Ugandan independence Constitution to 'property of any description'. The Ugandan formula has been used in many other constitutions. The modification appears to make no difference to interpretation.[91] With the exception of the constitutions of St Lucia, St Vincent and Dominica, none of the constitutions offer a definition of property. The constitutions of St Lucia, St Vincent and Dominica declare that ' ''property'' means any land or other thing capable of being owned or held in possession and includes any right relating thereto, whether under a contract, trust or law or otherwise and whether present or

[87] Zimbabwe, s. 11. Other opening provisions add to the list of rights that are protected; for example, Grenada adds a paragraph (d) for the protection of 'the right to work'. In Zambia, paragraph (c) is renumbered as paragraph (d), and paragraph (c) refers to the 'protection of young persons from exploitation'. Some opening provisions are similar to the original Ugandan provision, but omit sub-paragraphs (a)–(c); see The Gambia, s. 17(2) and Ghana, s. 12(2).

[88] See pp. 99–101, below.

[89] It also broadens the scope of other rights: see generally Tom Allen, 'Commonwealth Constitutions and Implied Social and Economic Rights', (1994) 6 *African Journal of International and Comparative Law* 555.

[90] Cf. *The State* v. *Adel Osman* [1988] L.R.C. (Const.) 212 at 221 and *Ngui* v. *Republic of Kenya* [1986] L.R.C. (Const.) 308; see generally Margaret De Merieux, 'Setting the Limits of Fundamental Rights and Freedoms in the Commonwealth Caribbean', (1987) 7 *Legal Studies* 39.

[91] See ch. 5.

future, absolute or conditional'.[92] While this definition may assist the courts, it is no broader than the judicial understanding of 'property' under other constitutions.[93]

'Taking possession' and 'acquisition' of property

Only the constitutions of St Lucia, St Vincent and Dominica offer a definition of 'acquisition' of property. They state that ' "acquisition", in relation to an interest in or right over property, means transferring that interest or right to another person or extinguishing or curtailing that interest or right'.[94] The reference to 'extinguishing or curtailing' the interest or right is very broad; indeed, it seems to remove any difference between the deprivation and acquisition of property. As explained in chapter 6, it goes much further than the meaning that most courts have given to 'acquisition'.[95]

Subsection (4) of the Nigerian right to property was not reproduced in subsequent constitutions of other states, and it does not appear in the most recent version of the Nigerian right to property. It is not clear precisely what it was meant to achieve. In Nigeria, as in other countries, the legislature may choose to delegate powers of acquisition on private companies that provide public services, such as railways and other utilities. Whether these companies acquire property 'by or on behalf of the state' is uncertain, but it would make the Nigerian Constitution quite exceptional if these acquisitions were treated differently from direct acquisitions by the state.

None of the property clauses include an express guarantee of due process for infringements of property that fall short of an outright expropriation, except to the extent that such a guarantee can be found in the opening provisions.[96] In this respect, they depart from the United States Constitution, the Indian and Malaysian Constitutions, the Canadian Bill of Rights, and the European Convention on Human Rights.[97]

[92] Dominica, s. 6(8); St Lucia, s. 6(8); St Vincent, s. 6(8).

[93] See p. 123, below.

[94] Dominica, s. 6(8); St Lucia, s. 6(8); St Vincent, s. 6(8).

[95] See pp. 163–71, below.

[96] See *Société United Docks and Others* v. *Government of Mauritius; Marine Workers Union and Others* v. *Mauritius Marine Authority* [1985] 1 A.C. 585; [1985] 2 W.L.R. 114; [1985] L.R.C. (Const.) 801 (P.C. Mauritius) and *La Compagnie Sucrière de Bel Ombre Ltee* v. *The Government of Mauritius* [1995] 3 L.R.C. 494 (P.C.), discussed below, pp. 99–101 and 196–9.

[97] For the Canadian Bill of Rights and Charter of Rights and Freedoms, see ch. 1, p. 6, above.

'Public purpose'

The Nigerian constitution does not limit the purposes for which property may be taken. However, the original Ugandan Constitution stated that property could be taken only where 'necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of any property in such manner as to promote the public benefit' and 'the necessity therefor is such as to afford reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property'.[98] Similar purpose clauses were included in many other independence constitutions,[99] although some constitutions omit any reference to purposes.[100] However, the degree of necessity varies; for example, Botswana's Constitution states that the taking must be 'necessary or expedient' for one of the permitted purposes,[101] whereas Zimbabwe's Constitution states that it must be 'reasonably necessary' for a purpose from a similar list.[102] The range of purposes also varies. For example, Botswana's Constitution states that property may also be taken 'in order to secure the development or utilization of the mineral resources of Botswana'.[103] Zimbabwe's independence Constitution adds a further alternative purpose provision applicable only to the acquisition of land, which stated that land could be taken for settlement, land reorganisation, environmental reasons, or the relocation of persons dispossessed for any of these reasons.[104] It is doubtful that any of these variations make a significant difference, since the courts interpret public purpose clauses very broadly in any case.[105]

[98] The Ugandan Constitution, s. 26(2)(a), now provides that property may not be taken or acquired compulsorily unless 'the taking of possession or acquisition is necessary for public use or in the interest of defence, public safety, public order, public morality or public health'.

[99] See *e.g.* Bahamas, s. 27(1); Fiji, s. 9(1); The Gambia, s. 22(1); Ghana, s. 20(1); Kenya, s. 75(1); Mauritius, s. 8(1); Nauru, s. 8(1); St Lucia, s. 6(1); St Vincent, s. 6(1); St Christopher and Nevis, s. 8(1); Solomon Islands, s. 8(1). See also Malawi, s. 44(4), which refers to 'public utility'.

[100] See *e.g.* Barbados, s. 16; Belize, s. 17; Dominica, s. 6; Grenada, s. 6; Guyana, s. 142; Jamaica, s. 18; Malta, s. 37; Nigeria, s. 42; Zambia, Art. 16.

[101] Botswana, s. 8(1)(a); Fiji, s. 9(1)(c); The Gambia, s. 22(1).

[102] Zimbabwe, s. 16(1)(a).

[103] Botswana, s. 8(1)(a)(iii).

[104] Zimbabwe, s. 16(1)(a)(i).

[105] See ch. 7. One exceptional case is *Patel* v. *Att.-Gen.* [1968] Z. R. 99 (H.C. Zam.), where the Court assumed that the purpose clause was a derogation clause (see below, p. 215, n. 65).

Compensation

The compensation requirement has also been subject to wide variation. While most constitutions require 'adequate compensation',[106] Kenya, Grenada, St Lucia require 'full compensation',[107] the Solomon Islands requires 'reasonable compensation'[108] and Zimbabwe now requires 'fair compensation'.[109] Barbados, Jamaica and St Christopher and Nevis adopted the language similar to that of Article 31(2) of the Indian Constitution.[110] Belize's provisions are similar, except that they state that legislation must prescribe 'the principles on which and the manner in which *reasonable* compensation [for property] is to be determined'.[111] In the 1970s, other countries amended their constitutions to substitute the Indian formula for references to 'adequate' compensation. Two prominent examples are Zambia and Guyana, where the Indian formula was adopted before the nationalisation of key industries.[112] As there was in India, there has been some confusion over the scope of judicial review permitted by these provisions.[113] In Jamaica, Premier Norman Manley informed the House of Representatives that the courts would only decide the means by which compensation would be paid,[114] but in *Yearwood* v. *Attorney-General* the High Court of St Christopher and Nevis stated that similar provisions require payment of the full money equivalent of the property.[115]

Some constitutions also state that compensation must be 'prompt'[116]

[106] See *e.g.* Bahamas, s. 27(1)(c)(ii); Botswana, s. 8(1); Dominica, s. 6(1); Fiji, s. 9(1); The Gambia, s. 22(1); Ghana, s. 20(2); Mauritius, s. 8(1). Malta, s. 37 requires 'adequate' compensation, but also provides that this requirement can be overriden in national interest. Some constitutions loosely based on the Nigerian model also use the 'adequate compensation' standard: Uganda, s.26, requires 'fair and adequate compensation'; Nauru, s. 8, requires 'just terms'; Malawi, s. 44, requires 'appropriate' compensation.

[107] Kenya, s. 75(1); Grenada, s. 6(1); St. Lucia, s. 6(1).

[108] Solomon Islands, s. 8(1).

[109] Zimbabwe, s. 16(1)(c).

[110] Barbados, s. 16(1); Jamaica, s. 18(a); St Christopher and Nevis, s. 8(1). Zimbabwe requires 'fair' compensation, except in relation to the acquisition of land, where the Indian formula is used: see s. 16(1)(c) and 16(2).

[111] Belize, s. 17(a) (emphasis added).

[112] On Zambia, see generally Amoo, 'Law and Development'; on Guyana, see generally Alexis, *Changing Caribbean Constitutions*, pp. 162–70. Guyana also made complete exceptions for church schools and Amerindian property: s. 142(2)(b)(i).

[113] Alexis, *Changing Constitutions*, p. 161n.

[114] Hahn, 'Commonwealth Bills of Rights', p. 184.

[115] (1977) 3 C.L.B. 593 (H.C.).

[116] See *e.g.* Kenya, s. 75(1)(c); Nigeria, s. 42(1)(a); Fiji, s. 9(1)(d); Mauritius, s.8(1)(c); St Lucia, 6(1); St Christopher and Nevis, s. 9(2)(b); Bahamas, s. 27(1)(c); Ghana, s. 20(2); The

and that the recipient must be entitled to remit compensation.[117] The constitutions generally avoid specifying the form of compensation; some countries have provided compensation in the form of long-term bonds.[118] The Jamaican Constitution also provides that 'compensation' means the 'consideration to be given to a person' for property that has been taken. It is not clear what this adds to the basic clause, or the specific problem (if any) it was intended to address, except that it may have been intended to avoid the application of the benefit-offset rule, whereby the state asserts that the property owner has indirectly benefited from the project and therefore has no claim to direct compensation.[119]

Limitation clauses

When compared with earlier Commonwealth rights to property, the most striking feature of the Nigerian right to property is the lengthy and detailed list of derogations in subsection (3). Subsequent constitutions have varied the list to some degree, but in substance there is little change, as most of the variations do not exempt laws or acts that would require compensation under the pre-Nigerian Commonwealth constitutions. The modern Zambian Constitution contains the most extensive list of exceptions; in addition to exceptions derived from the Nigerian list, Article 16(2) includes the following:

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of clause (1) to the extent that it is

Gambia, s. 22(1)(c). Botswana requires 'prompt' compensation, but s. 8(3) allows compensation for minerals and mines to be paid by 'payment at reasonable intervals of adequate royalties'. Belize, s. 17(1)(a), Grenada, s. 6(1), the Solomon Islands, s. 8(1)(c), and Zimbabwe, s. 16(1)(c), require compensation to be given within a 'reasonable' time. Uganda, s. 26(2)(b) requires 'prompt payment of fair and adequate compensation, *prior* to the taking of possession or acquisition of the property' (emphasis added).

[117] See *e.g.* Botswana, s. 8(2); Mauritius, s. 8(2); Fiji, s. 9(3); St Lucia, s. 6(4); St Christopher and Nevis, s. 8(4).

[118] See *San Jose Farmers' Co-operative Society Ltd.* v. *Att.-Gen.* (1992) 43 W.I.R. 63 (C.A. Belize). The Solomon Islands, s. 8(1)(c)(i), requires 'payment of reasonable compensation (the valuable consideration of which may take the form of cash or some other form and may be payable by way of lump sum or by instalments) within a reasonable period of time having regard to all the relevant circumstances'.

[119] See also Lloyd G. Barnett, *The Constitutional Law of Jamaica* (Oxford: Oxford University Press (for the London School of Economics and Political Science), 1977), p. 395: 'The use of the term ''consideration'' in the subsection is suggestive of the rules of the law of contract which excludes the adequacy of the benefits conferred on a party to an agreement from the adjudication of the court.'

shown that such law provides for the taking possession or acquisition of any property or interest therein or right thereover –

. . . (j) in terms of any law relating to abandoned, unoccupied, unutilized or undeveloped land, as defined in such law;

(k) in terms of any law relating to absent or non-resident owners, as defined in such law, of any property; . . .

(o) for the purpose of or in connection with the prospecting for or exploitation of, minerals belonging to the Republic on terms which provide for the respective interests of the persons affected; . . .

(u) where the property consists of any licence or permit;

(v) where the property consists of wild animals existing in their natural habitat or the carcasses of wild animals; . . .

(x) 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 –

(i) upon failure to comply with any provision of such law relating to the title or licence or to the exercise of the rights accruing or to the development or exploitation of any mineral, mineral oil or natural gases; or

(ii) in terms of any law vesting any such property or rights in the President;

(y) for the purpose of the administration or disposition of such property or interest or right by the President in implementation of a comprehensive land policy or of a policy designed to ensure that the statute law, the Common Law and the doctrines of equity relating to or affecting the interest in or rights over land, or any other interests or right enjoyed by Chiefs and persons claiming through and under them, shall apply with substantial uniformity throughout Zambia;

(z) in terms of any law providing for the conversion of titles to land from freehold to leasehold and the imposition of any restriction on subdivision, assignment or sub-letting.

Whether all of these exceptions would be compensatable under other constitutions is uncertain. However, one general difference between Zambia and countries with less extensive lists of exceptions is the degree of flexibility given to the courts. For example, most other courts would agree that the acquisition of a licence is not normally a compensatable acquisition of property, but they would do so on a case-by-case basis, reserving the possibility that some licences might be treated as property for which compensation must be paid in at least some situations. In Zambia, paragraph (u) of Article 16(2) appears to rule out a right to compensation for any licence.

As a final comment on the Nigerian-model constitutions, it is surprising that the rights to property vary as much as they do, especially

since British drafters wrote most bills of rights over a relatively short period. Some of the variations were a response to local conditions or demands, but it also seems that the framers struggled to find an appropriate role for the judiciary. This is apparent from the gradual acceptance that the judiciary should openly balance public and private interests in some circumstances. A number of later constitutions add a closing proviso to the limitation clause. They state that the limitations apply 'except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society'.[120] This proviso invites the judiciary to balance interests: the Nigerian Constitution excluded any reference to a judicial balancing of interests and, although the Ugandan Constitution referred to balancing in the purpose clauses and the opening provision, these had only limited effect.

Canadian Bill of Rights and Trinidad and Tobago

Canada did not have a constitutional bill of rights before the enactment of the Canadian Charter of Rights and Freedoms in 1982. However, in 1960, the Canadian Parliament passed the Canadian Bill of Rights as an ordinary statute. In section 1, it recognised the existence of individual rights to life, liberty, security of the person and enjoyment of property. Section 1 also declared that these rights were enjoyed by all Canadians, regardless of race, national origin, colour, religion or sex, and that they could not be deprived of these rights except by due process of law. Section 2 added certain procedural rights relevant to criminal trials, and also stated that federal laws should 'be so construed and applied so as not to abrogate, abridge, or infringe' any of the rights contained in the Bill, except where there was a declaration in the law to the contrary. In very broad terms, therefore, the content of the Canadian Bill of Rights is similar to the European Convention on Human Rights and the Nigerian Bill of Rights. However, it is written in language that is much more general and does not include express limitations or derogations.

The Canadian courts have had some difficulty determining the constitutional status of the Canadian Bill of Rights. The Canadian Parliament enacted it as an ordinary statute and the courts declined to

[120] Kenya, s. 75(6). See also: Botswana, s. 8(5); Fiji, s. 9(5)(a); Mauritius, s. 8(4)(a); St Christopher and Nevis, s. 8(6); St Lucia, s. 6(5); Solomon Islands, s. 8(2)(a); Zimbabwe, s. 16(7).

elevate it to the status of a quasi-constitutional instrument.[121] In any case, the Supreme Court interpreted the Bill of Rights so narrowly that it has had very little practical effect. The Supreme Court has declared that the Bill of Rights rendered legislation 'inoperative' in only one case.[122] The case did not concern the right to property and the Bill of Rights has had no impact on the protection of property. Indeed, the Canadian Bill of Rights is not even cited in the leading Canadian cases on compensation for property.[123] In any case, there is some doubt that it provides anything more than procedural rights, since it only guarantees 'due process of law'. In *Curr* v. *The Queen*, Laskin J. left open the possibility that 'due process' might be given substantive content in relation to the trial process, but doubted that economic rights were protected by anything but procedural due process.[124]

Trinidad and Tobago opted for a bill of rights based on the Canadian Bill of Rights, even though the British put some pressure on the Trinidadian leaders to adopt a bill of rights modelled on the Nigerian example.[125] The Trinidadians favoured the style of the Canadian Bill of Rights because it was drafted with greater generality and fewer qualifications than Nigerian bills of rights. In Trinidad and Tobago, unlike Canada, the provisions were enacted as part of the Constitution. Section 5 provides that 'no law shall abrogate, abridge or infringe or authorise the abrogation, abridgement or infringement of any of the rights and freedoms hereinbefore recognised and declared'. The courts therefore had little difficulty in holding that this gives them the power to declare legislation invalid.[126] They have also held that the right to the 'enjoyment of property' guarantees both procedural rights and substantive rights. In *Trinidad Island-wide Cane Farmers' Association Inc. and Attorney-General* v. *Prakash Seereeram*, the Court of Appeal of Trinidad and Tobago held that property may only be expropriated for a public purpose and on payment of compensation.[127] Surprisingly, the Court did not even raise the possibility that the Constitution guarantees only procedural rights.

[121] Despite the objections of one former chief justice: see *Hogan* v. *The Queen* (1974) 48 D.L.R. (3d) 427 at 443 *per* Laskin J. (as he then was).
[122] *R.* v. *Drybones* [1970] S.C.R. 282.
[123] See *Manitoba Fisheries* v. *The Queen* (1978) 88 D.L.R. (3d) 462 (S.C.C.) and *British Columbia* v. *Tener* (1985) 17 D.L.R. (4th) 1 (S.C.C.).
[124] (1972) 26 D.L.R. (3d) 603 at 613–14 *per* Laskin J.
[125] See Hahn, 'Commonwealth Bills of Rights', pp. 55–8.
[126] See *Collymore* v. *Att.-Gen.* (1967) 12 W.I.R. 5 (C.A. T.T.), *affirmed* [1970] A.C. 538.
[127] (1975) 27 W.I.R. 329.

The Trinidadian Constitution also includes a limited override provision. Section 13 states that an Act of Parliament supported by three-fifths of the members of each House may expressly declare that it shall have effect even if inconsistent with the Bill of Rights, 'unless the Act is shown not to be reasonably justifiable in a society that has proper respect for the rights and freedoms of the individual'. The override provision seems to be used fairly often as a precautionary measure; however, its use has not led to anything like the Indian 'fundamental rights' controversy.[128]

Namibia

For the two decades following the enactment of the independence Constitution of Nigeria, bills of rights were written with increasing detail. There were exceptions (such as the Canadian and Trinidadian bills of rights), but it was not until the 1980s that it was felt that it was unnecessary to confine judicial discretion in interpretation by precise language. This was apparent with the framing of the Canadian Charter of Rights and Freedoms and in the constitutions of Namibia and South Africa.

The Namibian Bill of Rights can be traced to 1982 Constitutional Principles, which were agreed by all interested parties as the basis for a constitution for an independent Namibia.[129] Clause B.5 stated that a constitution for an independent Namibia would contain a declaration of fundamental rights, which would include 'protection from arbitrary deprivation of private property or deprivation of private property without just compensation'. In Namibia, some political parties drafted the Windhoek Declaration of Basic Principles in 1984. The Windhoek Declaration included a set of fundamental rights, which were brought into force by the South West African Legislative and Executive Authority Proclamation 1985. While the Windhoek Declaration and the Proclamation were both attacked because of the failure to include all parties in discussions, it does appear that there was an attempt to conform to the

[128] Alexis, *Changing Constitutions*, pp. 177–80.

[129] See generally Marinus Wiechers, 'Namibia: The 1982 Constitutional Principles and their Legal Significance', in Dawid van Wyk, Marinus Wiechers and Romaine Hill (eds.), *Namibia: Constitutional and International Law Issues* (Pretoria: VerLoren van Themaat Centre for Public Law Studies, University of South Africa, 1991), pp. 1–21, and Sean M. Cleary, 'A Bill of Rights as a Normative Instrument: South West Africa/Namibia 1975–1988', (1988) 21 C.I.L.S.A. 291.

1982 Constitutional Principles and the right to property contained in the Proclamation provides the basic structure for Namibia's present right to property. Article 11 of the Bill of Rights provided as follows:

The right to own property
Everyone has the right to acquire, own and dispose of movable, immovable and immaterial property, alone or in association with others.

Everyone shall have the right to leave his property to his heirs or legatees. No one shall be arbitrarily deprived of his property. Expropriation shall only be permitted in the public interest and if properly authorised by law.

Fair compensation shall be payable in all cases of expropriation.

The influence of Article 11 on the right to property of the Namibian Constitution of 1990 can be seen by examining the present right to property, contained in Article 16 of the present Constitution:

16. (1) All persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their heirs or legatees: provided that Parliament may by legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens.

(2) The State or a competent body or organ authorised by law may expropriate property in the public interest subject to the payment of just compensation, in accordance with requirements and procedures to be determined by Act of Parliament.

Article 16(1) is similar to Article 19(1)(f) of the Indian Constitution; both are somewhat unusual, as they express the right to property in positive form.[130] The Namibian distinction between the specific rights to acquire, own, dispose and bequeath property and 'property' *per se* reflects the Roman–Dutch distinction between ownership and lesser rights of property. Article 16(2) is more concerned with the taking of the ownership interest than lesser rights, and it would not normally be applicable to the regulation of property.

Article 16 does not contain specific limitations on the right to property (except in so far as the powers to regulate ownership by non-Namibians). Instead, Article 22 contains the following general limitation to all fundamental rights:

22. Whenever or wherever in terms of this Constitution the limitation of any

[130] Article 16(1) is similar to the institutional guarantee of property in Article 14 of the German Constitution. Other positive guarantees in the Commonwealth are Cyprus, s. 23(1), and Uganda, s. 26(1) (and the interim Constitution of South Africa, discussed below).

fundamental rights or freedoms contemplated by this chapter is authorised, any law providing for such limitation shall:

(a) be of general application, shall not negate the essential content, and shall not be aimed at a particular individual;
(b) specify the ascertainable extent of such limitation and identify the article or articles on which authority to enact such limitation is claimed to rest.

Section 22 borrows from the German law of limitations on constitutional rights. Accordingly, the Namibian courts would probably find that laws that satisfy tests of generality, non-arbitrariness, publicity and precision laws are laws 'of general application'.[131] The bar on negating the 'essential content' of a right would mean that the regulation of ownership would be permitted without violating Article 16(1), provided it fell short of the extinction or complete deprivation.

South Africa

The interim constitution

The process that ultimately concluded with the enactment of the interim Constitution began with Prime Minister de Klerk's speech at the opening of Parliament in February 1990, in which he stated his commitment to a negotiated political settlement and his acceptance of a constitutional bill of rights.[132] In December 1991, formal multilateral negotiations began with the Convention for a Democratic South Africa; however, it failed to produce a draft constitution. Full negotiations resumed with the Multi-Party Negotiating Process (MPNP) in March 1993. It was envisioned that the MPNP would produce an interim Constitution, and that the final Constitution would be drafted by a democratically elected body that would also serve as a transitional Parliament. The MPNP appointed a Technical Committee on

[131] S. Woolman, 'Limitations', in M. Chaskalson, S. Kentridge, G. Marcus, D. Spitz and S. Woolman (eds.), *Constitutional Law of South Africa* (Kenwyn, South Africa: Juta & Co. Ltd, 1996), p. 18.

[132] On the negotiating process, see Dawid van Wyk, 'Introduction to the South African Constitution', in Dawid van Wyk, John Dugard, Bertus de Villers and Dennis Davis (eds.), *Rights and Constitutionalism: The New South African Legal Order* (Kenwyn, South Africa: Juta & Co. Ltd, 1994), pp. 131–70, and Hugh Corder, 'Towards a South African Constitution', (1994) 57 *Modern Law Review* 491. On the right to property specifically, see Matthew Chaskalson, 'Stumbling Towards Section 28: Negotiations over the Protection of Property Rights in the Interim Constitution', (1995) 11 *South African Journal of Human Rights* 222.

Fundamental Rights during the Transition Period to prepare a charter of rights essential to the transition to democracy. The African National Congress (ANC) believed that the transitional bill of rights should only include those rights that were essential to the transition to democracy. Hence, it opposed the inclusion of a right to property in the interim Constitution. However, the Technical Committee's first report was a detailed document and seemed to be written on the assumption that the interim Constitution would be comprehensive; hence, it included a right to property. The National Party strongly supported the inclusion of the right to property, and the ANC (and the other parties) elected not to resist it. The interim Constitution contains the following right to property:

28. (1) Every person shall have the right to acquire and hold rights in property and, to the extent that the nature of the rights permits, to dispose of such rights.

(2) No deprivation of any rights in property shall be permitted otherwise than in accordance with a law.

(3) Where any rights in property are expropriated pursuant to a law referred to in Subsection (2), such expropriation shall be permissible for public purposes only and shall be subject to the payment of agreed compensation or, failing agreement, to the payment of such compensation and within such period as may be determined by a court of law as just and equitable, taking into account all relevant factors, including, in the case of the determination of compensation, the use to which the property is being put, the history of its acquisition, its market value, the value of the investments in it by those affected and the interests of those affected.

Once the ANC accepted the inclusion of a right to property in the interim Constitution, it concentrated on several basic objectives. First, it sought to ensure that the right to property would not block its plans for land restitution.[133] The National Party accepted the principle of land restitution, and concentrated on ensuring that restitution would affect white farmers as little as possible.[134] Surprisingly, it focused on the technical question of the location of the provisions on land restitution. Through most of the negotiations, it was more concerned with keeping the property clause free of references to land restitution than it was with, for example, the amount of compensation payable on expropriation of property. Why it focused on this issue is unclear: just before the commencement of the MPNP, it had proposed a property clause that

[133] Chaskalson, 'Stumbling', p. 229.
[134] *Ibid*., p. 231.

would have required compensation at market values and payable within a reasonable time; indeed, it would have protected against taxation that would make 'unreasonable inroads on the enjoyment, use or value' of property.[135] This insistence on full compensation seems to have been quietly dropped during the subsequent negotiations. Hence, section 28 contains no references to land restitution, but the language of section 28(3) probably gives the government sufficient flexibility to accomplish restitution without facing unmanageable compensation claims.

The ANC was also concerned that the interests of rural Africans in land should be constitutionally protected to the same degree as other forms of property. However, in the Roman–Dutch system of private law, 'property' could be read as referring only to ownership interests; if so, the usufructuary interests of rural Africans would not be protected. Hence, the ANC demanded that the property clause should protect 'rights in property' rather than just 'property'.[136] Despite some misgivings, the National Party acquiesced.[137] However, this led to a further problem, as the ANC opposed any clause that would require the state to compensate for the regulation of property use. It feared that the 'rights in property' formulation would make regulation compensatable, as the courts might regard regulation as a deprivation of a 'right in property'. It therefore proposed adding a provision along the lines of the Nigerian list of exceptions to the right to compensation. Ultimately, no such clause was included; instead, section 28(2) and (3) borrow the structure of Article 13(1) and (2) of the Malaysian Constitution and Article 31(1) and (2) of the Indian Constitution. The ANC believed that the Malaysian cases on Article 13 suggested that South African courts would not require compensation for regulation that did not amount to an outright expropriation of property.[138]

Whether it was necessary to adopt the structure of section 28(2) and

[135] Republic of South Africa, Government Proposals on a Charter of Fundamental Rights, 2 February 1993, Clause 18.

[136] See Chaskalson, 'Stumbling', p. 234. See also André J. van der Walt, *The Constitutional Property Clause: A Comparative Analysis of Section 25 of the South African Constitution of 1996* (Kenwyn, South Africa: Juta & Co. Ltd, 1997), p. 53.

[137] The National Party originally opposed the 'rights in property' formulation because it thought that it would be used to support rights of squatters against landowners. The possibility that 'rights in property' formulation might extend their own protection did not seem to be considered: Chaskalson, 'Stumbling', p. 235.

[138] *Ibid*., p. 236n (see, in particular, *Selangor Pilot Association (1946)* v. *Government of Malaysia and Another* [1978] A.C. 337).

(3) is unclear, as the interim Constitution includes a general limitation clause in section 33,[139] as follows:

33. (1) The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation:
(a) shall be permissible only to the extent that it is:
(i) reasonable; and
(ii) justifiable in an open and democratic society based on freedom and equality; and
(b) shall not negate the essential content of the right in question . . .

Paragraph (a) borrows from the general limitation clause of the Canadian Charter of Rights and Freedoms (which, in turn, borrows from the European Convention on Human Rights).

Paragraph (b) borrows from the German law on limitations on constitutional rights. It is not clear how it would apply to section 28, as the German right to property protects ownership; hence, there would be a point at which restrictions on property could amount to a negation of ownership, while still leaving the individual with some lesser property interest. This does not translate well to section 28, as it protects rights in property rather than ownership.[140]

The final Constitution

A crucial section of the interim Constitution as a whole is Schedule 4, which contains the Constitutional Principles. Section 71 states that the final Constitution would not be effective unless certified by the Constitutional Court to be in compliance with the Principles. The interim Parliament drafted the final Constitution and presented it to the Constitutional Court for certification in May 1996.

It is questionable whether the Constitutional Principles required the final Constitution to include a right to property. However, apart from the Pan-Africanist Congress (PAC), the leading parties in the Constitutional Assembly accepted its inclusion and that it would be similar in content to section 28 of the interim Constitution, with the exception

[139] See also *Transkei Public Servants Association* v. *Government of the Republic of South Africa and Others* [1996] 1 L.R.C. 118 (S.A. S.C.), the transitional provisions in section 236(4) of the interim Constitution allowed alterations to civil servants' conditions of employment to bring about uniformity; hence, reductions in public servants' housing benefits intended to bring about uniformity are exempt from the application of section 28.

[140] See André J. van der Walt, 'Property Rights, Land Rights, and Environmental Rights', in Van Wyk, Dugard, de Villers and Davis (eds.), *Rights and Constitutionalism*, p. 494.

that it would include provisions on land reform. The right to property is contained in section 25 of the final Constitution:

25. (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application –

(a) for a public purpose or in the public interest; and

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including –

(a) the current use of the property;

(b) the history of the acquisition and use of the property;

(c) the market value of the property;

(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and

(e) the purpose of the expropriation.

(4) For the purposes of this section –

(a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and

(b) property is not limited to land.

(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

(9) Parliament must enact the legislation referred to in subsection (6).

The first five subsections of section 25 elaborate on the interim Constitution. Section 28(1) of the interim Constitution was removed.

Subsections (1) and (2) of the final Constitution preserve the basic distinction between subsections (2) and (3) of the interim Constitution. The Technical Committee of Theme Committee Four advised the Constitutional Committee of the Assembly that 'deprivation' 'has the meaning of regulation',[141] whereas 'expropriation' 'means compulsory acquisition of property by the state'.[142] This distinction in wording was therefore thought to allow the State to regulate without compensation, even where regulation prevented the property owner from exercising virtually all the rights of ownership.

In response to the ANC's concerns, the change was made from protecting 'rights in property' to 'property', which shows that the original concern that interests in land short of full ownership would not be protected by a simple reference to 'property' has subsided. Subsections (2)(a) and 4(a) reflect some concern that the interim Constitution's omission of any reference to the 'public interest' may have been too narrow.[143] The compensation formula is very close to that of the interim Constitution, despite a proposal by the National Party for full and prompt compensation and a proposal from the PAC that the determination of compensation should be left entirely to the legislature.

Subsection (3) repeats the compensation formula of the interim Constitution. It represents a compromise between a guarantee of 'full' or 'adequate' compensation and the absence of any guarantee. The range of factors in section 25(3) is so broad that it is not clear if this will make litigation under section 25 unattractive to property owners. At this point, it seems that the one message that comes through section 25(3) is negative: 'just and equitable' compensation is not to be equated with compensation at the market value of the property.

Subsections (4) to (9) safeguard the land reform programme. Subsection (8) was added relatively late in the drafting process. Some parties regarded it as a 'Trojan Horse', because it seemed to give the legislature a means for circumventing the guarantees in subsections (2) and (3). In the Constitutional Committee, the ANC stressed that subsection (8) did not supersede subsections (2) or (3) and, in any case, it would be subject to the limitations in section 36(1).[144] Section 36 is the general derogation clause; it provides as follows:

[141] Technical Committee of Theme Committee Four, Explanatory Memoranda on the Draft Bill of Rights, 9 October 1995, para. 4.2.2.; see also para. 5.2.

[142] *Ibid.*, para. 4.2.3.

[143] *Ibid.*, para. 5.3; see also *ibid.*, para. 5.2.3, and Chaskalson, 'Stumbling'.

[144] Constitutional Assembly, Minutes of the Constitutional Committee Meeting, 7 May

36. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

Section 36 drops the interim Constitution's reference to the 'essential content' of the right. Overall, it repeats the principles of section 33(1)(a) of the interim Constitution, as it was interpreted by Chaskalson P. in *S.* v. *Makwanyane*.[145] The jurisprudence under sections 25 and 36 is bound to be important, both within South Africa and in the Commonwealth generally. It demonstrates how framers have become more willing to invite the judiciary to balance interests when resolving fundamental rights cases. There are similarities with the Nigerian-model constitutions, although the South African (and Namibian) Constitutions go further. That is, the specific limitations contained in section 25 are clearly quite different in nature to specific limitations of the Nigerian-model rights to property and, although the policy of section 36 is arguably no different than that expressed in the opening provisions of the Nigerian-model bills of rights, any doubts about the judiciary's role in balancing interests is resolved.

In *Re Certification of the Constitution of the Republic of South Africa, 1996*[146] the Constitutional Court dealt with three objections regarding section 25 of the final Constitution. First, it was argued that section 25 was defective because it did not protect the rights to acquire, hold and dispose of property, unlike section 28(1) of the interim Constitution. However, the Court observed that there 'no universally recognised formulation of the right to property exists', and that it is widely accepted that the formulation of section 25 implicitly protects rights to

1996, paras. 4.2–4.8. Subsequently, some doubt has been expressed about the application of section 36 to section 25: see pp. 192–4, below.

[145] Case No. CCT/3/94 (Judgment 6 June 1995); 1995 (3) S.A. 391 (C.C.), paras. 104–7.

[146] 1996 (1) B.C.L.R. 1253. In this case, the Court refused to certify the 1996 Constitution, but in the *Second Certification Case: Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (1) B.C.L.R. 1, the Court certified the amended text. The amendments did not relate to the property clauses.

acquire, hold and dispose of property. Second, it was argued that the compensation provisions should have guaranteed payment of the market value of the expropriated property. The Court stated that there is no universal standard for compensation and that, while market value is normally a relevant consideration, it is often not the sole consideration; hence, section 25(3) was satisfactory in this regard. Finally, it was argued that the clause was defective because it did not appear to protect intellectual property. Again, the Court stated that there is no universal practice of separate protection of intellectual property and, in any case, it could not be assumed that section 25 did not protect intellectual property.[147]

Other modern constitutions

A number of recent constitutions borrow from a number of different sources. The Constitution of Nauru follows the Nigerian model in many respects, but the right to property differs on several points. The opening provision refers to the 'enjoyment of property', and the property clause guarantees 'just terms' for the compulsory deprivation of property, rather than compensation for the compulsory acquisition of property.[148] Vanuatu's Bill of Rights is closer in structure to that of Trinidad and Tobago, except that it guarantees 'protection . . . from unjust deprivation of property'.[149] The right to property in Malawi's 1994 Constitution resembles the rights to property in the Namibian and interim South African Constitution: section 28 contains both a positive guarantee that '[e]veryone shall be able to acquire property alone or in association with others' and a negative guarantee that '[n]o person shall be arbitrarily deprived of property'. However, section 44 allows the derogations to the right to property (and some of the other fundamental rights), subject to the following conditions:

> (2) . . . no restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this Constitution other than those prescribed by law, which are reasonable, recognized by international human rights standards and necessary in an open and democratic society.
>
> (3) Laws prescribing restrictions or limitations shall not negate the essential content of the right or freedom in question, and shall be of general application.
>
> (4) Expropriation of property shall be permissible only when done for public

[147] 1996 (1) B.C.L.R. 1253 at 1287.
[148] Nauru, ss. 3 and 8(1).
[149] Vanuatu, s. 5(1)(j).

utility and only when there has been adequate notification and appropriate compensation, provided that there shall always be a right of appeal to a court of law.

The present Ugandan Constitution contains both a positive guarantee of property and the more traditional negative guarantee, as follows:

26. (1) Every person has a right to own property either individually or in association with others.

(2) No person shall be compulsorily deprived of property or any interest in or right over property of any description except where the following conditions are satisfied –

(a) the taking of possession or acquisition is necessary for public use or in the interest of defence, public safety, public order, public morality or public health; and

(b) the compulsory taking of possession or acquisition of property is made under a law which makes provision for –

(i) prompt payment of fair and adequate compensation, prior to the taking of possession or acquisition of the property; and

(ii) a right of access to a court of law by any person who has an interest or right over the property.

There are no express derogations to the right to property, but, as framed, it leaves the circumstances in which compensation is payable unclear. Section 26(2) is particularly confusing. It is odd that it opens by referring to the compulsory deprivation of property, but the following conditions only refer to the 'taking possession or acquisition' of property: where does this leave deprivations of property that cannot be described as a taking possession or acquisition of property?

Conclusions

It is possible to divide Commonwealth rights to property into two broad categories: those drafted by the British and those drafted by national conventions or conferences. The British category includes the Government of Ireland Act 1920, the Government of India Act 1935, the Malaysian Constitution and most of the Nigerian-model constitutions. The national category includes the constitutions of Canada, Australia, India, South Africa and other recent constitutions.

Considering the continuing involvement of the British in drafting rights to property, it might have been thought that the provisions would exhibit a steady development of certain features of the right to property, but this is not the case. The brevity of the right to property of

the Government of Ireland Act 1920 (and the Irish Home Rule Bill 1893) demonstrates a remarkable willingness to allow the judiciary to develop the limits of judicial review. Subsequently, the British became much more cautious. In the 1920s, the British position hardened for what were presented as technical reasons. While the entrenchment of rights to property enjoyed greater favour than the entrenchment of most other fundamental rights, the unease over giving the judiciary the power to review legislation grew. Even though the cynicism over justiciable rights eased in the late 1950s, the attention to detail and the reliance on specific and explicit limitations on rights demonstrate a mistrust of the judiciary's ability to take a moderate position on the protection of fundamental rights. Outside Britain, there has generally been much greater willingness to confer the power of judicial review on the courts. Again, this is apparent in the style of drafting, especially in the later constitutions of Namibia and South Africa.

4 Constitutional interpretation

Introduction

In most Commonwealth countries, the enactment of a bill of rights brought about profound changes in the constitutional system. In many cases, the bill of rights represented a break with a colonial system characterised by political oppression and economic inequality. While the ringing endorsements of equality in bills of rights seem to support egalitarian reforms, the right to property provides the propertied classes with an instrument for resisting change. Not surprisingly, courts vary in the enthusiasm with which they approach judicial review and the right to property. The counter-majoritarian difficulty – that an unelected judiciary can invalidate legislation passed by an elected legislature – arises in respect of all fundamental rights, but it is especially acute in relation to property rights. For most judges, the resolution of the difficulty lies in the method of constitutional interpretation. Only some methods of interpretation are legitimate, but as long as a legitimate method of interpretation is followed, most judges believe that they have fulfilled their constitutional function and can therefore refute allegations that they have usurped the powers of the legislature.

This chapter therefore examines how the courts interpret the right to property. The first section of the chapter examines legalist interpretation, which concentrates on the language of the relevant provisions. The terms used to define the right to property – 'property', 'acquisition', 'deprivation' and 'compensation' – provide the courts with the structure for analysing property cases. Although most Commonwealth judges interpret rights to property in a legalist manner, there has been a movement away from legalism as the appropriate method of

constitutional interpretation in general. The courts now describe constitutional bills of rights as 'sui generis' instruments and advocate 'purposive and generous' interpretation of all fundamental rights, including the right to property, although precisely what this involves is uncertain.

The next section of the chapter takes a closer look at the alternatives to legalism. It begins by studying historical methods of interpretation, which uses evidence contemporaneous with the enactment of the bill of rights to discover the purpose and meaning of particular provisions. It then considers structural methods of interpretation, by which judges seek to interpret provisions in a manner that enables political institutions to fulfil their constitutional functions. Finally, the chapter examines ethical interpretation. To some extent, a judge's beliefs on the ethics of a claim to compensation are bound to affect his or her decision; in this sense, ethical interpretation is an element in every judgment. In most cases, it is an inarticulate element. Nevertheless, there are cases where the judicial reasoning expounds an ethical philosophy, and the chapter explores the effect of ethical argument on the interpretation of rights to property. There are, of course, other ways of analysing the right to property. In particular, North American commentators have produced an extensive literature on the economic analysis of the right to property.[1] In an indirect way, economic theory has some impact on Commonwealth cases, since most Commonwealth judges follow the liberal theory of the constitution and property. However, economic analysis does not appear in Commonwealth judgments and, for this reason, it is not examined in detail in this chapter.

The chapter then considers the possibility that different methods of interpretation may produce different results on the same set of facts. This question has attracted great interest in the United States, and the American debate is briefly reviewed. As a general observation, Commonwealth courts and scholars do not seem to be as concerned with the problem of conflicting methods of interpretation as their American counterparts. Nevertheless, the issue is worth addressing, and the

[1] See *e.g.* Frank I. Michelman, 'Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law', (1967) 80 *Harvard Law Review* 1165; Jack L. Knetsch, *Property Rights and Compensation: Compulsory Acquisition and Other Losses* (Toronto: Butterworth & Co. (Canada) Ltd, 1983); Lawrence Blume and Daniel L. Rubinfeld, 'Compensation for Takings: An Economic Analysis', (1984) 72 *California Law Review* 569; Thomas W. Merrill, 'The Economics of Public Use', (1986) 72 *Cornell Law Review* 61; William A. Fischel, *Regulatory Takings: Law, Economics, and Politics* (Cambridge, Mass. and London: Harvard University Press, 1995).

closing section of this chapter reviews the current position of the Commonwealth courts on the relationship between the different methods of interpretation.

Legalism and constitutional interpretation

Legalist interpretation concentrates on the terms in which the right to property and related provisions are expressed. Legalist judges resolve ambiguities in the provisions by reference to other provisions of the text or the text as a whole and not by reference to evidence extrinsic to the text.[2] To understand the prominence of legalism, we begin by examining the historical background to constitutional theory and judicial review in the Commonwealth.

In the imperial system, most colonial legislatures had the power to expropriate and regulate property. Colonial legislation was subject to review under the principle of repugnancy: no subordinate legislature had the authority to pass legislation repugnant to the law of England. In the nineteenth century and earlier, the executive had primary responsibility for reviewing colonial legislation,[3] but the courts could also declare colonial legislation invalid for repugnancy.[4] One question concerned the grounds on which the judiciary could declare colonial legislation ultra vires. It was assumed that fundamental laws, such as the principle that property could not be expropriated without payment of compensation, did extend to the colonies.[5] While there was no doubt that Parliament and the Crown could override or disallow legislation that contradicted fundamental law, it was thought that the judiciary should not be permitted the same degree of freedom. Instead, the

[2] *Att.-Gen. of Ontario* v. *Att.-Gen. of Canada* [1912] A.C. 571 at 583: 'if the text is explicit the text is conclusive . . . When the text is ambiguous . . . recourse must be had to the context and scheme of the Act.' An exception is made where the text itself authorises consideration of extrinsic evidence. For example, section 24 of the Constitution of Papua New Guinea allows the courts to refer to certain historical documents as aids to constitutional interpretation: see *Supreme Court Reference (No. 2 of 1995): Re Reference by Western Highlands Provincial Executive* [1996] 3 L.R.C. 28.

[3] See p. 16, above.

[4] Alpheus Todd, *Parliamentary Government in the British Colonies*, 2nd edn (London: Longmans, Green, and Co., 1894), p. 302.

[5] See Joseph Henry Smith, *Appeals to the Privy Council from the American Plantations* (New York: Columbia University Press, 1950), pp. 530–1; P. J. Marshall, 'Parliament and Property Rights in the Late Eighteenth-century British Empire', in John Brewer and Susan Staves (eds.), *Early Modern Conceptions of Property* (London and New York: Routledge, 1995), pp. 530–44; Dudley Odell McGovney, 'The British Origin of Judicial Review of Legislation', (1944) 93 *University of Pennsylvania Law Review* 1.

judiciary could act only on the specific limitations found in the British laws conferring power on the colonial legislatures.[6] Hence, in the absence of a constitutional bill of rights or other specific limitation on a colony's legislative powers, the courts would not impose further limitations on legislation affecting property rights.[7] This, of course, focused the judiciary's attention on the terms of the constitution; and, as colonial constitutions were passed as ordinary Acts of Parliament, the Judicial Committee of the Privy Council concluded that constitutions should be interpreted 'by the same methods of construction and exposition' as ordinary statutes.[8] Statutory interpretation concentrated on the literal meaning of the provisions, rather than their broader purpose; accordingly, constitutional interpretation became equally focused on the language of provisions rather than their general purpose.

Types of legalism

The focus on language describes the legalist method of constitutional interpretation only in part. We can divide legalist interpretation into two methods of interpretation: the literal and the doctrinal. The literal method focuses on the ordinary or popular meaning of terms. In relation to the right to property, the ordinary meaning of terms such as property, acquisition and compensation would guide constitutional interpretation. By contrast, the doctrinal method concentrates on the meanings that lawyers would give to the same terms. The differences between literal and doctrinal interpretation are sharpest in relation to the interpretation of property, since it is a term that is regularly used in

[6] See generally Loren P. Beth, 'The Judicial Committee of the Privy Council and the Development of Judicial Review', (1976) 24 *American Journal of Comparative Law* 22; at p. 24, Beth states that Parliament intended the Colonial Laws Validity Act 1865 (28 & 29 Vict., c. 63) 'to validate such of their [the colonies'] laws as were not ''repugnant'' as against the claims that the powers of colonial legislatures were limited by natural law'. See also Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (London: Stevens & Sons, 1966), pp. 535–41.

[7] See *Florence Mining Co. Ltd* v. *Cobalt Lake Mining Co. Ltd* (1909) 18 O.L.R. 275 (Ont. S.C. and C.A.) at 279 *per* Riddell J. (S.C.) (*affirmed* (1910) 43 O.L.R. 474 (P.C.)): 'The prohibition, ''Thou shalt not steal,'' has no legal force upon the sovereign body. And there would be no necessity for compensation to be given. We have no such restriction upon the power of the Legislature as is found in some States.' See also *Att.-Gen. of Canada* v. *Att.-Gen. of Ontario* [1898] A.C. 700 (P.C.) at 713 *per* Lord Herschell: the 'suggestion that the [federal] power might be abused so as to amount to a practical confiscation of property does not warrant the imposition by the Courts of any limit upon the absolute power of legislation conferred'.

[8] *Bank of Toronto* v. *Lambe* (1887) 12 App. Cas. 575 at 579.

both ordinary and legal discourse.[9] The differences between ordinary and legal understandings of property are discussed in detail in chapter 5; briefly, one point of difference concerns intangible property, such as a debt. The ordinary view would probably hold that debts are not property, but the typical lawyer would quite readily conclude that they are property. In constitutional cases, the courts have held that debts are protected under the right to property. In this sense, they interpret 'property' in its doctrinal, specialist meaning. Nevertheless, doctrinal interpretation has a further aspect. It relates to the value of doctrinal consistency to judicial review, as explained by Alexander Bickel in *The Least Dangerous Branch*.[10] Bickel seeks to resolve the counter-majoritarian difficulty by justifying the existence of judicial review in a democratic state. For Bickel, most government actions have two effects: 'their immediate, necessarily intended, practical effects, and their perhaps unintended or unappreciated bearing on values we hold to have more general and permanent interest'.[11] The legislative and executive decisions are characterised by a concern with the immediate and practical effects of action. The judicial function is distinct, and therefore justifiable, in so far as it is concerned with the effect of government action on 'values we hold to have more general and permanent interest'.[12] Even so, judicial review is justified only if the judiciary takes a neutral, principled view of the issues that come before it. Bickel explains his vision of judicial review as follows:

> [J]udicial review is the principled process of enunciating and applying certain enduring values of our society. These values must, of course, have general significance and even-handed application. When values conflict – as they often will – the Court must proclaim one as overriding, or find an accommodation among them . . . the root idea is that the process is justified only if it injects into representative government something that is not already there; and that is principle, standards of action that derive their worth from a long view of society's spiritual as well as material needs and that command adherence whether or not the immediate outcome is expedient or agreeable.[13]

Principles arise from the reasons given for a choice of values: '[a] neutral principle . . . is an intellectually coherent statement of the reason for a

[9] See generally Bruce Ackerman, *Private Property and the Constitution* (New Haven: Yale University Press, 1977), and see below, pp. 120–2.

[10] Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis and New York: Bobbs-Merrill, 1962). See also Herbert Wechsler, 'Toward Neutral Principles of Constitutional Law', (1959) 73 *Harvard Law Review* 1.

[11] Bickel, *Least Dangerous Branch*, p. 24 [12] *Ibid*. [13] *Ibid*., p. 58.

result which in like cases will produce a like result, whether or not it is immediately agreeable or expedient'.[14] Hence, where principles have been laid down in previous cases, the courts should strive to apply them to subsequent cases.

While Bickel wrote about judicial review in the United States, most Commonwealth judges would argue that his remarks are generally applicable to any democratic state where the judiciary is neither elected nor accountable to elected representatives. Hence, in constitutional cases, the interpretation of property follows Bickel's argument that legislatures act on expediency. For example, the constitutional protection of causes of action has arisen in a number of cases where the state has extinguished an existing cause of action. One issue that arises under the legalist analysis is whether these causes of action should be regarded as property. Courts generally agree that causes of action arising under common law are property, but are reluctant to treat statutory causes of action as property. Several courts have stated that a debt owed by the state that arises from a contract is property, but a debt arising from a statutory entitlement to a social welfare payment is not.[15] Implicitly, they act on Bickel's belief that statute law is a response to expediency, whereas common law claims are determined by judge-made, neutral principles which are in turn based on enduring values. These values are, apparently, also the values of the constitutional law of property.

The doctrinal method is also apparent in the judicial use of comparative law. While no Commonwealth court treats comparative law as binding, many of them use comparative law to help identify and resolve issues. Comparative law therefore reinforces the impression that the judicial decisions are based on fundamentally different criteria from those criteria that direct executive or legislative decisions. While this fulfils one of Bickel's criteria for the legitimacy of judicial review, the use of comparative law is not principled, in Bickel's sense, unless it assists in the identification of the nation's enduring values. This point tends to be raised only where new constitutions represent a fundamental shift in the public and legal perception of the nature of the constitutional order.[16] In India, for example, the adoption of the bill of rights was widely regarded as a significant break with British

[14] *Ibid*., p. 59. [15] See pp. 153–60, below.

[16] See generally Christopher P. Manfredi, 'The Canadian Supreme Court and American Judicial Review: United States Constitutional Jurisprudence and the Canadian Charter of Rights and Freedoms', (1992) 40 *American Journal of Comparative Law* 213.

constitutional values in favour of American values. Consequently, the Indian Supreme Court frequently referred to leading American cases to assist in the interpretation of the right to property.[17] Similarly, in South Africa, the final Constitution specifically authorises the courts to refer to comparative law as an aid to the interpretation of the fundamental rights provisions.[18] Again, the willingness to use comparative law marked a deliberate move to the creation and reinforcement of a new set of values. In many other cases, however, the courts do not question the utility of comparative law; some judgments seem to consist of numerous citations from other jurisdictions without an explanation of their relevance.[19] Where judges do question the utility of comparative law, they focus on differences in the language of the right to property rather than differences in values.[20] As such, it seems that they assume that similar language reflects similar values. Whether values are similar is a question worth asking, but in fact it is rarely done.

Challenges to legalism

Legalism dominated constitutional interpretation in most of the Commonwealth until the late 1970s. However, it would be incorrect to say that legalism went unchallenged in earlier periods. At different times in Australia, Canada and India, lawyers and judges argued that legalist interpretation narrowed the judicial analysis excessively.

The first challenge to legalism came from the Australian High Court.[21] In a number of early decisions, the Court stated that the Australian Constitution was intended to create a decentralised state

[17] See *e.g. West Bengal* v. *Subodh Gopal Bose* [1954] S.C.R. 587; *Saghir Ahmad* v. *Uttar Pradesh* [1955] S.C.R. 707; *Arora* v. *Uttar Pradesh* A.I.R. 1962 S.C. 764; *Bihar* v. *Singh* A.I.R. 1952 S.C. 252; but cf. *Madan Mohan Pathak* v. *Union of India* A.I.R. 1978 S.C. 803 at 821 *per* Bhagwati J.

[18] Section 39(1)(c).

[19] See *e.g. Trinidad Island-wide Cane Farmers' Association Inc. and Attorney-General* v. *Prakash Seereeram* (1975) 27 W.I.R. 329 (C.A. T.T.) and *Manitoba Fisheries* v. *The Queen* (1978) 88 D.L.R. (3d) 462 (S.C.C.).

[20] Compare *Minister of Home Affairs* v. *Bickle and Others* [1983] 2 Z.L.R. 400 (H.C. and S.C.) and *La Compagnie Sucrière de Bel Ombre Ltee* v. *The Government of Mauritius* [1995] 3 L.R.C. 494 (P.C.) on the relevance of the cases on Article 1 of the First Protocol of the European Convention on Human Rights to the interpretation of Nigerian-model rights to property.

[21] See generally Greg Craven, 'Cracks in the Façade of Literalism: Is there an Engineer in the House?', (1992) 18 *Melbourne University Law Review* 540 and Greg Craven, 'The Crisis of Constitutional Literalism in Australia', in H. P. Lee and George Winterton (eds.), *Australian Constitutional Perspectives* (Sydney: The Law Book Company Limited, 1992), pp. 1–32.

and should be interpreted in the spirit of that intention.[22] In 1920, in the *Engineer's Case*, the High Court rejected its earlier method because it could not provide 'any secure foundation for Commonwealth or State action, and must inevitably lead . . . to divergencies and inconsistencies more and more pronounced as the decisions accumulate'.[23] The Court believed that legalism would provide a stable and predictable basis for determining the powers of the States and the Commonwealth. Whether legalism was in fact as important as the Court suggests is open to debate. The *Engineer's Case* is more significant as a reversal of the decentralist tendency of the earlier decisions in favour of an expansive view of the Commonwealth's powers. At the time, courts eschewed such radical shifts in policy; hence, the supposed neutrality of legalism provided a defence against charges that the judges were deciding on the basis of their political preferences.[24]

Subsequently, in the 1930s and 1940s, several leading Canadian lawyers criticised the Privy Council's interpretation of distribution of legislative powers between Canada and the provinces.[25] In a series of decisions, the Privy Council restricted Canada's power to legislate, especially in relation to economic matters.[26] It did not permit, for example, the Canadian Parliament to create a national system of unemployment insurance[27] or a marketing scheme for natural

[22] See *e.g. Att.-Gen. of Queensland* v. *Att.-Gen. of the Commonwealth* (1915) 20 C.L.R. 148 at 163, *D'Emden* v. *Pedder* (1904) 1 C.L.R. 91; *Deakin* v. *Webb* (1904) 1 C.L.R. 585.

[23] *The Amalgamated Society of Engineers* v. *The Adelaide Steamship Company Limited and Others* ('*Engineer's Case*') (1920) 28 C.L.R. 129 at 145.

[24] In the *Engineer's Case* itself, there is evidence that the shift in interpretation was not as important as the Court made it appear. The Court stated that legalism was more predictable because the judges would not examine the policy reasons for a decision; in particular, the previous practice of examining the Convention Debates was inappropriate. Nevertheless, the Court justified its rejection of the decentralist policy partly by referring to a speech made by Lord Haldane in the House of Commons (as a member of the House), on the motion for leave to introduce the bill subsequently enacted as the Constitution: *ibid*. at 147.

[25] For a general review, see: Alan C. Cairns, 'The Judicial Committee and its Critics', (1971) 4 *Canadian Journal of Political Science* 301; Edward McWhinney, *Judicial Review in the English-speaking World*, 2nd edn (Toronto: University of Toronto Press, 1960), chs. 3, 4.

[26] The controversy arose over the interpretation of section 91 of the British North America Act 1867, which gives Canada a general power to legislate for peace, order and good government and lists a number of specific fields which, as written, appear to provide examples of the general power. In the cases cited in the following notes, the Privy Council marginalised the general power and construed the specific powers very narrowly.

[27] *Att.-Gen. of Canada* v. *Att.-Gen. of Ontario (Employment and Social Insurance Act Reference)* [1937] A.C. 355.

products.[28] The effects of its decisions were remarkably similar to those of the United States Supreme Court's decisions of the late nineteenth and early twentieth centuries on economic substantive due process.[29] The decisions in both countries were highly controversial, as it appeared that the courts were making it impossible to enact legislation to alleviate the economic crisis of the Depression. In the United States, the Supreme Court eventually abandoned the restrictive doctrine after the president's court-packing threat.[30] The Privy Council did not reverse itself in such dramatic fashion, but its decisions contributed to the movement to abolish the Privy Council's remaining appellate jurisdiction. Not surprisingly, the Privy Council and its defenders responded to the criticism by emphasising the neutrality of literalist interpretation. They suggested that the responsibility for addressing Canada's difficulties lay with those empowered to amend her Constitution.[31]

The Privy Council's critics doubted both the neutrality of the Privy Council and the desirability of excluding policy from the judicial analysis.[32] Bora Laskin argued that the Privy Council followed a 'conscious and deliberate choice of a policy which required, for its advancement, manipulations which can only with some difficulty be represented as ordinary judicial techniques'.[33] Whether it was a political policy of decentralisation or an economic policy of laissez-faire capitalism is debatable,[34] but the criticism remained that the Privy

[28] *Att.-Gen. of British Columbia* v. *Att.-Gen. of Canada (Natural Products Marketing Act Reference)* [1937] A.C. 377.

[29] The Supreme Court struck down legislation intended to improve working conditions by regulating maximum hours, minimum wages and child labour on the basis that they violated the Bill of Rights. See *e.g. Lochner* v. *New York* 198 U.S. 45 (1905); *Hammer* v. *Degenhart* 247 U.S. 251 (1918); *Bailey* v. *Drexel Furniture Co.* 259 U.S. 20 (1922); *Adkins* v. *Children's Hospital* 261 U.S. 525 (1923).

[30] The conflict came to a head after the Court's restrictive decisions in *Schecter Poultry Corpn* v. *United States* 295 U.S. 495 (1935); *United States* v. *Butler* 297 U.S. 1 (1936); *Carter* v. *Carter Coal Co*. 298 U.S. 238 (1936). The restrictive doctrine was abandoned in cases such as *West Coast Hotel Co*. v. *Parrish* 300 U.S. 379 (1937) and *United States* v. *Carolene Products* 304 U.S. 144 (1938).

[31] See, in particular, W. Ivor Jennings, 'Constitutional Interpretation: The Experience of Canada', (1937) 51 *Harvard Law Review* 1 and Lord Normand, 'The Judicial Committee of the Privy Council – Retrospect and Prospect', (1950) 3 *Current Legal Problems* 1.

[32] See generally Cairns, 'Judicial Committee', and McWhinney, *Judicial Review*.

[33] Bora Laskin, '"Peace, Order and Good Government" Re-examined', (1947) 25 *Canadian Bar Review* 1054, p. 1086. See *contra* Jennings, 'Constitutional Interpretation', p. 37.

[34] Arthur Lower, 'Theories of Canadian Federalism', in Arthur Lower et al. (eds.), *Evolving Canadian Federalism* (Durham, N.C.: Duke University Press, 1958), who argues that the Privy Council's decisions reveal a fear that the centralisation of power in Canada threatened imperial unity. By contrast, David Schneiderman, 'Constitutional

Council's reasoning would have been much clearer if it had acknowledged its preferences openly.[35] Laskin argued that constitutional interpretation should evolve in response to changing circumstances, but as long as the judiciary only had regard to the language of the Constitution, 'uninformed and unnourished by any facts of Canadian living', it would fail to fulfil its constitutional function.[36] Similarly, Vincent C. MacDonald argued that the Privy Council had failed to appreciate the 'revolutionary change in the frame of circumstances affecting the Constitution; and which in the case of Canada have included changes in her political status, in her economy and in the accepted philosophy of the function of government'.[37] In particular, the Depression brought about a demand for a more interventionist government, and the type of intervention that was required lay beyond the powers of the provinces acting individually.[38]

Despite the criticisms of MacDonald, Laskin and other leading constitutional lawyers, legalism continued to dominate constitutional interpretation, in Canada and the rest of the Commonwealth, for most of the four subsequent decades. Neither the recognition of equal status in the Statute of Westminster 1931, nor the abolition of appeals to the Privy Council, led to a re-examination of the original positivist justification of judicial review. Constitutional supremacy had become the foundation of the legal system, rather than the theory of repugnancy and supremacy of the imperial Parliament.[39] However, there was no real examination of the foundations of legalism or constitutional theory. While

Interpretation in an Age of Anxiety: A Reconsideration of the *Local Prohibition* Case', (1996) 42 *McGill Law Journal* 411 makes a persuasive argument that, by the late nineteenth century, the Judicial Committee showed a marked preference for upholding regulation which would ensure the productive use of property and for striking down regulation which would not. See also James Russell Mallory, *Social Credit and the Federal Power in Canada* (Toronto: University of Toronto Press, 1954): the judicial interpretations of the federal power exhibit a hostility to greater regulation of the economy, and G. Le Dain, 'Sir Lyman Duff and the Constitution', (1974) 12 *Osgoode Hall Law Journal* 261, p. 278, and Beth, 'Judicial Committee', p. 34.

[35] McWhinney, *Judicial Review*, pp. 29–30; see also Vincent C. MacDonald, 'The Privy Council and the Canadian Constitution', (1951) 29 *Canadian Bar Review* 1021, p. 1035.

[36] Laskin, ' "Peace, Order and Good Government" Re-examined', p. 1060.

[37] MacDonald, 'The Privy Council and the Canadian Constitution', p. 1027.

[38] Vincent C. MacDonald, 'The Constitution in a Changing World', (1948) 26 *Canadian Bar Review* 21, p. 25.

[39] Edward McWhinney argues that the failure to re-examine doctrine 'would seem primarily due to the fact that the practice has become ingrained over the years and its historical roots and justification have been forgotten': McWhinney, *Judicial Review*, pp. 14, 58–9.

courts accepted that they had the power and responsibility to prevent legislatures from violating constitutional limits on their powers, they tended to avoid controversy. Consequently, the judiciary was relatively slow to take an interest in bills of rights. This was most notable with the decisions on the Nigerian-model bills of rights. While the courts espoused the principle of constitutional supremacy, they declared legislation invalid for infringement of a fundamental right in only a small number of cases.[40] Relatively few property cases were decided in this period; those that were decided were characterised by legalist reasoning.[41]

One dramatic exception to this trend was the Indian Supreme Court's interpretation of Part III of the independence Constitution, which contains the fundamental rights.[42] In a series of cases, the Supreme Court used increasingly strained interpretations of Part III to invalidate legislation that affected property rights. The cases are discussed in other chapters, but they gave the impression that the Supreme Court was determined to defend property against a reforming legislature. On several occasions, Parliament amended the Constitution in response to unfavourable decisions on property reform and other economic policies.[43] In *Golak Nath* v. *State of Punjab*,[44] the Supreme Court held that Parliament did not have the power to abrogate or repeal the right to property or any of the other fundamental rights by constitutional amendment. Parliament continued to assert its power to amend any part of the Constitution and, in *Kesavananda* v. *State of Kerala*, the Supreme Court reconsidered its position:[45] six judges held that all

[40] See generally Maurice Glinton, 'The Right to Life and Physical Integrity of the Person', (1991) 15 *West Indian Law Journal* 45, p. 48; Adrienne van Blerk, 'The Botswana Court of Appeal: A Policy of Avoidance?', (1985) 18 C.I.L.S.A. 385; Margaret De Merieux, *Fundamental Rights in the Commonwealth Caribbean Constitutions* (Barbados: Faculty of Law Library, University of West Indies, 1992), pp. 486–99; Albert K. Fiadjoe, 'Judicial Attitudes to Commonwealth Caribbean Constitutions', (1991) 20 *Anglo-American Law Review* 116; Howard Malcolm, 'Towards the Emergence of a West Indian Jurisprudence', (1993) 18 *West Indian Law Journal* 53; J. B. Ojwang and G. Kamau Kuria, 'The Rule of Law in General and Kenyan Perspectives', (1975–7) 7–9 *Zambia Law Journal* 109, pp. 126–7; A. J. G. M. Sanders, 'Constitutionalism in Botswana: A Valiant Attempt at Judicial Activism', (1983) 16 C.I.L.S.A. 350 and (1984) 17 C.I.L.S.A. 49.

[41] See *e.g. Selangor Pilot Association* v. *Government of Malaysia and Another* [1978] A.C. 337 (P.C.); *IRC and Att.-Gen.* v. *Lilleyman and Others* (1964) 7 W.I.R. 496 (C.A. British Caribbean); *Trinidad Island-wide Cane Farmers' Association Inc. and Attorney-General* v. *Prakash Seereeram* (1975) 27 W.I.R. 329 (C.A. T.T.).

[42] See generally Herbert Christian Laing Merillat, *Land and the Constitution in India* (New York and London: Columbia University Press, 1970).

[43] See pp. 49–53, above. [44] [1967] 2 S.C.R. 762. [45] (1973) 4 S.C.C. 225.

fundamental rights formed part of an unamendable core;[46] six judges held that there was no part of the Constitution that Parliament could not amend;[47] and the remaining judge, Khanna J., held that the Constitution has an unamendable core, but the right to property was not part of it.[48]

Kesavananda is interesting for the discussion of both the specific questions on the amendment of the right to property and the general questions of constitutional interpretation and judicial review. While all the judges advanced legalist arguments on the Constitution's provisions on amendment, none of the judges justified their decisions solely on the basis of a legalist analysis. Some of the judges took an historical perspective, by referring to the debates in the Constituent Assembly, although these judges also stated that recourse to historical evidence is normally improper.[49] Some judges put forward the natural law argument that Parliament cannot abrogate fundamental rights, because neither Parliament nor the Constituent Assembly creates fundamental rights.[50] However, there was very little argument on the status of the right to property as a right under natural law. The six judges who stated that Part III of the Constitution was unamendable implicitly assumed that the right to property was as fundamental as any of the other rights in Part III, and the six opposing judges assumed that none of the rights, including the right to property, had special status as rights at natural law. Only Khanna J. addressed the relative importance of property, by arguing that it does not give 'primacy to the claims of individual right to property over the claims of social, economic and political justice';[51] indeed, the framers wished to 'subordinate the individual right to property to the social good'.[52] The

[46] Sikri C.J., Shelat, Hegde, Grover, Reddy and Mukherjea JJ.

[47] Ray, Palekar, Mathew, Beg, Dwivedi and Chandrachud JJ.

[48] The 'basic structure or framework' could not be changed. This included, for example, the democratic nature of government and the secular character of the state. See (1973) 4 S.C.C. 225 at 767.

[49] See *ibid*. at 339–41 *per* Sikri C.J., 491–3 *per* Hegde and Mukherjea JJ., 840–2 *per* Mathew J. Nevertheless, some of the judges referred to the Assembly debates for guidance on Article 368 and the other relevant provisions; see *e.g.* at 605 *per* Reddy J., 678 *per* Palekar J., 743 *per* Khanna J. Several judges stated that the debates provided nothing useful: see at 418–19 *per* Shelat and Grover JJ., 471–2 *per* Hegde and Mukherjea JJ. and 1004–5 *per* Chandrachud J.

[50] *Ibid*. at 367 *per* Sikri C.J.; see also *Golak Nath* v. *Punjab* [1967] 2 S.C.R. 762 at 787 *per* Subba Rao C.J.: the 'constitution preserves the natural rights against state encroachment and constitutes the higher judiciary of the state as the sentinel of the said rights'.

[51] *Kesavananda* v. *Kerala* (1973) 4 S.C.C. 225 at 791. [52] *Ibid*. at 794.

majority judges were more concerned with maintaining external controls on the legislative power. In effect, they attempted to develop a review jurisdiction based on fundamental principles of the constitution, similar to the review jurisdiction held by the executive in the colonial system.[53] In this sense, they took a pluralist approach to interpretation: legalist interpretation provided one justification for their position, but it was not the only justification.

Alternatives to legalism: the constitution as a sui generis instrument

In India, economic reform eventually led to the constitutional impasse between the judiciary and Parliament. Elsewhere in the Commonwealth, other governments planned radical programmes of economic reform. Several countries repealed or amended their rights to property to reduce the threat of judicial review.[54] None of these changes inspired courts to follow the Indian Supreme Court's defence of liberalism in the fundamental rights cases. Indeed, the courts were quite anxious to avoid the impression that they would become involved in political controversy. By the late 1970s and early 1980s, the courts were taking a more active role in protecting human rights in general, as they began to favour the 'purposive' and 'generous' interpretation of rights. One of the most prominent examples of the shift away from legalism is Lord Wilberforce's opinion in *Minister of Home Affairs (Bermuda)* v. *Fisher*, decided in 1978.[55] Lord Wilberforce stated that

> When therefore it becomes necessary to interpret . . . [Bermuda's Bill of Rights] the question must inevitably be asked whether . . . these provisions are to be construed in the manner and according to the rules which apply to Acts of Parliament . . . In their Lordships' view there are two possible answers to this. The first would be to say that, recognising the status of the Constitution as, in

[53] In formal terms, the independence Constitution did not dispense with executive review in property matters, as the president had a power of reservation over state legislation authorising the acquisition of property; see Art. 31(3) of the independence Constitution. Plainly, the majority believed that Art. 31(3) was an inadequate protection.

[54] For example, Zambia and Guyana weakened the compensation guarantees to facilitate the nationalisation of certain industries: see Samuel Amoo, 'Law and Development and the Expropriation Laws of Zambia', in Munro Ndulo (ed.), *Law in Zambia* (Nairobi: East African Publishing House, 1984) and Francis Alexis, *Changing Caribbean Constitutions* (Bridgetown, Barbados: Antilles Publications, 1984), pp. 162–70.

[55] [1980] A.C. 319. The issue in *Fisher* was whether the illegitimate child of a Bermudan woman and a non-Bermudan man was a Bermudan 'national' under the Constitution.

effect, an Act of Parliament, there is room for interpreting it with less rigidity, and greater generosity, than other Acts . . . The second would be more radical: it would be to treat a constitutional instrument such as this as sui generis, calling for principles of interpretation of its own, suitable to its character as already described, without necessary acceptance of all the presumptions that are relevant to legislation of private law.[56]

Lord Wilberforce took the 'radical' course of treating the constitution as a sui generis instrument, and most Commonwealth courts have followed his lead.[57]

Despite the broad acceptance of the sui generis approach, it is not clear precisely what it entails. For some judges, it means only that interpretation should favour the individual to the extent that the language permits.[58] This does not represent a substantial change in approach for, as Lord Wilberforce acknowledged, a court could reject the sui generis characterisation of the constitution and still interpret the rights generously. Indeed, many courts had already stated that 'property' should be interpreted to give the broadest possible scope to the constitutional right to property.[59] Moreover, it appears that the sui generis characterisation still gives primary importance to the language of the relevant provision and, specifically, the legal meaning of the language. In *Fisher*, Lord Wilberforce stated that treating the constitution as a sui generis instrument does not mean 'that there are no rules of law which should apply to the interpretation of a constitution. Respect must be paid to the language which has been used and to the traditions and the usages which have given meaning to that language'.[60] A similar fear that interpretation will lack focus if it is not

[56] *Ibid*. at 329.

[57] *Faridah Begum bte Abdullah* v. *Sultan Haji Ahmad Shah Al Mustain Billah Ibni Almarhum Sultan Abu Bakar Ri'Ayatuddin Al Mu'Adzam Shah* 1996 M.L.J. LEXIS 970 (Special Court, Malaysia) at 22, 33; *Dato' Menteri Othman bin Baginda & Another* v. *Dato' Ombi Syed Alwi bin Syed Idrus* (1981) 1 M.L.J. 29 at 32; *Hunter* v. *Southam* (1984) 11 D.L.R. (4th) 641 at 650; *Bahamas Entertainment Ltd* v. *Koll and Others* [1996] 2 L.R.C. 45 (S.C. Bahamas) at 62–3; *Ifezu* v. *Mbadugha* [1985] L.R.C. (Const.) 1141 (S.C. Nigeria) at 1144; *Pumbun* v. *Att.-Gen.* [1993] 2 L.R.C. 317 (C.A. Tanz.) at 323; *Zuma* v. *The State* 1995 (4) B.C.L.R. 401 (C.C. S.A.); *Government of Republic of Namibia* v. *Cultura 2000* 1994 (1) S.A. 407 (S.C. Namibia) at 418; *Dow* v. *Att.-Gen.* [1992] L.R.C. (Const.) 623 (C.A. Botswana) at 634. For other examples see Gretchen Carpenter, 'Constitutional Interpretation by the Existing Judiciary in South Africa – Can New Wine be Successfully Decanted into Old Bottles?', (1995) 28 C.I.L.S.A. 322, pp. 333–5.

[58] See *e.g. Hewlett* v. *Minister of Finance and Another* [1982] 1 S.A. 490, [1981] Z.L.R. 571 (S.C.); and *Zuma* v. *The State* 1995 (4) B.C.L.R. 401 at 412.

[59] See pp. 122–3, below.

[60] [1980] A.C. 319 at 329.

guided by the text is apparent from Kentridge A.J.'s judgment in *Zuma* v. *The State*, where he stated that

> While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument. I am well aware of the fallacy of supposing that general language must have a single 'objective' meaning. Nor is it easy to avoid the influence of one's personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean. . . . If the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination.[61]

Legalism is rejected not because it does not constrain the judiciary, nor because constraining the judiciary is impossible, but because the constraint is both real and excessive. Lord Wilberforce and Kentridge A.J. suggest that the judge may strain the language of the constitution to achieve its purpose, but without departing from the language entirely.[62] Plainly, this version of purposive interpretation concentrates on the intentions of the framers; in that sense, it is not fundamentally different from legalist interpretation. It rejects the idea that legalist interpretation is the best method of ascertaining the intentions of the framers, but it accepts the idea that interpretation should further those intentions. As explained below, this leads to the historical method of interpretation.

Some judges reject the belief that purposive interpretation is an historical method of interpretation. In Canada and India, in particular, judges have quite consciously interpreted rights in a manner contrary to the expectations of the framers.[63] For these judges, the judiciary's sense of the purpose of a constitutional instrument or provision, as it evolves over time, governs interpretation. But stating that interpretation must respond to changing conditions is not very helpful; plainly, there are many directions that purposive interpretation could take. After discussing historical interpretation, this chapter investigates two directions that Commonwealth judges take most often: the structural and ethical methods of interpretation.

[61] 1995 (4) B.C.L.R. 401 at 412 (C.C. S.A.).

[62] On this type of purposive interpretation, see Francis A. R. Bennion, *Statutory Interpretation: Codified, with a Critical Commentary* (London: Butterworths, 1984), pp. 657–74.

[63] See *Maneka Ghandi* v. *Union of India* A.I.R. 1978 S.C. 597; *Re Public Service Employee Relations Act* (1987) 38 D.L.R. (4th) 161 (S.C.C.) and *Reference Re Motor Vehicle Act* (1988) 24 D.L.R. (4th) 536 (S.C.C.).

Historical interpretation

Until recently, Commonwealth courts did not use legislative debates as aids to statutory interpretation.[64] Since courts interpreted constitutions according to the principles of statutory interpretation, a similar exclusionary rule applied to constitutional interpretation.[65] In Australia, the High Court relaxed the exclusionary rule in constitutional interpretation in *Cole* v. *Whitfield*.[66] To date, the relaxation of the rule has had little impact on the interpretation of section 51(xxxi) of the Constitution, although in *Health Insurance Commission* v. *Peverill*, McHugh J. referred to the debates of the Australasian Federal Convention to show that '[i]t may be that the authors of the Constitution in drafting section 51(xxxi) had a physicalist conception of property in mind and intended the paragraph to apply only to the acquisition of land, buildings and other material objects', and hence they would probably not have treated a chose in action as property. However, he also stated that the 'settled doctrine of this Court is that the term ''property'' in that paragraph' extends to choses in action.[67]

Other courts have been unwilling to relax the exclusionary rule in constitutional law. They question the assumption that statements of a minister or promoter represent the views of the lawmaking body.[68] Even ordinary statutes are often the products of a series of bargains and compromises between legislators and specific interest groups. Quite often, individual legislators have different understandings of essential terms and provisions. Matthew Chaskalson's account of the drafting of the right to property in South Africa's interim Constitution demonstrates this quite clearly: differences were so great that '[i]n the case of

[64] Recently, the House of Lords relaxed the exclusionary rule in statutory interpretation (see *Pepper* v. *Hart* [1993] A.C. 593), but not all Commonwealth courts agree with this development (see *R.* v. *Heywood* (1994) 120 D.L.R. (4th) 348 (S.C.C.)).

[65] See *e.g. Engineer's Case* (1920) 28 C.L.R. 129. Note that section 24 of the Constitution of Papua New Guinea allows the courts to refer to certain historical documents as aids to constitutional interpretation; see *Supreme Court Reference (No. 2 of 1995): Re Reference by Western Highlands Provincial Executive* [1996] 3 L.R.C. 28.

[66] (1988) 165 C.L.R. 360.

[67] (1994) 179 C.L.R. 226 at 264, n. 11.

[68] For examples of constitutional property cases, see *Belfast Corpn* v. *O.D. Cars Ltd* [1960] A.C. 490 (H.L. N.I.) at 516–17 *per* Viscount Simonds and *Hewlett* v. *Minister of Finance and Another* [1982] 1 S.A. 490 at 497 *per* Fieldsend C.J. For other leading cases, see *Reference Re Motor Vehicle Act* (1988) 24 D.L.R. (4th) 536 (S.C.C.), at 554–5 *per* Lamer J. and *Dow* v. *Att.-Gen*. [1992] L.R.C. (Const.) 623 (C.A. Botswana) at 693–7 *per* Puckrin J.A. (dissenting on other grounds).

the property clause at least, there simply is no coherent original intention to be retrieved'.[69]

A second reason for rejecting historical evidence is more fundamental. There is a fear it may produce a jurisprudence of 'frozen rights' and thereby block the generous interpretation of bills of rights.[70] Accordingly, some courts, such as those of India and Canada, openly acknowledge that their interpretations of fundamental rights have gone considerably further than the framers' intentions.[71] Nevertheless, the use of historical evidence has extended the plain meaning of the text in one important line of cases on the right to property, beginning with *Société United Docks and Others* v. *Government of Mauritius; Marine Workers Union and Others* v. *Mauritius Marine Authority*.[72] In this case, creditors claimed that they were unconstitutionally deprived of property when legislation extinguished the debts. The Supreme Court of Mauritius and the Privy Council agreed that the creditors had been deprived of property without compensation, but section 8 of the Constitution, which contains the Mauritian version of the Nigerian-model right to property, only guarantees compensation when property is 'taken possession of' or 'compulsorily acquired'. The creditors then turned to section 3, which opens the Bill of Rights. It seems to guarantee compensation for the deprivation of property, but it is uncertain whether the opening provision is a substantive provision or whether it is merely a preamble. It states that:

> It is hereby recognised and declared that in Mauritius there have existed and continue to exist . . . each and all of the following human rights and fundamental freedoms, namely . . .
>
> (c) the right of the individual to protection for the privacy of his home and other property and from deprivation of property without compensation . . .

[69] Matthew Chaskalson, 'Stumbling Towards Section 28: Negotiations over the Protection of Property Rights in the Interim Constitution', (1995) 11 *South African Journal of Human Rights* 222, p. 223. Some provisions may be left unclear quite deliberately, in order to reduce conflict and secure sufficient support to ensure enactment (but cf. *Pepper* v. *Hart* [1993] A.C. 593 at 634, where Lord Browne-Wilkinson states that 'Parliament never intends to enact an ambiguity').

[70] This was the case under the Canadian Bill of Rights (1960), which was enacted as an ordinary statute. See *Robertson and Rosetanni* v. *The Queen* [1963] S.C.R. 652; *Lavell* v. *Att.-Gen. of Canada* [1974] S.C.R. 1349; *Bliss* v. *Att.-Gen. of Canada* [1979] 1 S.C.R. 183.

[71] See *Maneka Ghandi* v. *Union of India* A.I.R. 1978 S.C. 597; *Re Public Sevice Employee Relations Act* (1987) 38 D.L.R. (4th) 161 (S.C.C.) and *Reference Re Motor Vehicle Act* (1988) 24 D.L.R. (4th) 536 (S.C.C.).

[72] [1985] 1 A.C. 585; [1985] L.R.C. (Const.) 801 (P.C. Mauritius).

and the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms . . .

Prior to *Société United Docks*, courts in other countries with similar opening provisions stated that it did not enact rights other than those contained in the rest of the bill of rights. The comments of Chanan Singh J., in *Shah Vershi Devshi* v. *Transport Licensing Board*, on the opening provision of the Kenyan Bill of Rights, are typical in that they concentrate on the text:

Although given a separate number, this section is quite clearly in the nature of a preamble. It speaks of 'the provisions of this Chapter' which give protection 'to those rights and freedoms' meaning the rights enumerated earlier. This section itself creates no rights: it merely gives a list of the rights and freedoms which are protected by other sections of the Chapter. That is the reason why it enumerates only those rights which are provided for in later provisions . . . Section 70 [the opening provision] may be of help in interpreting any ambiguous expression in later sections of Chapter V [on fundamental rights and freedoms], but it itself gives no rights or freedoms.[73]

Similar statements can be found in judgments from other courts.[74] Indeed, in *La Compagnie Sucrière de Bel Ombre Ltee* v. *The Government of Mauritius*, where the Privy Council recently considered Lord Templeman's opinion in *Société United Docks*, Lord Woolf remarked that '[c]onstrued literally the language of section 3 could have been treated as only providing an introductory declaration as to the scope of the rights referred to in the subsequent sections of Chapter II, including section 8' and 'Lord Templeman was not troubled by what could be said to be the literal interpretation of the language of the section.'[75] Nevertheless, as explained below, the Privy Council did not reverse its earlier decision in *Société United Docks*.

Plainly, *Société United Docks* does not turn purely on a legalist analysis of the language of the provision. In the Mauritius Supreme Court, Rault C.J. regarded section 3 as the central provision of the Bill of Rights:

to all who care for human rights and liberty, section 3 [the opening provision] spoke loud and clear. It set out the essence of the pact entered into between the people and the Government on the eve of independence. If other sections are

[73] [1971] E.A. 289 at 298.

[74] See *Olivier* v. *Buttigieg* [1967] 1 A.C. 115 (P.C. Malta) at 128–9; *Att.-Gen.* v. *Antigua Times* [1976] A.C. 16 at 26; *Ameerally and Bentham* v. *Att.-Gen. of Guyana* (1978) 25 W.I.R. 272 (C.A. Guyana); cf. *Hewlett* [1981] Z.L.R. 571 at 590 *per* Fieldsend C.J.; *Shah* v. *Att.-Gen. (No. 2)* [1970] E.A. 523 (H.C. Uganda) *per* Wambuzi J. (diss.).

[75] [1995] 3 L.R.C. 494 (P.C.) at 500–1.

severed from their common origin in section 3, they will lose their fundamentality at the same time as their foundation. They will be left over as unlinked fragments which may for a time protect bits and pieces of liberty, but fail to give comprehensive cover to liberty against those who seek to curtail and mutilate it.[76]

Other judges might dispute whether Rault C.J.'s historical view of the provision is appropriate, but there are other arguments that suggest that these provisions have substantive effect. For example, other courts have examined the general redress provisions of the bills of rights; if these provisions state that relief is available for a breach of the opening provision, it would appear that it should have substantive effect.[77] In any case, once it is accepted that the opening provision does have independent force, the declaration that rights 'existed and continue to exist' invites an historical inquiry.

The cases reveal at least three different approaches to the historical inquiry arising from the declaration. The first is seen in *Thornhill* v. *Attorney-General of Trinidad and Tobago*,[78] where Lord Diplock stated that the Trinidadian declaration that rights continue to exist protects not only the rights and freedoms enjoyed by the individual 'de jure as a legal right', but also includes rights and freedoms enjoyed 'de facto as the result of a settled executive policy of abstention from interference or a settled practice as to the way in which an administrative or judicial discretion has been exercised'.[79] He therefore concluded that the existing practice of providing legal advice to a detainee was now guaranteed by the Constitution and could not be abrogated by the legislature. By this reasoning, the practice of disallowing legislation that interfered with property rights could be relevant to the interpretation of the opening provision. Similarly, recognition of a practice of

[76] [1985] L.R.C. (Const.) 801 at 816. See also *Dow* v. *Att.-Gen.* [1992] L.R.C. (Const.) 623 at 636 *per* Amissah J.P. Cf. *Matadeen* v. *Pointu and Minister of Education and Science* [1998] 3 W.L.R. 18 (P.C. Mauritius).

[77] For example, section 18(1) of the Botswana Constitution states that 'if any person alleges that any of the provisions of sections 3 to 16 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, then . . . that person may apply to the High Court for redress'. In *Dow* v. *Att.-Gen. of Botswana* [1992] L.R.C. (Const.) 623 (C.A. Botswana) at 636, Amissah J.P. stated that the reference to section 3 (the opening provision) put it 'beyond doubt' that the opening provision was not a mere preamble. See also *Ameerally and Bentham* v. *Att.-Gen. of Guyana* (1978) 25 W.I.R. 272 (C.A. Guyana) at 294, where Haynes C. stated that the redress provision's omission of any reference to the opening provision meant that the opening provision was a mere preamble.

[78] [1981] A.C. 61.

[79] *Ibid*. at 71 (see the Constitution of Trinidad and Tobago, s. 4).

compensating for injurious affection could be treated as a factor in favour of broadening the right to property.[80]

The second derives from the 'de jure' category of *Thornhill*. In *Société United Docks*, both the Privy Council and the Mauritian Supreme Court stated that the pre-existing common law right to property extended to the deprivation of property; hence, the entrenched right to property must also extend to deprivation. The strength of this argument is questionable. *Burmah Oil* v. *Lord Advocate*[81] was cited as the authority for the principle that the common law recognises a right to compensation for the deprivation of property, but it concerns executive action rather than legislative action. Other courts have doubted whether constitutional rights to property impose restrictions on the legislature that traditionally applied only to the executive.[82] In the Guyanese case of *Ameerally and Bentham* v. *Attorney-General of Guyana*, the appellants claimed that the opening provision of the Guyanese bill of rights protects freedom of contract.[83] Freedom of contract was not included in the right to property; nor was it referred to expressly in the opening provision. However, the opening provision stated that individuals were entitled to 'life, liberty, security of the person and the protection of the law' and the appellants argued that the 'protection of the law' should extend to freedom of contract. While Haynes C. accepted that freedom of contract was one of the common law rights available in Guyana at independence, he pointed out that if freedom of contract fell under the opening provision, all common law rights would be similarly protected. He held that the opening provision merely declared that common law rights, such as freedom of contract, were not implicitly repealed by the inclusion of certain specific rights in the rest

[80] In fact, where such evidence has been raised in cases, it has tended to restrict the right to property. In the earlier case of *Belfast Corpn* v. *O.D. Cars Ltd* [1960] A.C. 490, where the issue was whether the imposition of restrictions on land use amounted to a taking of property under section 5 of the Government of Ireland Act 1920, Lord Radcliffe decided that no taking took place because the history of town and country planning legislation demonstrated that it was not Parliament's practice to compensate for such restrictions.

[81] [1965] A.C. 75.

[82] Indeed, this is implicitly recognised by Rault C.J. [1985] L.R.C. (Const.) 801 at 817, where he states that prior to independence, 'no Mauritian who was deprived of his property by the *executive* doubted that he could obtain redress from our Courts' (emphasis added).

[83] (1978) 25 W.I.R. 272 (C.A. Guyana). The case arose under the 1966 Constitution, where the opening provision was Art. 3. Under the 1980 Constitution, the opening provision is Art. 40.

of the Bill of Rights.[84] A different but equally restrictive approach was taken by the Canadian courts on the Canadian Bill of Rights, which is drafted in terms very similar to those of Trinidad's Constitution (although enacted as an ordinary statute). The Canadian courts have held that the 'right to . . . enjoyment of property, and the right not to be deprived thereof except by due process of law' provides guarantees only against the executive.[85] Nevertheless, in *Société United Docks*, the Privy Council applied Lord Diplock's dicta to the legislative branch.

The third approach to historical evidence concentrates on the international antecedents of the bills of rights. In some respects, the analysis is quite similar to that of *Minister of Home Affairs (Bermuda)* v. *Fisher*,[86] where Lord Wilberforce used the international origins of the Nigerian-model bills of rights to determine the constitutional validity of the Bermudian law on the status of children.[87] The link between international conventions and the Nigerian-model bills of rights is quite close: the bills of rights were based on the European Convention on Human Rights, which the United Kingdom applied to its dependent territories. Arguably, by the reasoning in *Thornhill*, the Convention rights are part of the body of rights that were constitutionally guaranteed to continue after independence. Nevertheless, until quite recently, the Convention jurisprudence had little impact on the interpretation of the Nigerian-model rights to property. However, in *La Compagnie Sucrière de Bel Ombre Ltee* v. *The Government of Mauritius*,[88] the Privy Council did treat the Convention as a useful guide to the right to property in neo-Nigerian constitutions. It was argued that legislation providing security of tenure to tenant farmers violated the landowners' rights under section 3 of the Mauritian Constitution. Lord Woolf explained the function of section 3 as follows:

> Section 3(c) . . . remains at the same time both the more general and the more qualified provision: more general, as its protection applies to a wider range of situations and a broader concept of property than does section 8; more qualified, because the protection it provides is restricted by broader limitations than that to which the protection provided by section 8 is subject.[89]

[84] *Ibid*. at 292.

[85] See *R*. v. *Appleby (No. 2)* (1976) 76 D.L.R. (3d) 110 (N.B. C.A.) and *Curr* v. *The Queen* (1972) 26 D.L.R. (3d) 603 (S.C.C.) at 615 *per* Laskin J.

[86] [1980] A.C. 319.

[87] Cf. *Dow* v. *Att.-Gen.* [1992] L.R.C. (Const.) 623 at 655–6 *per* Amissah J.P. and 670–4 *per* Aguda J.A.

[88] [1995] 3 L.R.C. 494 (P.C.).

[89] *Ibid*. at 501.

In this passage, Lord Woolf treats section 3(c) more as a guarantee of due process than a guarantee of compensation. In other words, a deprivation of property must be authorised by the legislature and it must comply with minimum standards of procedural (and possibly substantive) justice.

Lord Woolf drew an analogy with Article 1 of the First Protocol of the European Convention on Human Rights, which the European Court of Human Rights has construed as containing three overlapping rules regarding the enjoyment of possessions.[90] According to Lord Woolf, section 3(c) of the Mauritian Constitution corresponds to the first rule of Article 1, which requires a fair balance between the owners' rights and the interests of the community.[91] The first rule applies to many forms of interference with property, but it does not require full compensation to achieve a fair balance in every case. Lord Woolf held that a similar 'fair balance' test applied to section 3(c). Hence, laws that authorise the deprivation of property are invalid under section 3(c) only where 'because of the lack of any provision for compensation, they do not achieve a fair balance between the interests of the community and the rights of the individuals whose property interests are adversely affected'.[92]

While Lord Woolf's analysis offers a workable resolution of the differences between sections 3 and 8 in the Mauritian Constitution, *La Compagnie Sucrière de Bel Ombre* and *Société United Docks* demonstrate that judges do not regard the methods of interpretation as exclusive. In *Société United Docks*, Lord Templeman paid scant attention to the language of section 3 in order to ensure that the deprivation of property would be treated no differently than the acquisition of property. In *La Compagnie Sucrière de Bel Ombre*, Lord Woolf decided that deprivation and acquisition should be treated differently and that section 3(c) does not in fact guarantee compensation for the deprivation of property. As explained in chapter 6, some courts have taken a simpler approach to this issue. In *Société United Docks*, Lord Templeman implicitly assumed

[90] Lord Woolf did not rely on the declaration that rights continue to exist; as such, his argument is not necessarily an historical argument. He merely stated that an analogy could be made and used it to explain the judgment in *Société United Docks and Others* v. *Government of Mauritius; Marine Workers Union and Others* v. *Mauritius Marine Authority* [1985] 1 A.C. 585; [1985] L.R.C. (Const.) 801.

[91] Lord Woolf stated that section 8 corresponds with the second rule of the Protocol, and the exceptions to section 8 correspond to the third rule of the Protocol; for a full discussion, see pp. 196–8, below.

[92] [1995] 3 L.R.C. 494 at 504–5.

that a debt is property, but the extinction of a debt is not an acquisition of property. However, some courts have held that the extinction of a debt should be treated as an acquisition because in substance it is an acquisition.[93] *Société United Docks* and *La Compagnie Sucrière de Bel Ombre* show that judges use different methods of interpretation, both in formal and substantive ways, in a pragmatic rather than an absolute manner.

Constitutional structure and interpretation

A further approach to judicial review and constitutional interpretation emphasises the structure of government created by the constitution. Under the structural approach, courts concentrate on ensuring that the institutions of government operate effectively. One clear example of this type of reasoning is found in early doctrines of the Australian High Court, in which it interpreted the Constitution in the light of the fundamental principle that Australia was a decentralised state. Structural interpretation, with its emphasis on institutions of government, seems to be more suited to federal constitutions. However, in the United States, some leading commentators advocate the structural interpretation of the Bill of Rights.[94] In particular, John Hart Ely maintains that judicial review is legitimate only when it furthers the democratic process. Hence, judicial review should concentrate on the process by which law is made rather than the substance of the laws that are made. Courts should interpret fundamental rights purposively, and, for Ely, their purpose is to enable participation and representation in the democratic process. For example, freedom of speech would not apply to every form of speech, but only to speech that in some way relates to participation or representation in the democratic process. While this approach seems to restrict fundamental rights, especially the right to property, it has also been argued that it would serve to protect certain social and economic rights.[95] In so far as the right to property is

[93] See pp. 163–71, below.

[94] John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass.: Harvard University Press, 1980). Outside the United States, see Geoffrey Kennett, 'Individual Rights, The High Court and the Constitution', (1994) 19 *Melbourne University Law Review* 581. Patrick Monahan, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (Toronto: Carswell, 1987) argues that Canadian courts should also interpret the Constitution in the light of both participatory and communitarian values.

[95] So, for example, it has been argued in the United States that children have a positive right to education because they must become intellectually equipped to participate in

concerned, one would ask whether property enables effective participation in the political process, and whether the taking of property without compensation in some way compromises participation in the process.

In practice, Commonwealth courts do not approach property cases in this way. The liberal conception of property divorces participation and political power from the rights of ownership.[96] In practical terms, of course, ownership of property facilitates participation in the political process. For this reason, the redistribution or nationalisation of property is sometimes defended on democratic grounds.[97] Redistribution, in this sense, includes both large-scale reforms and more subtle modifications of property rights. It would include, for example, the imposition of a right of access to private property where necessary for the exercise of political rights.[98] Similarly, any property interest in confidential information would be limited by the public interest in guaranteeing freedom of speech in relation to political matters.[99]

In addition, Ely argues that judicial review is also justified when:

> (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.[100]

In such cases, the courts are not immediately concerned with the political rights arising from the ownership of property, but with the failure to give access to the process by which property interests are

the democratic process in adulthood; see generally Allen W. Hubsch, 'Education and Self-government: The Right to Education under State Constitutional Law', (1989) 18 *Journal of Law and Education* 93.

[96] See A. M. Honoré, 'Ownership', in A. G. Guest (ed.), *Oxford Essays in Jurisprudence* (London: Oxford University Press, 1961), pp. 107–47. Cf. *Clunies-Ross* v. *The Commonwealth of Australia* (1984) 155 C.L.R. 193 and Michael Taggart, 'Expropriation, Public Purpose and the Constitution', in Christopher Forsyth and Ivan Hare (eds.), *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC* (Oxford: Clarendon Press, 1998), pp. 110–12.

[97] See Theunis Roux, 'Constitutional Property Rights Review in South Africa: A Civil Society Model', Ph.D. thesis, University of Cambridge (1997). Indeed, in South Africa, land reform and restitution is required by the Constitution: see the final Constitution, s. 25.

[98] See Kevin Gray, 'Equitable Property', (1994) 47(2) *Current Legal Problems* 157, pp. 172–81.

[99] Cf. *Secretary of State for Defence* v. *Guardian Newspapers Ltd* [1985] A.C. 339 (H.L.) and *Smith Kline & French* v. *Secretary, Department of Community Services and Health* 95 A.L.R. 87 (F.C.).

[100] Ely, *Democracy and Distrust*, p. 103.

affected. Judicial review acts as a substitute for participation; more specifically, in the case of property, compensation is a substitute for a real opportunity to participate in decisions regarding property. For example, David Farrier and Patrick McAuslan argue that certain changes in English law that increased the amount of compensation payable for the expropriation of land were the result of 'an assumption that people can be bought off and that it is preferable to do that with money or the promise of a better designed development than it is to try to involve them more meaningfully in the planning and governing process and so get them to accept development in that way'.[101] William A. Fischel examines similar issues from the constitutional point of view, with the conclusion that a lack of access or influence over the process by which expropriatory or regulatory laws are made should strengthen the constitutional claim to compensation. He maintains that, in the United States, access and influence are likely to be weakest at the local level, especially in relation to land-use planning regulations passed by local government.[102] Fischel therefore argues that the courts should examine such regulation more closely than regulations produced at the national level.

The Canadian cases on the relationship between Canada and its aboriginal peoples demonstrate that structural considerations may be significant in some circumstances. These cases are discussed in greater detail in chapter 2; briefly, the Supreme Court held that the Canadian Government holds its powers to act in relation to aboriginal matters in a kind of trust for the aboriginal peoples.[103] These trust-like duties derive from the vulnerability of the aboriginal peoples in a legal system in which they have only limited rights of participation. In this context,

[101] David Farrier and Patrick McAuslan, 'Compensation, Participation and the Compulsory Acquisition of "Homes" ', in J. F. Garner (ed.), *Compensation for Compulsory Purchase: A Comparative Study* (London: The United Kingdom National Committee of Comparative Law, 1975), p. 70. Compare *Pennell* v. *City of San Jose* 485 U.S. 1 (1988) at 15–24, where Justice Scalia (concurring in part, dissenting in part) argues that requiring compensation for regulation is likely to enhance democracy, because the consequent increase in taxation forces the majority to consider the cost of their actions. Cf. *Fok Lai Ying* v. *Governor-in-Council and Others* [1997] 3 L.R.C. 101 (P.C.) at 113–14: provision of monetary compensation does not necessarily mean that an interference with one's home is not arbitrary, under Article 14 of the Hong Kong Bill of Rights.

[102] William A. Fischel, *Regulatory Takings: Law, Economics, and Politics* (Cambridge, Mass. and London: Harvard University Press, 1995), pp. 289–324. But cf. Carol Rose, 'Takings, Federalism and Norms', (1996) 105 *Yale Law Journal* 1121.

[103] See pp. 24–9, above.

the distinction between legal and extra-legal vulnerability illustrates a general criticism of Ely's process theory made by Mark Tushnet.[104] Tushnet argues that, if judges consider only the formal obstacles to political participation, they are unlikely to do very much to protect or enhance the democratic process. In Botswana, for example, Clement Ng'ong'ola analyses the possibility of a land claim by the Basarwa peoples of Botswana. He argues that they would have no claim for special status based on a fiduciary relationship, because they did not transfer the land they occupied to the colonial authorities. By this view, the fiduciary relationship cannot arise except where there was some recognition of pre-existing rights, as in North America.[105] Hence, the fiduciary theory is unlikely to have much impact as long as vulnerability or other obstacles to political participation are regarded solely in terms of formal rights. However, Tushnet argues that if informal obstacles are also considered, Ely's initial concern with the counter-majoritarian difficulty will not be answered, as 'judges will be called upon to make controversial assessments of political reality and the theory loses its constraining force'.[106] That is, the degree to which a group is in fact excluded from the political process requires the sort of empirical analysis that the courts are not likely to perform successfully.[107]

Plainly, this is not a view shared by the Canadian courts. Nevertheless, it is also clear that they have been anxious to confine the fiduciary theory to aboriginal peoples. The Canadian courts have refused to extend the fiduciary theory to Canada's relationship with its northern territories, although one could argue that the territories are also vulnerable to Canada's legal powers.[108] The process theory provides a justification for imposing the fiduciary duties on aboriginal relationship, but it does not seem to provide the starting point for finding fiduciary duties in other situations.

[104] Mark Tushnet, *Red, White and Blue: A Critical Analysis of Constitutional Law* (Cambridge, Mass. and London: Harvard University Press, 1988), ch. 2.

[105] Clement Ng'ong'ola, 'Land Rights for Marginalized Ethnic Groups in Botswana, with Special Reference to the Basarwa', (1997) 41 *Journal of African Law* 1, p. 9. Cf. Kristyne Bishop, 'Squatters on their Own Land: San Territoriality in Western Botswana', (1998) 31 C.I.L.S.A. 92.

[106] Tushnet, *Red, White and Blue*, p. 73. [107] *Ibid*., p. 75.

[108] *Penikett* v. *Canada* (1987) 45 D.L.R. (4th) 108 (C.A. Yukon), leave to appeal to S.C.C. refused (1988) 46 D.L.R. (4th) vi; followed in *Sibbeston* v. *Canada* (1988) 48 D.L.R. (4th) 691 (C.A. Northwest Territories). Cf. Brian Slattery, 'First Nations and the Constitution: A Question of Trust' (1992) 71 *Canadian Bar Review* 261, p. 271.

Interpretation and ethical values

Some judges interpret constitutional provisions with a view to furthering a particular ethical or moral philosophy of the rights of the individual. In its strongest form, the ethical approach applies natural law theory of the constitution and property. This version of ethical argument is rarely found in Commonwealth property cases.[109] There is the exception of the Indian fundamental rights cases, especially *Kesavananda*, where the six majority judges justified their position partly by the argument that the rights owed their existence to natural law. However, as explained above, none of these six judges specifically examined the status of the right to property as a right of natural law.[110]

Except for the six judges in *Kesavananda*, judges are quite reluctant to accord property rights the status of natural law rights. However, ethical theories of property have had some impact in a weaker form, as an aid to the interpretation of the specific terms of the written rights to property. For example, in *Société United Docks*, Lord Templeman stated that compensation should be paid for both the deprivation and acquisition of property because '[l]oss caused by deprivation and destruction is the same in quality and effect as loss caused by compulsory acquisition'.[111] The emphasis is put on the individual's loss rather than the state's gain, and the purpose of the right to property seems to be the protection of an area of personal autonomy. In some cases, ethical theories have also affected the judicial construction of 'property'. For example, in *Government of Mauritius* v. *Union Flacq Sugar Estates Co. Ltd*[112] and *Attorney-General* v. *Lawrence*,[113] judges held contrasting views on whether powers that a corporation's constitutional instruments conferred on minority shareholders should be treated as property, but both cases turn partly on the judges' perceptions of the ethical entitlement

[109] Neither is it found in the texts of the constitutions. However, the Constitution of Uganda, s. 20(1) (the introduction to the chapter on fundamental rights), declares that 'Fundamental rights and freedoms of the indvidual are inherent and not granted by the State.' Some general preambles to constitutions lend some support to natural law theories of individual rights; see *e.g.* the Constitution of St Christopher and Nevis, Preamble: 'Whereas the People of Saint Christopher and Nevis – (a) declare that the nation is established on the belief in Almighty God and the inherent dignity of each individual; (b) assert that they are entitled to the protection of fundamental rights and freedoms . . .'

[110] See pp. 94–5, above. See also *Golak Nath* v. *Punjab* [1967] 2 S.C.R. 762 at 787ff. *per* Subba Rao C.J., but see 885ff. *per* Hidayatullah J.

[111] [1985] L.R.C. (Const.) 801 at 841.

[112] [1992] 1 W.L.R. 903 (P.C. Mauritius).

[113] [1985] L.R.C. (Const.) 921 at 930 *per* Peterkin C.J.

to have the powers protected as property. Chapter 5 examines these theories of property in greater detail.

As *Kesavananda* and *Société United Docks* demonstrate, where ethical theories of property affect interpretation, it is the liberal theory of limited government and personal autonomy that the courts apply. There have been arguments that other ethical theories should apply. For example, a number of commentators argue that the Canadian Constitution embodies communitarian values and, hence, the courts should interpret it in the light of those values.[114] Communitarianism asserts that the 'good of the individual is not conceivable apart from some regard for the good of the whole' and 'restraints on individuals are natural rather than contractual, flowing from the very duties and rights which are implicit in membership in a larger community'.[115] There is a real risk that a judicial preference for individuals over communities will deprive communities of their capacity to 'define their common identity [and] enrich the lives of individuals in those communities'.[116] In fact, it appears that the Canadian Supreme Court has preferred the individual to the community in many cases.[117] In relation to property, however, the Supreme Court has been careful not to read property or economic rights into the Charter. Arguably, in this limited respect, it has recognised a public or communitarian interest in limiting private property (at least within the terms of the Charter).[118]

Elsewhere, there have been arguments that bills of rights, and the right to property, embody ethical values that carry less weight in non-Western countries. There is little doubt that British colonial administrators and judges frequently misunderstood indigenous property regimes and some modern judgments have given more protection to communal interests.[119] Whether the jurisprudence on constitutional

[114] See *e.g.* Monahan, *Politics and the Constitution*; Allan C. Hutchinson and Andrew Petter, 'Private Rights/Public Wrongs: The Liberal Lie of the Charter', (1988) 38 *University of Toronto Law Journal* 278; Michael Mandel, *The Canadian Charter of Rights and the Legalization of Politics in Canada* (Toronto: Wall & Thompson, 1989); Andrew Petter, 'Canada's Charter Flight: Soaring Backwards into the Future', (1989) 16 *Journal of Law and Society* 151. See also the feminist argument made by Wilson J. in *R.* v. *Morgentaler* (1988) 44 D.L.R. (4th) 385 at 490–1.

[115] Monahan, *Politics and the Constitution*, p. 92.

[116] *Ibid.*, p. 98.

[117] See generally Christopher P. Manfredi, 'The Canadian Supreme Court and American Judicial Review: United States Constitutional Jurisprudence and the Canadian Charter of Rights and Freedoms', (1992) 40 *American Journal of Comparative Law* 213.

[118] See generally Robert G. Doumani and Jane Matthews Glenn, 'Property, Planning and the Charter', (1989) 34 *McGill Law Journal* 1036.

[119] *E.g. Akoonay and Another* v. *Att.- Gen.* [1994] 2 L.R.C. 399 (C.A. Tanz.).

property reflects fundamentally different values is difficult to say, partly because most judges prefer to base their decisions on legalist, historical or structural arguments. Recently, in South Africa, there has been some interest in relevance of the moral values encapsulated by the Zulu expression *ubuntu* to constitutional interpretation. *Ubuntu* has been variously described as an expression of 'ideas of humaneness, social justice and fairness',[120] 'the reciprocity generate[d] in interaction with the collective community',[121] and 'group solidarity where such group solidarity is central to the survival of communities with a scarcity of resources'.[122] The interim Constitution refers to *ubuntu* in its afterword,[123] but the final Constitution does not refer to it. Nevertheless, it has been argued that both constitutions reflect its values, expressly or implicitly.[124] To some extent, these values are reflected in some constitutional provisions, such as those on land reform and restitution. Arguably, the balancing process of the general limitation clause also reflects the importance of the community. Whether this exhausts the influence of *ubuntu*, in the sense that judges will have no further reason to refer to *ubuntu* as an aid to constitutional interpretation (and the right to property), remains to be seen. Members of the Constitutional Court sought to incorporate the values of *ubuntu* in their judgments in *S*. v. *Makwanyane*[125] and *AZAPO* v. *The President of the Republic of South Africa*,[126] but it has not figured in the most recent cases from the Court and, in any case, neither case concerned property rights. It may be the case that *ubuntu* does not represent the sort of values that would assist judges in the interpretation of specific provisions. Rosalind English argues that:

[120] *S*. v. *Makwanyane*, Case No. CCT/3/94 (Judgment 6 June 1995); 1995 (3) S.A. 391 (C.C.), at para. 237 *per* Madala J.

[121] *Ibid*. at para. 263 *per* Mahomed J.

[122] Yvonne Mokgoro, 'Ubuntu and the Law in South Africa,' (1998) 4 *Buffalo Human Rights Law Review* 15 (see also her judgment in *S* v. *Makwanyane*, Case No. CCT/3/94 (Judgment 6 June 1995); 1995 (3) S.A. 391 (C.C.), at para. 308).

[123] Chapter 16 provides that: 'The adoption of this constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violation of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge. These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimisation. . . .' Section 232(4) of the interim Constitution provides that Chapter 16 should be taken into account in interpretation.

[124] Mokgoro, 'Ubuntu,' pp. 18–23.

[125] Case No. CCT/3/94 (Judgment 6 June 1995); 1995 (3) S.A. 391 (C.C.).

[126] 1996 (8) B.C.L.R. 1015.

In its short life, ubuntu has served three purposes. It is, bluntly, a marketing device, designed to put an African imprimatur on a set of civil liberties and freedoms forged largely out of Western instruments; it has been deployed to separate the idea of justice from revenge; and it has been used as a rallying cry to community values, or what the judges of the Constitutional Court deem those values to be.[127]

She maintains that, in so far as *ubuntu* reflects a general moral outlook of the people, it is unlikely to provide assistance 'in solving the conflict between the state's notion of the public interest and the liberties and freedoms of the individual'.[128]

Conflicts in methods of interpretation

It is uncertain whether *Minister of Home Affairs* v. *Fisher*[129] and the associated rise of purposive interpretation changes the interpretation of the right to property radically. In particular, is it still the case that other methods of interpretation are relevant only where the text is ambiguous? If not, how should the courts choose between methods of interpretation that lead to conflicting results in a given case?

The difficulty of answering these questions is evident from the protracted American debate over constitutional interpretation. The methods of interpretation outlined in this chapter can be found in the jurisprudence of the United States Supreme Court, and determining the priority of these methods is a central question of American constitutional law.[130] The Court has not indicated how it ranks the methods in terms of their authority, or, indeed, whether it believes that such a ranking is desirable.[131] In particular, the Court has stated that it would decide takings cases on an *ad hoc*, case-by-case basis, without laying

[127] Rosalind English, 'Ubuntu: The Question for an Indigenous Jurisprudence', (1996) 12 *South African Journal on Human Rights* 641, p. 641.

[128] *Ibid*., p. 646.

[129] [1980] A.C. 319.

[130] Although they are often described in different terms; see *e.g.* Tushnet, *Red, White and Blue*; Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (New York and Oxford: Oxford University Press, 1982) and *Constitutional Interpretation* (Cambridge, Mass. and Oxford: Blackwell, 1991); Robert C. Post, *Constitutional Domains: Democracy, Community, Management* (Cambridge, Mass. and London: Harvard University Press, 1995), pp. 23–51; Richard H. Fallon, Jr, 'A Constructivist Coherence Theory of Constitutional Interpretation', (1987) 100 *Harvard Law Review* 1189.

[131] Stephen M. Griffin, 'Pluralism in Constitutional Interpretation', (1994) 72 *Texas Law Review* 1753, p. 1757; Philip Bobbitt, 'Reflections Inspired by my Critics', (1994) 72 *Texas Law Review* 1869, p. 1927.

down fixed rules.[132] This, for some scholars, represents a grave defect in the state of constitutional interpretation in the United States, and it has produced a voluminous literature on interpretation and judicial review, which would be impossible to recount here.[133] In very general terms, however, it is possible to group the various theories into two broad categories.

The first category comprises those theories that identify or defend a principle for ranking one of the methods ahead of the others. These theories find their roots in liberal constitutional theory, as they stress the idea of limited government. For liberals, the constitution constrains the state from interfering with individual choice. Judicial review provides a necessary constraint on the legislature, but the idea of limited government also requires that the judiciary itself should be subject to constraints. Hence, many liberal scholars believe that it is necessary to rank the methods of interpretation in terms of authority. The plurality of methods of interpretation suggests that the courts are not constrained; as long as different methods lead to different decisions, and there is no method of determining which method and decision is the correct decision, judges can decide on the basis of their personal preferences.

Many lawyers have sought to demonstrate that one of the methods should have priority over the other methods. The differences between their arguments can be so pronounced that it makes it difficult to see their common elements. Nevertheless, they are all challenged by the second category of analysis, where it is argued that any attempt to find a single, overarching principle of interpretation is either impossible or unnecessary. Mark Tushnet's *Red, White and Blue: A Critical Analysis of Constitutional Law* is an example of this position. Tushnet argues that the counter-majoritarian difficulty cannot be resolved because it is impossible to develop decision-making principles that entirely exclude the judge's personal preferences. A creative judge can manipulate any method of interpretation to produce a justification for any decision. In any case, the counter-majoritarian difficulty is only a difficulty within the liberal tradition. Tushnet's politics are those of the republican–communitarian tradition in the United States. Where liberals stress the importance of individualism and self-interest, republicans stress the social nature of people, civic virtue and the public interest. For

[132] See *Penn Central Transportation Co.* v. *New York City* 438 U.S. 104 (1978) at 124.
[133] See *e.g.* the works cited above in n. 130.

republicans, the state has a positive role to play: individuals, acting selfishly, are the disruptive force. Hence, the counter-majoritarian difficulty is only a difficulty if one accepts the liberal belief that individual preferences must be protected from the state; it would cease to be an important question in a republican state. The nature of society would be so different that judicial review might not be necessary.[134]

This chapter has described some of the critical discussion on the role of communitarian values in Canadian and South African constitutional interpretation. These critics would argue that many of Tushnet's comments apply to the Canadian scene. In some other Commonwealth countries, there has been a rejection of liberal theory, but by branches of the government other than the judiciary. In India, for example, the courts consistently followed the liberal tradition of protecting property in the face of Parliament's determination to achieve greater social and economic justice through the redistribution of property and wealth. Elsewhere in the Commonwealth, the legislative and executive branches of some countries sought to reduce the constitutional status of property as a fundamental right. Two prominent examples are Zambia and Guyana, where the compensation guarantee was weakened before the nationalisation of important industries.[135] In Canada, a right to property was included in drafts of the Charter of Rights and Freedoms, but dropped from the final version.[136] The interesting point is that these challenges to the value of a right to property have not been made by the judiciary, and there is no real sign that the judiciary has sought to recast the right to property in terms other than those of the liberal tradition.[137] Certainly, the forms of argument and interpretation are not fundamentally different from those outlined in this chapter, and the judiciary's search for principled constraints on its own powers continues.

In general, the interest in conflicts between methods of interpretation has not been as great in the Commonwealth as it has been in the United States. The American interest may be attributed, in part, to the

[134] Tushnet, *Red, White and Blue*, p. 146.

[135] On Zambia, see generally Amoo, 'Law and Development'; on Guyana, see Alexis, *Changing Caribbean Constitutions*, pp. 162–70.

[136] See generally Alexander Alvaro, 'Why Property Rights were Excluded from the Canadian Charter of Rights and Freedoms', (1991) 24 *Canadian Journal of Political Science* 309.

[137] Although note that André J. van der Walt, *The Constitutional Property Clause: A Comparative Analysis of Section 25 of the South African Constitution of 1996* (Kenwyn, South Africa: Juta & Co. Ltd, 1997), pp. 54–71 argues that the South African Constitutional Court may be more willing to depart from the exclusively liberal theory.

continuing attention to interpretation that follows from the leading cases on substantive economic due process, civil rights and abortion. But this is at least partly true in the Commonwealth as well, as dramatic shifts in the judiciary's view of the function of bills of rights have been accompanied by shifts in theories of interpretation. For example, the shift to legalism in the *Engineer's Case* in Australia and the more recent shift to purposive and generous interpretation in *Fisher* signalled important changes in constitutional law. Nevertheless, the theoretical analysis has not been anywhere near as controversial as it has in the United States, and there is probably greater consensus amongst Commonwealth judges and scholars on judicial review and constitutional interpretation than in America. Several general observations can be made as follows.

(i) Commonwealth judges believe that judicial review is part of their constitutional system. The explanations they offer for the existence of judicial review vary and, not surprisingly, a judge's justification for judicial review tends to be tied to his or her preferred method of constitutional interpretation. For example, legalist judges justify judicial review by reference to the text itself, as many Commonwealth constitutions include supremacy and redress clauses that state that the courts have wide powers to ensure that the legislature does not exceed its powers.[138] The doctrinal aspect of legalism appears in some justifications for judicial review, as a number of judges have referred to leading cases as evidence that the power of judicial review is available to them. Followers of the historical approach rely on the 'pact theory' of the *Société United Docks–Thornhill* line of cases, as well as various historical records of the deliberations of the framers. Structuralists raise the argument that, without judicial review, there would be no guarantee that fundamental rights would be protected from the legislature.[139] Finally, natural law and ethical arguments support both ethical interpretation and the existence of judicial review, if one accepts that

[138] See *e.g. Collymore* v. *Att.-Gen*. (1967) 12 W.I.R. 5 (C.A. T.T.) *affirmed* [1970] A.C. 538, and see generally A. R. Carnegie, 'Judicial Review of Legislation in the West Indian Constitutions', [1971] *Public Law* 276 (but cf. Gibson Kamau Kuria and Algeisa M. Vazquez, 'Judges and Human Rights: The Kenyan Experience', (1991) 35 *Journal of African Law* 142). For an example of supremacy and redress clauses, see Belize, s. 2 (supremacy clause) and s. 18 (redress) (these clauses are typical of the Nigerian-model constitutions).

[139] See *Kesavananda* v. *Kerala* (1973) 4 S.C.C. 225, where this type of argument dominated the judges' reasoning.

there are certain values that bind all of the nation's citizens and institutions.

(ii) Most courts and commentators also accept the existence and importance of the counter-majoritarian difficulty. While the nature of the principles that constrain the judiciary may have changed with the rise of purposive interpretation, the belief that constraining principles are both possible and necessary has not changed. Hence, in its broad outlines, the constitutional theory of the Commonwealth courts resembles the liberalism that Tushnet identifies with the American theories. In property rights, it is clear that Commonwealth courts concentrate on liberal conceptions of property based on private, exclusionary interests rather than public or participatory interests. This approach often produces results that are very similar to those of the United States; for example, 'property' does not include social welfare entitlements and 'compensation' is generally no less than the market value of the property.[140] Exceptions may develop in the future; in particular, the South African right to property does not require market value compensation and there is a strong argument that the courts should extend the constitutional protection of property to social welfare entitlements and similar interests.[141] In general, however, most judges appear to adhere to the liberal theory of the constitution and property.

(iii) There is still considerable faith in the determinancy of the methods of interpretation. Many judges are aware of the modern scepticism concerning the determinacy of language, but do not feel that it undermines their approach to interpretation. The recent expressions of disapproval for legalism, beginning with *Fisher* v. *Home Office*, have not been made because the courts believed that literalism is indeterminate; the judges believe that literalism is determinate, but too restrictive. Judges therefore reject the critical argument that they act on personal preference. They accept that their decisions may be politically or socially unacceptable to many critics, but believe that it is not the method of interpretation or argument which is responsible but the material that they must interpret. Indeed, in the most controversial cases, judges tend to fall back on the most formal methods of interpretation, once again demonstrating their belief that formality can be equated with neutrality.

(iv) The judiciary's approach to interpretation is best described as a

[140] See pp. 153–60, below, on social welfare; see ch. 8 on market value compensation.
[141] van der Walt, *Constitutional Property Clause*, pp. 54–71.

pluralist approach. There is probably greater use of the literal and doctrinal methods of interpretation than other methods, but the historical and structural approaches are often used as well. Ethical arguments appear less often, but most judges probably regard them as legitimate forms of argument. Some courts have stated that legalist interpretation should prevail over the other methods, especially in the pre-*Fisher* cases, but even before *Fisher* the cases reveal that a variety of methods were in fact used. Indeed, although the courts stated that literal methods of interpretation should prevail, it is at least arguable that, in some cases, doctrinalism was preferred to literalism and that structuralism was preferred to both. In cases where judges discuss methods of interpretation at length, such as *Kesavananda*, they are quite willing to employ all methods of interpretation. In such cases, the judicial rhetoric is closer to that of the advocate than that of the logician.

(v) Pluralism does not seem to require justification in the way that the other methods of interpretation require it. Indeed, one could argue that the pluralism of Commonwealth judges shows that they do act on personal preference and that they tend to entrench class interests. So, for example, one could argue that the Privy Council's Canadian judgments in the Depression and the Indian Supreme Court's judgments leading to the fundamental rights cases are only explicable as the products of policies opposed to social welfare. However, even at this level, it is difficult to ascertain a clear or consistent policy lying behind the decisions. For example, even during the height of the Indian Supreme Court's defence of property rights, it gave certain decisions that clearly favoured the state over property owners.[142] Similarly, the Privy Council's decisions are equally explicable as the products of a political policy of centralisation. Moreover, in both cases, there were lawyers who argued that the arguments were sufficiently coherent to enable the prediction of future decisions, without reference to the economic or political policies of the courts.[143]

It therefore appears that judges are careful not to cut off the stock of available justifications for a decision because they wish to preserve their individual discretion to decide cases as they choose. Stated in the best possible light, the judiciary believes that its search for justice cannot be captured entirely by any of the existing methods of interpretation. In

[142] See *e.g. Atma Ram* v. *Punjab* [1959] Supp. (1) S.C.R. 748 and see generally Rajeev Dhavan, *The Supreme Court of India: A Socio-legal Analysis of its Juristic Techniques* (Bombay: N. M. Tripathi Pvt Ltd, 1977), pp. 146–68.

[143] See *e.g.* Jennings, 'Constitutional Interpretation', p. 38.

another light, however, pluralism merely entrenches elitism. Judges preserve their discretion despite their professed concern for the counter-majoritarian difficulty and the importance of establishing principled constraints on judicial activism. Either they do not wish to constrain their actions or, at least, they consider their personal preferences to be an adequate constraint. Perhaps judges believe simply that identifying the just resolution of a case is a product of character, and that training and social and professional class are sufficient to produce persons of the right character to make just decisions.

The impression given by the cases is that, to the extent that there is an underlying belief or philosophy in operation, judges reinforce their position as judges. That is, the values on which the judges act and the values that they seek to reflect in their judgments are the products of a judicial way of thinking about issues. Their values are professional values and do not seem to be tied to a specific culture or an economic class within the culture (although plainly they may further the interests of certain classes). The 'radical' shift to purposive interpretation has had very little impact on the right to property, in the sense that judges have not been shaken from their belief that judge-made values are the backdrop against which they must interpret the right to property.

5 The meaning of property

At the centre of the constitutional right to property lies property itself. The meaning of 'property' varies according to its function in a particular context, and so we might conclude that it simply has no general meaning.[1] Constitutional framers clearly did not share this view, since Commonwealth constitutions are written in terms of a right to 'property'. Hence, we cannot know what the constitution protects without knowing what property is. The constitutional texts offer no guidance, as the vast majority do not attempt to define 'property'.[2] This task has been left to the courts, and so by determining the scope of property they determine the extent of the protection provided by right to property.[3]

This chapter opens by considering the judiciary's sense of property. Most judges follow the legalist approach to interpretation, inasmuch as they work on the assumption that property does have a meaning that can be applied to most cases. However, while they seek to discover and apply the 'plain meaning' of property, their approach runs into the difficulties identified by Bruce Ackerman, who argues that property has

[1] See Thomas C. Grey, 'The Disintegration of Property', in J. Roland Pennock and John W. Chapman (eds.), *Property: NOMOS XXII* (New York: New York University Press, 1980), pp. 69–85; cf. Stephen R. Munzer, *A Theory of Property* (Cambridge: Cambridge University Press, 1990), pp. 31–6.

[2] Only St Vincent, s. 6(8) and Dominica, s. 6(8), define 'property': both state that ' "property" means any land or other thing capable of being owned or held in possession and includes any right relating thereto, whether under a contract, trust or law or otherwise and whether present or future, absolute or conditional'.

[3] But see Chanan Singh, 'Nationalization of Private Property and Constitutional Clauses Relating to Expropriation and Compensation', (1971) 7 *East African Law Journal* 85, p. 102, where he argues that the definition of property is given by the Interpretation and General Provisions Act (Chapter 2 of the Laws of Kenya), 'would, it seems, apply because our Constitution does not give a definition of the word property'.

two different plain meanings.[4] The first is the meaning that the ordinary, non-lawyer would give to property; the second is the meaning that the lawyer would give to it. The first part of this chapter examines how Commonwealth courts choose between these two different meanings of property.

The ordinary, non-legal meaning of property would probably limit it to ownership interests in tangible objects. The second part of the chapter focuses on the classification of interests that fall short of full ownership, in both tangible and intangible objects. In some cases, courts have held that an individual has constitutionally recognised property if he or she holds rights of possession or disposition. In other cases, the economic value of rights indicates whether they are property.

The final section of the chapter examines the communitarian critique of this approach and addresses several specific areas of contention. The first concerns communal property; the second area concerns social welfare benefits and other forms of entitlements against the state.

The plain meaning of property: 'ordinary' property and 'legal' property

Most Commonwealth judges work on the basis that property has a meaning that can be discovered and applied in constitutional cases. In this sense, their interpretation of property is a legalist, 'plain meaning' interpretation. However, even in this sense, property can be understood in fundamentally different ways.

Bruce Ackerman argues that the ordinary conception of property is based on the understanding of ordinary people regarding the control and use of things in their usual dealings with others.[5] In ordinary discourse, people say that a particular thing is theirs when they may, without negative social sanction, use the thing many more ways than others can, and when negative social sanctions are normally visited upon anyone who uses it without their consent.[6] Since the ordinary meaning of property is based on social understandings regarding the use of things, people usually do not need legal opinions to determine whether they own something.[7] Nevertheless, there are situations where lawyers are consulted, either because there is a dispute over the factual basis of a claim, or because there are no existing social practices

[4] *Private Property and the Constitution* (New Haven: Yale University Press, 1977).
[5] *Ibid*. [6] *Ibid*., pp. 99–100. [7] *Ibid*., p. 116.

regarding the use and control of the thing.[8] The lawyer's analysis is then likely to focus on the specific rights that the client has in relation to the thing. Lawyers are usually quite comfortable with the idea that a great many people may have rights in an object without any one of them being easily identified as its owner. Indeed, there is often no reason to identify the owner of an object. Equally, there is no conceptual difficulty with rights over intangible objects, since the focus is on rights rather than the objects of those rights. The boundary between ordinary 'social' property and 'legal' property clearly depends on the social practices of the given society, but the existence of a boundary is likely to be present in every society.

Ackerman argues that the 'plain meaning' of property could refer to either its narrower, ordinary meaning or to its broader legal meaning. The choice of meaning affects the way in which judges analyse constitutional property cases. The judge who applies the broader meaning of property places little emphasis on the object of rights or the totality of rights. Instead, each right that the claimant has over the thing is itself property, and hence any state action that restricts or extinguishes any one of these rights is a taking of property. By this view, there is no conceptual distinction between regulation and outright expropriation.[9] By contrast, judges who limit property to its ordinary meaning would approach property cases by asking whether the non-lawyer would say that his or her property has been taken from them. Attention would focus on whether they have lost their control over the use of the thing itself and whether others are now free to use the thing without their consent. Accordingly, regulation would not normally be compensatable, because regulation usually leaves the owner with greater control over the thing than others.

Ackerman observed that the cases that give American courts the greatest difficulty are those that concern those interests that the ordinary person would describe as legal property. In other words, the problematic cases are those where social practices do not establish

[8] *Ibid*., p. 117.

[9] See *e.g.* Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge, Mass.: Harvard University Press, 1985), p. 75: 'No matter how the basic entitlements contained within the bundle of ownership rights are divided and no matter how many times the division takes place, all of the pieces together, and each of them individually, fall within the scope of the eminent domain clause.' For a criticism, see Margaret Jane Radin, 'The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings', (1988) 88 *Columbia Law Review* 1667, pp. 1676–8, who coins the phrase 'conceptual severance' to describe Epstein's position.

whether something is property. In practice, these fall into two categories: (1) all forms of intangible property, such as intellectual property, choses in action, social welfare benefits, and (2) interests in tangible property that fall short of full ownership, such as leasehold or communal interests in land. In the Commonwealth, all courts treat the non-lawyer's 'ordinary property' as constitutional property. In addition, the courts also treat legal property as constitutional property in at least some circumstances. While it is difficult to predict when the courts will treat legal property as constitutional property, it seems to depend on the nature of the issue before them. The first issue is the threshold question of whether the individual has property at all. While the first issue can arise in any type of property case, the second issue tends to arise only in cases involving regulation and 'partial takings'. It asks whether an interest that the state acquires as a result of regulation amounts to property.[10] The question of regulation is discussed in more detail in chapter 6; however, because it is often cast in terms of whether 'property' has been taken from the individual, it is convenient to discuss it here.

'Legal' property and property interests

A number of constitutions protect 'property', without further qualification or explanation.[11] Courts have stated that a simple reference to 'property' 'must receive the widest interpretation and must be held to refer to property of every kind',[12] including debts,[13] intellectual property,[14]

[10] Where the constitution guarantees compensation for the deprivation of property, the courts would ask whether the interest that the individual lost is property.

[11] See *e.g.* Australia, s. 51(xxxi); the Government of Ireland Act 1920, s. 5; India, Art. 31 (as amended in 1955 by the Fourth Amendment); Malaysia, Art. 13; South Africa, final Constitution, s. 25.

[12] *Madan Mohan Pathak* v. *Union of India* A.I.R. 1978 S.C. 803 at 820 *per* Bhagwati J., following Shah J. in *R. C. Cooper* v. *Union of India* [1970] 3 S.C.R. 530. See also *Smith, Kline & French* v. *Secretary, Department of Community Services and Health* (1990) 95 A.L.R. 87 (F.C. Aust.) at 134; *Manitoba Fisheries Ltd* v. *The Queen* (1978) 88 D.L.R. (3d) 462 (S.C.C.) at 466–7 (common law 'right' to property).

[13] See *e.g. Madan Mohan Pathak* v. *Union of India* A.I.R. 1978 S.C. 803; *Rao Jiwaji Rao Scindia* v. *Union of India* A.I.R. 1971 S.C. 530; *Deokinandan Prasad* v. *Bihar* A.I.R. 1971 S.C. 1409; *Georgiadis* v. *Australian and Overseas Telecommunications Corpn* (1994) 179 C.L.R. 297.

[14] *Smith, Kline & French* v. *Secretary, Department of Community Services and Health* (1990) 95 A.L.R. 87 (F.C. Aust.) (confidential information; but cf. *Re Att.-Gen. of Canada and Anti-Dumping Tribunal* (1972) 30 D.L.R. (3d) 678 (T.D.) at 696 (reversed on other grounds (1973) 39 D.L.R. (3d) 229 (C.A.), reversed on other grounds (1975) 65 D.L.R. (3d) 354 (S.C.C.) *sub nom. P.P.G. Industries Canada Ltd* v. *Att.-Gen. of Canada*) and *Smith, Kline & French Laboratories Ltd et al.* v. *Att.-Gen. of Canada* (1986) 34 D.L.R. (4th) 584 (Federal C.A.), *affirming* (1985) 24 D.L.R. (4th) 321 (Federal T.D.) *per* Strayer J. at 356 (T.D.) (patents).

business goodwill,[15] leasehold interests,[16] and restrictive covenants over land.[17] Other constitutions reflect the judicial approach by clarifying that property refers to such interests. For example, Article 31(2) of the Indian independence Constitution originally protected 'property, movable or immovable, including an interest in, or in any company owning, any commercial or industrial undertaking'. In 1955, the Fourth Amendment changed the language of Article 31(2) to a simple reference to 'property', but it was regarded as a simplification of language without a change in meaning.

The Nigerian independence Constitution states that '[n]o movable property or any interest in an immovable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily'.[18] Most Nigerian-model bills of rights contain similar wording.[19] Courts have interpreted this formula broadly: it is 'indicative and descriptive of every possible interest which a party can have'[20] and it applies to intangible interests such as debts,[21] shares in a company[22] and business goodwill.[23] Most of these bills of

[15] *Ulster Transport Authority* v. *James Brown & Sons* [1953] N.I. 79 at 109–10; *Selangor Pilot Association (1946)* v. *Government of Malaysia and Another*. [1978] A.C. 337 (P.C. Malaysia); *Manitoba Fisheries* v. *The Queen* (1978) 88 D.L.R. (3d) 462 (S.C.C.) at 466–7.

[16] *Minister of State for the Army* v. *Dalziel* (1944) 68 C.L.R. 261.

[17] *Commonwealth* v. *Tasmania* (1983) 158 C.L.R. 1 at 287 *per* Deane J.

[18] Nigeria, s. 42(1). See James Read, 'Nigeria's Constitution for 1992: The Third Republic', [1991] *Journal of African Law* 174, p. 184.

[19] See Botswana, s. 8(1); Grenada, s. 6; Guyana, s. 40(1); Barbados, s. 16(1); Belize, s. 17(1); St Christopher and Nevis, s. 8(1); Kenya, s. 75; Jamaica, s. 18(1); Namibia, Art. 16(1). Note that the definitions of property in St Vincent, s. 6(8), St Lucia, s. 6(8) and Dominica, s. 6(8), are just as broad: see p. 64, above.

[20] *Zimbabwe Township Developers (Pvt) Ltd*. v. *Lou's Shoes (Pvt) Ltd*. (1983) 2 Z.L.R. 376 (S.C.) at 384 *per* Georges C.J.; see also *Hewlett* v. *Minister of Finance and Another* [1982] 1 S.A. 490, [1981] Z.L.R. 571 (S.C.) at 583 *per* Fieldsend C.J.; *Att.-Gen.* v. *Lawrence* [1985] L.R.C. (Const.) 921 (C.A. St Christopher and Nevis); *Government of Mauritius* v. *Union Flacq Sugar Estates Co. Ltd* [1992] 1 W.L.R. 903 (P.C. Mauritius) at 911.

[21] See *e.g. Att.-Gen. of The Gambia* v. *Jobe* [1985] L.R.C. (Const.) 556 (P.C.), *Shah* v. *Att.-Gen. (No. 2)* [1970] E.A. 523 (H.C. Uganda); *Hewlett* v. *Minister of Finance and Another* [1982] 1 S.A. 490, [1981] Z.L.R. 571 (S.C.); *Société United Docks and Others* v. *Government of Mauritius; Marine Workers Union and Others* v. *Mauritius Marine Authority* [1985] 1 A.C. 585; [1985] 2 W.L.R. 114; [1985] L.R.C. (Const.) 801 (P.C. Mauritius).

[22] *Government of Mauritius* v. *Union Flacq Sugar Estates Co. Ltd* [1992] 1 W.L.R. 903 (P.C. Mauritius); *Att.-Gen.* v. *Lawrence* [1985] L.R.C. (Const.) 921 (C.A. St Christopher and Nevis); *Dwarkadas Shrinivas* v. *Sholapur Spinning and Weaving Co. Ltd* A.I.R. 1954 S.C. 119; *Chiranjit Lal* v. *Union of India* A.I.R. 1951 S.C. 41.

[23] *Société United Docks and Others* v. *Government of Mauritius; Marine Workers Union and Others* v. *Mauritius Marine Authority* [1985] 1 A.C. 585; [1985] 2 W.L.R. 114; [1985] L.R.C. (Const.) 801 (P.C. Mauritius).

rights also contain a separate introductory provision which, among other things, states that the constitution protects a right 'not to be deprived of property without compensation'. As explained in chapter 4, some courts have held that the opening provision enacts rights separately from the subsequent provisions of the bill of rights, including the right to property.[24] The use of two different descriptions of the interest that is protected suggests that the framers did not see a sharp distinction between them. In particular, it suggests that a simple reference to 'property' includes at least some types of legal property.

In South Africa, the framers of the interim and final Constitutions were concerned that a simple reference to 'property' would not extend to the interests of rural Africans in land. Due to pressure from the ANC, the interim Constitution protects 'rights in property' rather than 'property'.[25] However, the framers of the final Constitution were concerned that the 'rights in property' formulation would limit the state's power to regulate property. Accordingly, the final Constitution protects 'property'. The framers were confident that the courts would include all interests in land in their interpretation of 'property', and comparative law supports this conclusion.[26] Whether other forms of legal property are protected remains to be seen. It was argued in *Re Certification of the Constitution of the Republic of South Africa, 1996 (The First Certification Case)*[27] that the final Constitution was defective because it did not protect mineral rights or intellectual property. Since the court was only asked to determine if the final Constitution complied with the Constitutional Principles contained in Schedule 4 of the interim Constitution, it found it sufficient to declare that the Principles did not require the protection

[24] See pp. 99–101, above.

[25] See Matthew Chaskalson, 'Stumbling Towards Section 28: Negotiations over the Protection of Property Rights in the Interim Constitution', (1995) 11 *South African Journal of Human Rights* 222, p. 234. André J. van der Walt points out that the Afrikaans version of section 28 uses the phrase *regte in eiendom*, *i.e.* rights in property, rather than the term *eiendom*, 'which can refer to the object of property rights or the right itself in the sense of ownership': A. J. Van der Walt, *The Constitutional Property Clause: A Comparative Analysis of the South African Constitution of 1996* (Kenwyn, South Africa: Juta & Co. Ltd, 1997), p. 53.

[26] See *Akoonay and Another* v. *Att. Gen.* [1994] 2 L.R.C. 399 (C.A. Tanz.), discussed below, p. 152.

[27] 1996 (1) B.C.L.R. 1253. In this case, the Court refused to certify the 1996 Constitution, but in the *Second Certification Case: Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (1) B.C.L.R. 1, the Court certified the amended text. The amendments did not relate to the property clauses.

of either interest, but it left open the possibility that they might be within the meaning of 'property' in any case.

Regulation

Although compensation is not normally required for the regulation of property, courts recognise that the practical impact of regulation may be as severe as that of an outright expropriation of property.[28] Where the impact is such that a court believes that regulation should be treated as a deprivation or an acquisition of property, it can do so by holding that the state has acquired property in the thing itself. In the vast majority of cases, regulation gives state authorities powers to control the exercise of the owner's property rights. Hence, many courts determine whether regulation is compensatable by asking whether the powers that the state acquires can be described as 'property'. The state's powers and rights would not amount to the non-lawyer's ordinary property, but they would constitute legal property. Arguably, the broad view of property that generally applies to the threshold issue should also apply to the regulatory issue; indeed, a number of prominent American judges and commentators take this view.[29] In the Commonwealth, however, it appears that the courts are considerably more reluctant to regard the state's bundle of powers and rights as constitutional property.

One of the most interesting cases on regulation is *Belfast Corporation* v. *O.D. Cars Limited*,[30] where Viscount Simonds and Lord Radcliffe differed on the application of ordinary and legal views of property, although ultimately both reached the conclusion that no compensation was payable. This case arose when a Belfast landowner was refused planning permission to build lock-up shops, factories and warehouses, on the grounds that they would be incompatible with land-use regulations in force. The landowner contended that the regulations took away his right to erect the buildings on his land and thereby took his property. Admittedly, he remained the owner of the land; however, he argued that the rights taken from him also constituted a property interest. By this reasoning, the zoning regulations would have contravened section 5(1) of the Government of Ireland Act 1920, because they did not provide for compensation. This put the issue before the courts in the

[28] See *e.g. Selangor Pilot Association (1946)* v. *Government of Malaysia and Another* [1978] A.C. 337 (P.C. Malaysia) and *Manitoba Fisheries Ltd* v. *The Queen* (1978) 88 D.L.R. (3d) 462 (S.C.C.).

[29] See *e.g.* Epstein, *Takings*, p. 75 and Radin, 'Liberal Conception', pp. 1676–8.

[30] [1960] A.C. 490.

clearest possible terms, as the landowner claimed, in effect, that every right that he held over the land was itself property. The Northern Ireland Court of Appeal accepted his argument, but the House of Lords allowed the appeal. Viscount Simonds had reservations about treating every form of legal property as constitutional property, as he stressed that the right to erect the buildings, by itself, did not constitute property:

> anyone using the English language in its ordinary signification would . . . agree that 'property' is a word of very wide import, including intangible and tangible property. But he would surely deny that any one of those rights which in the aggregate constituted ownership of property could itself and by itself aptly be called 'property' and to come to the instant case, he would deny that the right to use property in a particular way was itself property.[31]

From this passage, it is not clear whether Viscount Simonds regarded 'property' as the thing itself (*i.e.* the land), or whether he regarded it is as the bundle of rights that constitute ownership in land. Nor is it clear whether he would apply the constitutional safeguards to property interests that are less than ownership (such as a leasehold interest). However, the central point is that he did not treat every right held by the owner as property, at least for the purpose of determining whether regulation is compensatable.

Unlike Viscount Simonds, Lord Radcliffe was willing to accept that a taking of property may have occurred. However, he held that the Government of Ireland Act 1920 included implied exceptions in favour of town and country planning. In other words, one might accept that a regulation of property amounts to a taking of property, even if it only affects isolated rights of property, but restrict the entitlement to compensation under specific exceptions to the right to compensation. In effect, attention shifts to justice of compensation, rather than the social perception of ownership.

The Government of Ireland Act 1920 protected against laws which 'take any property without compensation'; whether Viscount Simonds's or Lord Radcliffe's reasoning would be relevant to constitutions that protect 'rights in property' or 'interests in property' is uncertain. The confusion on this point is illustrated by two cases on the rights of

[31] *Ibid*. at 517; see also *Dwarkadas Shrinivas* v. *Sholapur Spinning and Weaving Co. Ltd* A.I.R. 1954 S.C. 119 at 136 *per* Das J. But cf. *Saghir Ahmad* v. *Uttar Pradesh* [1955] S.C.R. 707 at 728 *per* Mukherjea J.; *Smith, Kline & French Laboratories Ltd et al*. v. *Att.-Gen. of Canada* (1986) 34 D.L.R. (4th) 584 (Federal C.A.), *affirming* (1985) 24 D.L.R. (4th) 321 (Federal T.D.) at 356 *per* Strayer J. (F.T.D.).

shareholders. In *Attorney-General* v. *Lawrence* the Court of Appeal of St Christopher and Nevis held that the shareholders' right to manage the company is constitutionally protected because property includes 'concrete as well as abstract rights of property' and management is 'an important incident of property'.[32] Hence, legislation that gave the minister of finance the power to appoint the majority of directors on the board of the St Kitts/Nevis/Anguilla National Bank amounted to a taking of a shareholder's property. The second case is *Government of Mauritius* v. *Union Flacq Sugar Estates Co. Ltd*,[33] which concerned the forced dissolution of a chain of sugar companies. It was one of a number of corporate chains in which subsidiaries held controlling blocks of shares in the parent companies.[34] The Mauritian Government sought to break up this corporate chain, but without nationalising any companies or otherwise triggering the constitutional guarantees. It therefore passed legislation that barred subsidiaries from exercising the right to vote in respect of shares held in the parent company. One such subsidiary claimed that the statute deprived it of its property, in the form of the right to vote its share, and in the form of its control over its parent company. The Privy Council disagreed. Lord Templeman stated his reasons in terms similar to those of Viscount Simonds in *Belfast* v. *O.D. Cars*. According to Lord Templeman, the legislation:

> did not deprive the company or any ordinary shareholder of property or any interests in or right over property. The company and its property are unaffected by the Act. Each ordinary shareholder remains entitled to his property namely his share and the dividends and capital to which he was entitled by virtue of his shareholding before the Act came into force.[35]

Lord Templeman's statement is quite clear, but unfortunately he discussed none of the leading Commonwealth cases on the issue. *Lawrence* was cited in argument, but not in the judgment. Neither did he discuss the judgment of the Supreme Court of Mauritius in any detail, although it was overruled.

[32] [1985] L.R.C. (Const.) 921 at 930 *per* Peterkin C.J.

[33] [1992] 1 W.L.R. 903 (P.C. Mauritius). See also *Chiranjit Lal* v. *Union of India* A.I.R. 1951 S.C. 41 and *Dwarkadas Shrinivas* v. *Sholapur Spinning and Weaving Co. Ltd* A.I.R. 1954 S.C. 119.

[34] Control was also exercised through special provisions in the company's articles of association that gave one company the right to nominate directors to the board of another.

[35] [1992] 1 W.L.R. 903 at 911.

'Legal' property and 'constitutional' property

From the above, it appears that Commonwealth courts are willing to treat legal property as constitutional property in at least some circumstances, though not in all circumstances. Plainly, it would be useful to know the general criteria by which courts determine whether particular examples of legal property are constitutional property. Many courts appear to apply a 'core rights' test of property, under which they treat a bundle of rights as property if it contains either possessory or dispositive rights. There are also general tests that concentrate on the economic value of an interest as the essential characteristic of constitutional property. In this section, we examine the use of these tests.

Possession

In general, Commonwealth courts regard an interest that gives the holder the exclusive control over the object as constitutional property, even where the control is temporary.[36] However, it is not often that the courts are asked whether a bare right of possession is constitutional property. The two Commonwealth cases on this point give conflicting answers. In *D'Aguiar* v. *Attorney-General*,[37] exchange controls required owners of certain types of securities to deposit the certificates of title with authorised depositaries. The owners retained all other rights of ownership; indeed, they did not lose all possessory rights since they could have prevented anyone, except the depositaries, from gaining access to the certificates. Nevertheless, the courts held that the loss of the physical custody of the certificates amounted to a deprivation of property.[38] This case can be contrasted with *Commonwealth* v. *Tasmania*,[39] which concerned legislation that gave the Australian Government a veto over development in Tasmania's parks. Tasmania challenged the legislation on the ground that the veto was a property interest, which had been unconstitutionally acquired from it. The majority in the High

[36] See *e.g. Minister of State for the Army* v. *Dalziel* (1944) 68 C.L.R. 261 at 285 *per* Rich J., at 295 *per* McTiernan J.; *West Bengal* v. *Subodh Gopal Bose* [1954] S.C.R. 587 at 617 *per* Patanjali Sastri C.J.

[37] (1962) 4 W.I.R. 481 (S.C. British Guiana).

[38] See also *Alleyne-Forte* v. *Att.-Gen. and Another* [1997] L.R.C. 338 (P.C. T.T.): it is implicitly accepted in the judgment that the removal of a car for violation of parking regulations is a deprivation of property under section 4 of the Constitution of Trinidad and Tobago.

[39] (1983) 158 C.L.R. 1.

Court held that the veto was not a property interest.[40] The case is not directly comparable with *D'Aguiar*, since Tasmania's possession of the parks was not in dispute; however, it is similar in that both cases concern bare, negative rights over property. It is difficult, therefore, to draw any conclusions on the positions of bailees, trustees and other persons who have legal possession but only limited property rights.

It also appears that rights of access are not constitutional property unless they are exclusive. For example, in *Saghir Ahmad* v. *The State of Uttar Pradesh*,[41] Uttar Pradesh sought to give itself the monopoly on providing bus services within the state, but without going through the process of nationalising private bus companies. It did so by prohibiting private bus companies from operating on public highways within the state. One of the private companies challenged the validity of the statute on the basis that it deprived it of property, in the form of its right to access to the highway. The Supreme Court refused to treat the bare right of access to the highway as property.[42]

Commonwealth courts have also applied a kind of possessory test to intangible things. For example, although mere ideas and information are not constitutional property, the courts have stated that copyright, patents and trademarks are protected.[43] The courts have not justified this distinction in any detail; however, it is consistent with a property test based on a right to possession.[44] Plainly, the nature of control over intangible property differs from control over tangible property. Nevertheless, Kevin Gray argues that exclusive control is still a prerequisite of property but, in his analysis, control can be physical or legal.[45] For example, equitable doctrines give confidential information the quality of legal excludability that is not found with public information. This

[40] *Ibid*. at 146 *per* Mason J., at 181–2 *per* Murphy J., at 248 *per* Brennan J. However, Deane J. was prepared to find the contrary, by arguing that the veto was analogous to a restrictive covenant (at 287). However, he also stated (at 283) that there is no acquisition of property unless the veto confers 'upon the Commonwealth or another an identifiable and measurable advantage or is akin to applying the property, either totally or partially, for a purpose of the Commonwealth'.

[41] [1955] S.C.R. 707.

[42] *Ibid*. at 714–15. Despite holding that the claimant had no property in the public highway, the Supreme Court declared that the regulations were ultra vires, because they amounted to a takeover of the business of the private companies.

[43] *Smith Kline & French Laboratories Ltd et al*. v. *Att.-Gen. of Canada* (1986) 34 D.L.R. (4th) 584 (Federal C.A.), *affirming* (1985) 24 D.L.R. (4th) 321 (Federal T.D.) at 356 *per* Strayer J. (T.D.). Cf. *The First Certification Case* 1996 (1) B.C.L.R. 1253, discussed above, p. 79.

[44] Kevin Gray, 'Property in Thin Air', (1991) 50 *Cambridge Law Journal* 252, pp. 273–6.

[45] *Ibid*.

view of excludability and property is reflected in the Australian case of *Smith Kline & French* v. *Secretary, Department of Community Services and Health*,[46] where Gummow J. held that confidential information should be treated as constitutional property.[47] Australia, like most Commonwealth countries, does not provide statutory protection for confidential information; however, access to it can be controlled through contractual and equitable duties of confidence. For this reason, Gummow J. stated that it was 'appropriate to describe it as having a proprietary character'.[48] In effect, the claimant's equitable rights over use of confidential information fulfilled the same function as possessory rights over tangible property, and this was sufficient to establish that it should be property.[49]

By this analysis, virtually anything has the potential to be the object of property because it can be made 'excludable' by passing the appropriate laws.[50] Arguably, legal excludability is the consequence of deciding that a thing should be the object of property rather than the prerequisite, especially in the case of intangible property.[51] In such cases, we must ask what guides the legislature and, especially, the courts in deciding whether to give an object the quality of legal excludability. Further difficulties are raised by observing that there are some abstract interests that would qualify as property by the excludability test that are unlikely to qualify as constitutional property.[52] For example, an individual can protect his or her personal reputation by bringing actions for libel and slander, yet most common law systems do

[46] (1990) 95 A.L.R. 87 (F.C.) (and see Gray, 'Property in Thin Air', pp. 300–1). The claim was ultimately dismissed on the ground that the information was not obtained compulsorily.

[47] But cf. *Re Att.-Gen. of Canada and Anti-Dumping Tribunal* (1972) 30 D.L.R. (3d) 678 (T.D.), reversed on other grounds (1973) 39 D.L.R. (3d) 229 (C.A.), reversed on other grounds (1975) 65 D.L.R (3d) 354 (S.C.C.), *sub nom. P.P.G. Industries Canada Ltd* v. *Att.-Gen. of Canada*, regarding investigations, where it appears that it was argued that information given by witnesses was property. The trial judge (30 D.L.R. (3d) 678 at 696) stated that 'none of the witnesses were being deprived of the enjoyment of property, nor were any constitutional rights being infringed'.

[48] (1990) 95 A.L.R. 87 at 135.

[49] Whether confidential information is property for all purposes – especially in private law – is an open question. See generally Norman Palmer and Paul Kohler, 'Information as Property', in Norman Palmer and Ewan McKendrick (eds.), *Interests in Goods* (London: Lloyd's of London Press Ltd., 1993), pp. 187–206.

[50] See A. M. Honoré, 'Ownership', in A. G. Guest (ed.), *Oxford Essays in Jurisprudence* (London: Oxford University Press, 1961), p. 130.

[51] Gray, 'Property in Thin Air', pp. 292–5.

[52] Grey, 'Disintegration', pp. 71–2.

not treat reputation as a property right. Possibly, if personal reputation were transferable, it might be characterised as a property interest. Indeed, business reputation in the form of goodwill is transferable, and it is treated as property.[53] This suggests that excludability alone is not always sufficient to qualify an interest as constitutional property.

Gray argues that no property is recognised where conferring rights of exclusive control would be 'morally or socially undesirable'.[54] Exclusive control is undesirable if the resources in question 'are essentially concerned with the furtherance of constructive interaction, purposive dialogue and decent (or ''moral'') communal living'.[55] This includes resources that are necessary for the exercise of human rights such as freedom of speech, belief, association, assembly and movement.[56] So, for example, property should not be recognised in the use of words that are common in ordinary speech.[57] Even where property is recognised, it should be limited by the human rights of others; for example, most legal systems prohibit owners of facilities that are open to the public to restrict entry because of race. Gray's argument leads to a communitarian conception of property, where property includes both rights and obligations. The communitarian conception is discussed further below; at this point, it is clear that the common understanding of property as exclusive control leads into ethical theories that regard possession as the foundation of property. Although most courts avoid detailed discussions of ethical theories, one can see aspects of the theories of Hegel and Locke in some judgments.

Hegel bases his theory on the development of the personality.[58] He begins with an abstract conception of the person as a self-conscious, abstract and free will. A person exists in the real world by putting its will into material objects, including its own body and mind. By this act of projection, it lays claim to property in the external world and it distinguishes itself from other persons. Its property in material things is its concrete qualities and attributes; in this sense, the totality of its

[53] See cases cited above, n. 15.
[54] Gray, 'Property in Thin Air', p. 281.
[55] *Ibid*.; see also Kevin Gray, 'Equitable Property', (1994) 47(2) *Current Legal Problems* 157.
[56] Gray, 'Property in Thin Air'.
[57] Gray, *ibid*., gives the example of *Davis* v. *Commonwealth of Australia* (1988) 166 C.L.R. 79.
[58] Georg W. F. Hegel, *Philosophy of Right*, trans. Thomas Malcolm Knox (Oxford: Clarendon Press, 1942), §§ 1–70 (on acquiring property see, in particular, §§ 41–58). For general discussions of Hegel's theory of property, see Margaret Jane Radin, 'Property and Personhood', (1982) 34 *Stanford Law Review* 957 and Peter G. Stillman, 'Hegel's Analysis of Property in the *Philosophy of Right*', (1989) 10 *Cardozo Law Review* 1030.

property identifies it to others as a unique individual. Property embodies the personality, and so making claims to external things is part of the development of a personality, and recognising the claims of others recognises their existence.[59] In this sense, property is part of personality; taking property takes part of the owner's personality.[60] We observe this when we acknowledge that theft affects the victim not only in an economic manner, but also in a very real psychological manner.[61]

The idea of putting the will into things appears to be highly abstract; however, Hegel describes it as simply the act of 'occupying' the thing. A person occupies a thing by grasping, forming or marking it so that others may recognise it as his or her property.[62] As such, occupancy comes fairly close to the test for first possession traditionally used by common law courts. The connections Hegel makes between personality and property respond to the concern with human rights that should come into the analysis of constitutional property. In a general sense, he provides some justification for limiting constitutional protection to those interests that are more closely identified with the personality of the holder. This partly explains the judicial willingness to include interests in land short of ownership as constitutional property, since these interests are often as closely identified with personality (and particularly with security) as an ownership interest.[63]

John Locke's justification for property begins from the position that every individual is entitled to self-ownership and that all external things are initially held in common ownership. Individuals acquire private property in external things by mixing their labour with the thing; the product of the labour becomes their property. For Locke, '[E]very man has a *Property* in his own *Person* . . . The *Labour* of his body,

[59] Hegel, *Philosophy of Right*, § 40: 'it is only as owners that . . . two persons exist for each other'.

[60] Hence, not all property is alienable. In particular, no person can alienate their own body and mind, for they cannot withdraw their will from their own body and mind: Hegel, *ibid*., §§ 65–6, and see also Stillman, 'Hegel's Analysis', p. 1040; Margaret Jane Radin, 'Market-Inalienability', (1987) 100 *Harvard Law Review* 1849.

[61] See also Radin, 'Property and Personhood', p. 977: the idea that the will is embodied in things suggests that the relationships that a person has with the things she regards as her own 'can be very close to a person's center and sanity'.

[62] Hegel, *Philosophy of Right*, §§ 51–8.

[63] See Radin, 'Property and Personhood' and 'Market-Inalienability'. See also van der Walt, *Constitutional Property Clause*, p. 49, on the expression of similar ideas in the German constitutional law of property.

and the *Work* of his hands, we may say, are properly his.'[64] Accordingly, one cannot appropriate things for private property merely by taking physical possession of them; labour must be put into the thing.

Some Commonwealth judgments reflect Locke's ideas on property. By way of example, consider *Smith Kline*, where property was claimed in confidential information.[65] Although Gummow J. did not refer to Locke's theory, judges in comparable American cases raise the point that trade secrets are the product of labour and skill and, as such, deserve constitutional protection as property.[66] A second example is *Akoonay and Another* v. *Attorney-General*,[67] which concerned a claim that the extinction of customary rights of occupation of land violated the Tanzanian Constitution. The court suggested that the extinction of the customary right would not require compensation if no labour had been expended to improve the land. The court relied on principles stated by Julius Nyerere in 1958, which bear a close similarity with Locke's theory:

> When I use my energy and talent to clear a piece of ground for my use it is clear that I am trying to transform this basic gift from God so that it can satisfy a human need. It is true, however, that this land is not mine, but the efforts made by me in clearing the land enable me to lay claim of ownership over the cleared piece of land. But it is not really the land itself that belongs to me but only the cleared ground which will remain mine as long as I continue to work it. By clearing that ground I have actually added to its value and have enabled it to be used to satisfy a human need. Whoever then takes this piece of ground must pay me for adding value to it through clearing it by my own labour.[68]

At one level, therefore, the labour theory seems to strike many people as both fair and economically sound. However, it is doubtful that it could be applied in any rigorous fashion, as it raises as many questions as it answers. A number of writers point out that Locke used his theory to support the European seizure of lands occupied by aboriginal peoples

[64] John Locke, *Two Treatises of Government*, ed. with an introduction and notes by Peter Laslett (Cambridge: Cambridge University Press, 1988), pp. 307–8 (emphasis in original).

[65] See p. 130, above.

[66] See *e.g. Ruckelshaus* v. *Monsanto* 467 U.S. 986 (1984) at 1002–3.

[67] [1994] 2 L.R.C. 399.

[68] Printed in Julius K. Nyerere, *Freedom and Unity* (London and Nairobi: Oxford University Press, 1967), pp. 53–4, quoted in *Akoonay*, [1994] 2 L.R.C. 399 at 409. See Moses Kaunda, 'Ownership of Property Rights in Land in the First Two Republics of Zambia: An Evaluation of Restrictions on Free Alienation and Some Lessons for the Future', (1989–92) 21–4 *Zambia Law Journal* 61, on the application of similar principles in Zambia.

in North America.[69] Locke argued that indigenous people did not appropriate land unless they improved it, and only cultivation improved land. According to Locke, most indigenous peoples lived by hunting and gathering and, therefore, they had no claim to property in the land. This reasoning was controversial at the time and has been discredited by modern writers and courts (although not, it would seem, by Nyerere).[70] This illustrates the central difficulty of Locke's theory: without a clear sense of what it is that makes labour deserve reward, we are left with a test for property that may prove as unfair in some situations as it is fair in others.

Transferability

When an interest includes both the right to possession and to transfer the object, the courts usually conclude that the interest is constitutionally protected as property. Indeed, many courts ignore the question of possession, and treat transferability itself as sufficient to establish property. For example, in *Dwarkadas Shrinivas* v. *Sholapur Spinning and Weaving Co. Ltd*, a case on regulatory takings, Das J. stated that a shareholder's rights to elect directors and to apply for a winding up were not property because 'apart from the shares, none of them can be acquired or disposed of'.[71] Similar logic appears in *Ackerman* v. *Nova Scotia*,[72] where the Supreme Court of Nova Scotia decided that certain milk quotas were property, on the basis that quotas were accepted by lending authorities as security, sold on the open market and at auction, and were also treated as property under bankruptcy. Other examples can be found in other Commonwealth jurisdictions, where the courts have held that driving licences,[73] pilots' licences[74] and

[69] See *e.g.* James Tully, 'Aboriginal Property and Western Theory: Recovering a Middle Ground', in Ellen Frankel Paul, Fred D. Miller, Jr and Jeffrey Paul (eds.), *Property Rights* (Cambridge: Cambridge University Press, 1994), pp. 153–80; Carol Rose, 'Possession as the Origin of Property', (1985) 52 *University of Chicago Law Review* 73, pp. 85–8.

[70] See Tully, 'Aboriginal Property'. Cf. *Mabo* v. *Queensland (No. 2)* (1992) 175 C.L.R. 1.

[71] A.I.R. 1954 S.C. 119 at 136. See also *Government of Mauritius* v. *Union Flacq Sugar Estates Co. Ltd* [1992] 1 W.L.R. 903 (P.C. Mauritius).

[72] (1988) 47 D.L.R. (4th) 681 (the milk quotas gave the holder the right to sell a specified quantity of milk). See *contra Sanders* v. *British Columbia (Milk Board)* (1991) 77 D.L.R. (4th) 603, where the British Columbia Court of Appeal held that no property was taken when milk quotas were taken, because 'In essence, it [the quota] was a revokable licence' (at 609; note that these cases were decided under the common law 'right' to property).

[73] *Bahadur* v. *Att.-Gen.* [1989] L.R.C. (Const.) 632 (C.A. T.T.).

[74] See *Selangor Pilot Association (1946)* v. *Government of Malaysia and Another* [1978] A.C. 337 (P.C. Malaysia).

occupations[75] are not property because they are not transferable. From these cases, it might appear that only alienable interests are treated as property. However, there are cases where Indian and Zimbabwean courts decided that certain governmental obligations to make payments to individuals were property, although the individuals did not have the right to transfer or assign the payments to others.[76] It is probably more accurate to say that most courts treat transferability as a strong but not conclusive indication that the interest is property.[77]

An American lawyer, William Stoebuck, argues that only transferable interests are protected under the Fifth Amendment of the United States Constitution.[78] Stoebuck observes that the Fifth Amendment is written as a protection against the 'taking' of property; from this, he concludes that only property that is capable of being taken is property under the Fifth Amendment. His argument is based primarily on the literal meaning of 'taking of property', but he also argues that historic evidence shows that the Fifth Amendment deals only with the power to force a sale of property to the state. He therefore concludes that 'no act of eminent domain occurs unless there is a transfer to the government and unless the transfer is of an interest such as an owner might transfer to a private person'.[79] Hence, ' "property" in eminent domain means every species of interest in land and things of a kind that an owner might transfer to another private person'.[80] While non-transferable

[75] See *e.g.*: *King* v. *Att.-Gen. of Barbados* [1994] 1 L.R.C. 164 (P.C. and C.A. Barbados); *Harrikisson* v. *Att.-Gen.* [1980] A.C. 265 (P.C. T.T.); *Rajasthan* v. *Union of India* A.I.R. 1977 S.C. 1361; cf. *Transkei Public Servants Association* v. *Government of the Republic of South Africa and Others* [1996] 1 L.R.C. 118 (S.C.) at 130. See also *Sumayyah Mohammed* v. *Moraine and Another* [1996] 3 L.R.C. 475 (H.C. T.T.) at 502: access to state schools is not a right of property. But cf. *Subramanien v. Government of Mauritius* [1995] 4 L.R.C. 320 (P.C.): ex-contractual entitlements of teachers were not property, but it seems to have been assumed that their contractual entitlements would have been property.

[76] *Madhav Rao Scindia* v. *Union of India* A.I.R. 1971 S.C. 530; *Hewlett* v. *Minister of Finance and Another* [1982] 1 S.A. 490; [1981] Z.L.R. 571 (S.C.).

[77] See *e.g. Australian Capital Television Pty Limited and Others and the State Of New South Wales* v. *The Commonwealth Of Australia and Another* (1992) 177 C.L.R. 106 at 165–6 *per* Brennan J.: assignability is not necessary for property although its absence suggests that there is no property under section 51(xxxi) of the Constitution.

[78] William B. Stoebuck, 'A General Theory of Eminent Domain', (1972) 47 *Washington Law Review* 553, and 'Police Power, Takings and Due Process', (1980) 37 *Washington and Lee Law Review* 1057. See also A. J. Harding, 'Property Rights under the Malaysian Constitution', in F. A. Trindade and H. P. Lee (eds.), *The Constitution of Malaysia: Further Perspectives and Developments* (Singapore: Oxford University Press, 1986), p. 66: 'property is that which can be bought and sold'.

[79] Stoebuck, 'General Theory', p. 605.

[80] *Ibid*., p. 606.

interests might be considered property in other contexts, they cannot be considered property in the context of the Fifth Amendment.

Stoebuck's analysis of the language of the right to property is similar to the argument the Indian Supreme Court initially gave for limiting property to transferable interests. In *State of West Bengal* v. *Subodh Gopal Bose*, Jagannadhadas J. stated that 'in a wide sense, property connotes not only a concrete thing – corporeal or incorporeal – but all the bundle of rights which constitute the ownership thereof and probably also each individual right out of the bundle in relation to such ownership'.[81] However, where the constitutionality of an alleged acquisition is concerned, property is limited to rights that can be acquired or taken possession of. This excludes 'a bare individual right, out of the bundle of rights which go to make up property as being itself property . . . unless such individual right is in itself recognised by law as property or as an interest in property . . . capable of distinctive acquisition or possession'.[82] Indirectly, this raises one of the difficulties in Stoebuck's theory. Although Stoebuck states that property must be transferable, he defines 'transfer' so broadly that it goes beyond any legal right of transfer; it is closer to enrichment, in that a transfer occurs if the owner is deprived of property rights and the state receives a benefit as a result.[83] The courts should not therefore ask if the interest is transferable, but merely if the state would benefit by depriving the individual of property. As such, this is more concerned with the meaning of 'taking' than the meaning of 'property'.

There is an argument based on economic efficiency that provides further support for limiting constitutional property to transferable interests.[84] In economic terms, firms can only increase their wealth through exchanges. Exchanges are either voluntary or forced; in turn, forced exchanges are either lawful (as in expropriation) or unlawful (as in theft). Firms stand to gain by lobbying the state to use its power over property to force exchanges that benefit the firm. For example,

[81] *West Bengal* v. *Subodh Gopal Bose* [1954] S.C.R. 587 at 672–3.

[82] *Ibid*. at 673. See also *Madan Mohan Pathak* v. *Union of India* A.I.R. 1978 S.C. 803 at 820 *per* Bhagwati J.

[83] Stoebuck, 'Police Power', pp. 1091–3. Cf. Radin, 'Market-Inalienability', pp. 1849–52; see also Gerald F. Gaus, 'Property, Rights and Freedom', in Ellen Frankel Paul, Fred D. Miller, Jr and Jeffrey Paul (eds.), *Property Rights* (Cambridge: Cambridge University Press, 1994), pp. 214–20.

[84] See *e.g.* Richard Posner, *Economic Analysis of Law*, 3rd edn (Boston: Little, Brown, 1986); Jonathon R. Macey, 'Property Rights, Innovation, and Constitutional Structure', in Paul, Miller and Paul (eds.), *Property Rights*, pp. 183–90.

they may lobby governments to confer powers of expropriation upon them, thereby allowing them to bypass the higher costs of voluntary acquisitions of property. This leads to economic inefficiency, as it diverts private resources from productive investment to wasteful lobbying. Moreover, it leads governments to order their priorities on potentially inefficient grounds. Since a constitutional right to property limits the power of the state to engage in forced exchanges, it limits the incentive for firms to lobby the state to exercise its power on its behalf.

This argument is usually put forward to justify making anything of value transferable.[85] Jonathon Macey argues that it also works in the opposite direction, by clarifying what it is that the constitution protects. According to Macey, the aggregate economic benefit of the right to property would be maximised if property applied to those things that have 'real or potential value in voluntary exchange'.[86] This suggests that, if economic efficiency is one purpose of the right of property, transferability should be sufficient to establish that a resource is constitutionally protected as property. This makes transferability one of the prerequisites of property, and not merely a consequence.

Although Macey's economic argument is not the type of argument that Commonwealth courts usually make, it can also be framed as a structural argument, which puts it a little closer to the Commonwealth forms of argument. As explained in chapter 4, structural arguments concentrate on the effectiveness of political institutions.[87] The function of fundamental rights is therefore to ensure that individuals can participate in the democratic process. Lobbying, from this perspective, is not merely economically inefficient; it also represents an improper form of participation in the political process. Accordingly, there is a valid structural reason for reducing the incentive for improper participation. Since there is no reason for a firm to lobby for resources that cannot be transferred to it in any event, there is no reason to require compensation for government action that reduces the value of those resources.

Even in this form, Macey's argument is difficult to reconcile with the conceptions of property and transferability that Commonwealth judges use most frequently. As discussed in chapter 6, this reflects the different

[85] See Radin's discussion of John Stuart Mill's argument that alienability is inherent in the concept of private property: Radin, 'Market-Inalienability', pp. 1888–91.

[86] Macey, 'Property Rights', p. 183.

[87] See pp. 105–8, above.

views of the judiciary on the formality of defining acquisitions in relation to intangible property such as state debts.[88] Regulations that restrict one person's rights may confer a benefit upon another, without any direct transfer of property rights or wealth. In addition, it seems possible that property owners would lobby to protect non-transferable property from restrictions on use and other rights as much as they would seek to protect their transferable property. This is illustrated by *Saghir Ahmad* v. *State of Uttar Pradesh*: the right to use the public highways was not a transferable right, but the bus companies had a powerful reason for lobbying against restrictions on their use of the highways.[89] If, as Macey argues, the purpose of the right to property is the elimination of wasteful lobbying, the Supreme Court should have treated the right to use the highways as property. Commonwealth courts are aware that the cancellation of non-transferable rights can indirectly lead to the transfer of a business to others, and in some cases they do treat the cancellation as a deprivation of property. However, they do not normally characterise the rights that are actually taken as property, but recognise that the state has benefited in a way that should require it to compensate the individual. Indeed, this was the approach in *Saghir Ahmad*: although the right to use the highway was not property, the Court held that the prohibition on using the highways was intended to secure the benefit of a monopoly for the state and, in effect, to obtain the business of the bus companies without providing compensation.

Despite these difficulties, there are parallels between Macey's argument and the argument made by Joseph Sax in his 1964 article, 'Takings and the Police Power'.[90] Sax's article is discussed in greater detail in chapter 6; briefly, he argues that only acquisitions of property should be compensatable, because acquisitions raise the greatest risk of corruption and arbitrary action by state officials. In very general terms, both Macey's and Sax's positions can be compared with the private law rule barring fiduciaries from profiting from their position, as the state's sovereign powers over property are roughly analogous to the powers of a fiduciary over property of the beneficiary or principal. Sax seeks to reduce the risk of misconduct by the state/fiduciary; Macey seeks to reduce the risk of improper influence by third parties on the state/fiduciary. From this perspective, Sax's approach seems clearer, as Macey

[88] See pp. 163–71, below.
[89] [1955] S.C.R. 707, discussed above, p. 129.
[90] (1964) 74 *Yale Law Journal* 36. Discussed below, pp. 173–9.

seems to concentrate on only one aspect of the general problem of corrupt or arbitrary state action.

Wealth as property: the economic value of rights

Another method of determining whether an interest is property focuses on the value of the interest. While it is clear that wealth and property are closely related, it is also clear that there is a distinction between wealth and both the ordinary and legal meanings of property.[91] Nevertheless, the courts have eroded the traditional distinction between property and wealth in cases involving regulatory takings. Since property is often held for its economic value, some courts determine whether a given regulation is a taking by examining its effect on value of the property. In doing so, they follow the dicta of Justice Oliver Wendell Holmes in the leading American case, *Pennsylvania Coal Co*. v. *Mahon*:[92]

> Government hardly could go on if to some extent values incident to property could be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.[93]

Holmes recognised that earlier cases suggested that regulation could strip property of value without giving rise to a right to compensation. However, he stated that, in some of these cases, property owners

[91] There are specific situations where statutes treat 'property' as any form of wealth. For example, marital property regimes in some countries allow the courts to adjust the couple's economic worth by ordering one party to make a money payment to the other. Some of these regimes set out fairly precise formulae for calculating the amount of the payment. Each party can be required to disclose their net worth, and this requires them to disclose all their 'property'. Under these regimes, it makes sense to treat present and future earning potential as 'property'; accordingly, some jurisdictions treat university degrees, professional qualifications or even work experience as 'property'. See generally R. G. Hammond, *Personal Property: Commentary and Materials*, revised edn (Oxford: Oxford University Press, 1992), ch. 2.

[92] 260 U.S. 393 (1922). For a detailed analysis of *Pennsylvania Coal Co*. v. *Mahon*, see William A. Fischel, *Regulatory Takings: Law, Economics, and Politics* (Cambridge, Mass. and London: Harvard University Press, 1995), ch. 1; Lawrence M. Friedman, 'A Search for Seizure: *Pennsylvania Coal Co*. v. *Mahon* in Context', (1986) 4 *Law and History Review* 1; Carol Rose, '*Mahon* Reconstructed: Why the Takings Issue is still a Muddle', (1984) 57 *Southern California Law Review* 561.

[93] 260 U.S. 393 (1922) at 413.

received a 'reciprocal advantage' from regulation and hence they did receive compensation. In other cases, the private loss was greatly outweighed by the public interest, and any remaining cases could be explained by tradition.[94] Nevertheless, these cases are exceptions: '[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking'.[95]

Holmes did not seek to lay down a precise formula; he stated only that regulation would be treated as a taking when the diminution of value 'reaches a certain magnitude'.[96] American courts have approved of the diminution of value test but declined to specify a proportion of value that must be lost for a taking to occur.[97] Many Commonwealth courts also approve of the test, but have had difficulty deciding when the diminution of value crosses the threshold of compensatability.[98] Some courts seem to require the diminution to be complete; for example, in *Manitoba Fisheries* v. *The Queen*, Ritchie J. indicated that only an 'obliteration of the appellant's entire business' would be compensatable.[99] By contrast, in *La Compagnie Sucrière de Bel Ombre Ltee* v. *The Government of Mauritius*, the Privy Council stated that it was not

[94] *Ibid*. at 415–16. [95] *Ibid*. at 415. [96] *Ibid*. at 413.

[97] The Supreme Court seems unwilling to treat anything except an almost total loss of value as a taking, but apparently state courts are more lenient. *Lucas* v. *South Carolina Coastal Council* 112 S.Ct. 2886 (1992) is regarded as making the doctrine more generous to property owners, but the diminution of value was almost complete in any case (see William W. Fisher, III, 'The Trouble with *Lucas*', (1993) 45 *Stanford Law Review* 1393 and Richard J. Lazarus, 'Putting the Correct "Spin" on *Lucas*', (1993) 45 *Stanford Law Review* 1411).

[98] Leading cases where it has been discussed are: *Belfast Corpn* v. *O.D. Cars Ltd* [1960] A.C. 490 at 519 *per* Viscount Simonds; *Selangor Pilot Association (1946)* v. *Government of Malaysia and Another* [1978] A.C. 337 (P.C. Malaysia) at 358 *per* Lord Salmon (diss.); *Revere Jamaica Alumina Ltd*. v. *Att.-Gen.* (1977) 26 W.I.R. 486 (S.C. Jam.) at 497; *West Bengal* v. *Subodh Gopal Bose* [1954] S.C.R. 587 at 618 *per* Patanjali Sastri C.J.; *La Compagnie Sucrière de Bel Ombre Ltee* v. *The Government of Mauritius* [1995] 3 L.R.C. 494 (P.C.) at 502–6. Some Commonwealth judges have doubted the relevance of the test: see *e.g.* the dissenting judgments of Dawson and Toohey JJ. in *Mutual Pools and Staff Pty Ltd* v. *The Commonwealth of Australia* (1994) 179 C.L.R. 155 and *Georgiadis* v. *Australian and Overseas Telecommunications Corpn* (1994) 179 C.L.R. 297. Article 23 of the Cyprus Constitution incorporates a dimunition of value test. It guarantees the 'right to acquire, own, possess, enjoy or dispose of any movable or immovable property' (Art. 23(1)) and allows restrictions on such rights only for certain purposes (Art. 23(2)), and also provides that '[j]ust compensation shall be promptly paid for any such restrictions or limitations which materially decrease the economic value of such property' (Art. 23(3)). Compensation for compulsory acquisition is guaranteed separately (Art. 23(4)).

[99] (1978) 88 D.L.R. (3d) 462 (S.C.C.) at 471.

necessary to reduce a business to a 'valueless shell'.[100] The application of the diminution of value test to regulations that only affect some assets of a business or other resource is also uncertain. For example, in *Manitoba Fisheries*, while the court required a complete loss of value, it only applied the test to the value of the company's goodwill and not to the value of the business as a whole.[101]

At present, no Commonwealth court has set out a precise test for determining when the severed rights or values carry enough weight to require compensation. The absence of a precise test could be attributed to the relatively small number of cases on point from any one jurisdiction in the Commonwealth, but it is more realistic to attribute it to the nature of the problem. American courts have produced an extensive body of cases on when regulation and other forms of state interference 'go too far', but whether they have achieved any measure of precision is doubtful.[102] Every attempt to delineate a clear difference between compensatable and non-compensatable interference seems to create as much confusion and uncertainty as it resolves. The Supreme Court has come close to abandoning the quest for a workable and broadly applicable test, by stating that it prefers to apply an *ad hoc*, case-by-case approach to the issue.[103] It seems that the Court has decided that it is not worthwhile or maybe not even possible to describe when regulation 'goes too far' more specifically than this.

Even when Commonwealth courts use the diminution of value test, they do so in a limited way. While it assists in determining whether rights lost due to regulation are important enough to constitute property, it does not assist in determining whether an economically

[100] [1995] 3 L.R.C. 494 (P.C.) at 506.

[101] (1978) 88 D.L.R. (3d) 462. See also *Selangor Pilot Association (1946)* v. *Government of Malaysia and Another* [1978] A.C. 337 (P.C. Malaysia); *Saghir Ahmad* v. *Uttar Pradesh* [1955] S.C.R. 707; *R. C. Cooper* v. *Union of India* [1970] 3 S.C.R. 530; cf. *Société United Docks and Others* v. *Government of Mauritius; Marine Workers Union and Others* v. *Mauritius Marine Authority* [1985] 1 A.C. 585; [1985] 2 W.L.R. 114; [1985] L.R.C. (Const.) 801 (P.C. Mauritius). American commentators have noted that the same issue arises and remains unresolved in their cases. See Frank I. Michelman, 'Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law', (1967) 80 *Harvard Law Review* 1165, pp. 1192, 1232–3; Rose, '*Mahon* Reconstructed', pp. 566–9.

[102] See *e.g.* the differences between the majority and dissenting opinions in *Lucas* v. *South Carolina Coastal Council* 112 S.Ct. 2886 (1992).

[103] See *Penn Central Transportation Co.* v. *New York City* 438 U.S. 104 (1978) at 124 and *Goldblatt* v. *Hempstead* 369 U.S. 590 (1962) at 594. Justice Scalia's attempt to resolve some of the confusion, in *Lucas* v. *South Carolina Coastal Council* 112 S.Ct. 2886 (1992), has not persuaded many of the commentators: see *e.g.* Fisher, 'The Trouble with *Lucas*' and Lazarus, 'Putting the Correct "Spin" on *Lucas*'.

valuable interest is constitutional property. For example, in *British Medical Association* v. *The Commonwealth*, Dixon J. emphasised that the protection given by the constitution 'is a protection to property and not to the general commercial and economic position occupied by traders'.[104] Similarly, the Supreme Court of Canada held that requiring firms to devote some of their labour to collecting taxes does not take their property, although it certainly reduces their profits.[105] By the same sort of reasoning, the courts have also concluded that offices and occupations are not property, despite their economic importance to the holder.[106]

As a related point, inchoate rights and mere expectancies are not treated as property, although they may have economic value. Several Canadian and American cases consider legislation that imposed upper limits on damages payable for nuclear accidents. The applicants argued that they were deprived of property, but the courts held that there can be no property in a potential claim for damages before the accident itself.[107] Property would exist only if the statute purported to reduce an outstanding award of damages.[108] Similarly, the courts are unlikely to regard an interest as property where its existence or extent depends on the discretion of another person. Hence, ex-contractual benefits received by employees from their employers were not treated as property by the Privy Council in *Subramanien* v. *Government of Mauritius*.[109] By this reasoning, a beneficial interest in a wholly discretionary trust is not property, although it may represent an important source of economic

[104] (1949) 79 C.L.R. 201 at 270–1. See also *R.* v. *Les Pêcheries Alfo Ltee* (1983) 46 N.B.R. (2d) 361 (Prov. Ct).

[105] *Reference Re: Goods and Services Tax* (1992) 94 D.L.R. (4th) 51.

[106] See the cases cited above, n. 75 . However, if an office includes rights in specific things, there is an argument that the rights should be treated as property rights. For example, there have been a series of Indian cases in which offices relating to the administration of temples, charities and similar religious institutions have been held to be property, on the basis that the holder had a personal and beneficial interest in the corpus or usufruct of the institution's estate. See *Kakinada Annadana Samajam* v. *Commissioner of Hindu Religious & Charitable Endowments, Hyderabad and Others* A.I.R. 1971 S.C. 891; *Tilkayat Shri Govindlalji* v. *Rajasthan* (1964) 1 S.C.R. 561; A.I.R. 1963 S.C. 1638, and the cases cited therein.

[107] *Energy Probe et al.* v. *Att.-Gen. of Canada* (1989) 58 D.L.R. (4th) 513; *Duke Power Co.* v. *Carolina Environmental Study Group Inc.* 438 U.S. 59 (1978).

[108] See *Hewlett* v. *Minister of Finance and Another* [1982] 1 S.A. 490; [1981] Z.L.R. 571 (S.C.) (discussed below, pp. 155–6); cf. *Rao Jiwaji Rao Scindia* v. *Union of India* A.I.R. 1971 S.C. 530 where the court stated that an obligation to make a payment is not property if it not yet due, or due but not yet ascertained or admitted.

[109] [1995] 4 L.R.C. 320 (P.C. Mauritius).

wealth to the holder.[110] Furthermore, property does not exist unless the things that are the object of the property rights are defined with reasonable certainty. This general principle is reflected in a number of areas of private law: under English law, a buyer of goods cannot acquire property to the goods before they are ascertained[111] and a trust cannot come into being unless the trust property is defined with reasonable certainty.[112] The courts have not considered the importance of certainty or discretion in the constitutional context. However, the emphasis that they have put on the rights to possess and transfer suggests that they would not consider these interests to be property.

Possession and transferability as liberal values

The emphasis on rights of possession and transfer reflects the liberal constitutional theory of most Commonwealth judges. Liberal theorists regard the constitution's purpose as the preservation of an area of individual choice in the face of governmental coercion. Property is part of this protected area of individual choice, and hence the liberal theory of the constitutional right to property describes property in terms of rights held by individuals.

The communitarian theory of property challenges the liberal theory by integrating rights and obligations in the conception of property. It has been argued that communitarian ideas held sway before the rise of liberal theory, and that older ideas of property regarded it as an essential element in the construction and maintenance of the social order. This is certainly apparent in feudal societies, but even through to the eighteenth century there was a strong belief that the distribution of property should ensure that each person had the resources 'needed to do one's part in keeping good order'.[113] While property clearly secured individual wealth, it also involved social obligations. The powers associated with property were held on a kind of trust, under which the holder could not act in an entirely self-interested manner.

The idea that property involves duties is reflected in a number of different doctrines. The common law of property has long recognised

[110] *Gartside* v. *IRC* [1968] A.C. 553.

[111] Sale of Goods Act 1893, s. 16 (U.K.), since adopted in various forms in most common law jurisdictions (the U.K. provision is now found in the Sale of Goods Act 1979, s. 16; see also s. 20A).

[112] *Knight* v. *Knight* (1840) 3 Beav. 148 at 173.

[113] Carol M. Rose, *Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership* (Boulder and Oxford: Westview Press, 1994), p. 59.

that the rights of ownership do not include a right of harmful use. A. T. Honoré treats these limitations on harmful use as an essential part of conception of ownership rather than something external to ownership.[114] Hence, regulation of harmful use, whether by the common law of nuisance or by its modern statutory equivalents (or extensions), should not be considered a deprivation of some of the rights of ownership, because the owner cannot hold absolute rights of enjoyment or use.[115] Although these limitations are important, they are restricted in scope, for they are concerned only with the use of property. They do not limit the owner's power to exclude others or to transfer it as he or she sees fit. However, the limitations on harmful use do not capture fully the extent to which ownership includes both rights and obligations. While the common law of property emphasises the owner's rights (subject to limitations on harmful use), equity emphasises the owner's obligations.[116] As in the case of the restrictions on harmful use, equity is part of the law of ownership, and an equitable restriction on the rights of a legal owner is not regarded as a deprivation of property within the terms of the right to property.[117]

Kevin Gray argues that a new, communitarian equity should develop to regulate the exercise of legal property rights:

> The new equity seeks exactly what the old equity achieved, and aims to engraft a different or corrective image of entitlement on to pre-existing legal estates. As always equity operates in response to demands of conscience, the sole difference being that the doctrinal force which drives equity here is more palpably the conscience of *community*.[118]

The integration of law and equity in the conception of property is crucial to the way in which the right to property is approached, because it suggests that regulation that goes beyond the prevention of nuisance-like activity need not be treated as a deprivation of property. The conscience of community is part of ownership rather than something outside ownership.[119]

[114] Honoré, 'Ownership', p. 123.

[115] See *e.g. Belfast Corpn* v. *O.D. Cars Ltd* [1960] A.C. 490 at 518 *per* Viscount Simonds.

[116] See generally Gray, 'Equitable Property'.

[117] *E.g.* imposition of a constructive trust would not be regarded as a compensatable deprivation of property.

[118] Gray, 'Equitable Property', p. 207.

[119] While the separate existence of courts of equity is only found in the common law system, the idea of inherent, socially determined obligations or limitations on property is part of the constitutional law of civilian countries. The clearest example is the German law of social property. See also van der Walt, *Constitutional Property Clause*,

Gray also observes that equity has always challenged the notion that property entitlements are rigid or static.[120] In constitutional law, there is the risk that any alteration of a legal right of property may lead to a claim that a deprivation of property has occurred. Gray also questions this claim:

> [T]here is nevertheless nothing quite so dangerous as a vested right, since *any* subsequent contraction of its scope – however justified – inevitably appears as unlawful deprivation . . . There is, accordingly, a need for constant reminder that the operation of equitable property is distributive rather than *re*distributive. The claims of civic property endorsed by the new equity comprise merely the assertion of latent human entitlements which have long been submerged by superficial allocations of formal title.[121]

Whether a judicial interpretation of a constitutional right to property can reflect liberal values of property alone and retain legitimacy is open to question. The conflict between the Indian Supreme Court and Parliament is attributable, in part, to the differences between the Supreme Court's liberal vision of property and Parliament's socialist vision. In an earlier period, the United States Supreme Court's defence of liberalism in the *Lochner* era also brought conflict with other branches of government, and the Privy Council's decisions regarding Canadian legislation intended to address the economic crisis of the Depression probably hastened the end of its jurisdiction over Canadian appeals.[122] Indeed, the fear of similar developments eventually resulted in the omission of a right to property from the Canadian Charter of Rights and

ch. 2, on the expression of similar ideas in the German constitutional law of property. It has also been argued that ethical values in many parts of the Commonwealth are closer to communitarianism than liberalism: see the discussion of *ubuntu*, above pp. 110–12, and see also Rajeev Dhavan, *The Supreme Court of India: A Socio-legal Analysis of its Juristic Techniques* (Bombay: N. M. Tripathi Pvt Ltd, 1977), p. 140, where he criticises the Supreme Court in the period leading up to the fundamental rights cases for failing to acknowledge the Indian conception of property, which 'works on the assumption that the rights of an owner have to adjust (and sometimes accede) to the competing claims of others and gives to the state extensive powers to interfere with the citizen's ownership of land'.

[120] The common law does recognise that the legal rights of use may change, as this is the effect of the locality rule in nuisance; the rights of the owner depend partly on the community affected by the exercise of those rights. See *St Helen's Smelting Co.* v. *Tipping* (1865) 11 H.L. Cas. 642.

[121] Gray, 'Equitable Property', p. 208. See also Joseph William Singer and Jack M. Beerman, 'The Social Origins of Property', (1993) 6 *Canadian Journal of Law and Jurisprudence* 217, pp. 242–3.

[122] See above, pp. 90–2.

Freedoms.[123] In such cases, legalism acts as the apology for liberalism: the constitution protects 'property', and the 'plain meaning' of property describes it in terms of rights of individuals. Communitarian property theory demonstrates that describing property in terms of rights is only part of the picture. The 'plain meaning' of property – whether it is the ordinary or legal meaning of property – must take the community interest into account.

One question arising from chapter 4 is whether the popularity of purposive interpretation will clarify the interpretation of 'property'. To date, Commonwealth courts have not attempted to relate purposive interpretation specifically to the interpretation of property. André J. van der Walt maintains that a purposive interpretation of the South African right to property would not be a purely liberal interpretation.[124] He observes that the final Constitution states, in several places, that it is intended 'to promote the values that underlie an open and democratic society based on human dignity, equality and freedom'.[125] The right to property, and property itself, should therefore be interpreted in the light of this objective. Hence, the right to property is not merely a negative guarantee of private property against the state, but a source of new property rights. It should strengthen rights or interests that do not receive full protection under private law, such as the rights of many black Africans in land. It should also limit the absolute rights of property owners in the Roman–Dutch system of private law. This approach results in a distinction between private law property and constitutional property, where constitutional property takes on the character of the communitarian property described by Gray.

The communitarian approach challenges many of the assumptions regarding property. Two examples demonstrate how it can operate in the Commonwealth: communal property and social welfare benefits. Both of these raise questions about the appropriateness of the 'core rights' conception of constitutional property.

[123] See generally Alexander Alvaro, 'Why Property Rights were Excluded from the Canadian Charter of Rights and Freedoms', (1991) 24 *Canadian Journal of Political Science* 309.

[124] van der Walt, *Constitutional Property Clause*, pp. 54–71. He also points out that constitutions of some other nations include statements of constitutional purpose that should affect the interpretation of property clauses: see André J. van der Walt, *Constitutional Property Clauses: A Comparative Analysis* (Kenwyn, South Africa: Juta & Co. Ltd, forthcoming), on Chapter II of Guyana's 1980 Constitution.

[125] See the Preamble, ss. 1, 7(1), 36(1) and 39(1) of the final Constitution.

Communal property

Private property can be contrasted with communal property, where individual members of the community have certain rights in the object and the community holds the full rights of ownership *vis-à-vis* outsiders.[126] 'Community', in this sense, includes families, political units within the state that own property,[127] partnerships and corporations. The nature of communal property leads us to ask whether the constitutional right to property is available to the community, the members of the community, or both. In this section, we examine two examples of communal systems of property holding: corporate property and customary land tenure in Africa.

Corporate property

The courts have no difficulty with the idea that corporations can bring constitutional claims for the loss of corporate property, although there is some doubt that corporations or other artificial legal persons have fundamental rights.[128] It is also clear that shares are constitutional property, and hence a shareholder in a corporation has a claim if the shares are expropriated. However, it is doubtful that they would have a claim on the sole ground that a taking of company property affects the value of their shares. The formal view of property as a bundle of rights suggests that only the rights of the company have been affected; hence, only the company has a constitutional claim against the state.[129] The *Penn Coal* principle might be raised where the diminution of the value of the shareholding is severe but, as explained above, it has only been

[126] For a full discussion of communal property arrangements, see William H. Simon, 'Social-republican Property', (1991) 38 *U.C.L.A. Law Review* 1335 and J. W. Harris, 'Private and Non-private Property: What is the Difference?', (1995) 111 *Law Quarterly Review* 421.

[127] *I.e.* groups with a degree of self-government, and that own property.

[128] In particular, the opening provisions of the Nigerian-model bills of rights refer to the fundamental rights and freedoms of the 'individual'. Some courts have stated that corporations are entitled to the right to property: see *e.g. Société United Docks and Others* v. *Government of Mauritius; Marine Workers Union and Others* v. *Mauritius Marine Authority* [1985] 1 A.C. 585; [1985] L.R.C. (Const.) 801 (P.C. Mauritius); cf. *Att.-Gen.* v. *Antigua Times* [1976] A.C. 16 (P.C.). A number of cases have been brought by corporations without any question of their status to do so: see *e.g. Bata Shoe Co. Guyana Ltd. and Others* v. *Commissioner of Inland Revenue and Att.-Gen.* (1976) 24 W.I.R. 172 (C.A. Guyana); *Zimbabwe Township Developers (Pvt) Ltd* v. *Lou's Shoes (Pvt) Ltd* (1983) 2 Z.L.R. 376 (S.C.). See generally, Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (London: Stevens & Sons, 1966), pp. 911–12.

[129] See *e.g. Churchill Falls (Labrador) Corpn Ltd v. Att.-Gen. of Newfoundland* (1984) 8 D.L.R. (4th) 1.

applied in cases where there has been a taking of the claimant's rights and the court wishes to know if the taking is severe enough to require compensation.[130]

Whether interests of employees in their company could be recognised as constitutional property is therefore very doubtful, although it is consistent with some versions of communitarian theory. Joseph Singer argues that reliance should play a more important role in property law, with the result that the ownership rights of companies would be restricted where their free exercise could harm their employees. The law of property, with its emphasis on exclusive access and transferability, puts too much emphasis on property as a guarantee of individual autonomy.[131] As such, it rests on a social vision that puts the market ahead of the state and family:

> In this picture, the market is an area of freedom and autonomy, while both the state and the family appear as areas of regulation or altruistic obligation. Within the market realm, legal obligations are generally negative duties not to harm others; positive obligations to help others ordinarily arise only as the result of voluntary promises.[132]

Singer contrasts property law with tort and contract law, where lawyers openly balance the individualism of the market against more altruistic values. For example, modern contract law reflects individualism in the doctrine of assent, and it reflects altruism in doctrines of reliance, good faith, unconscionability, and inequality of bargaining power.[133] By contrast, property law still emphasises individualistic values and tends to push altruistic values to the periphery. Singer argues courts should recognise that individual autonomy is not the only value in private law. Altruistic values, such as dependence, reliance and good faith, should also be considered.

One area where mutual dependence does affect the exercise of ownership rights is family property. Family property regimes vary from one country to another, but virtually all regimes permit a spouse to make a claim to property held by the other spouse in at least some situations. Many systems also allow cohabiting common law spouses to make claims. The legal nature of the claim varies, but in some countries it takes the form of a property interest that accrues during the course of

[130] Above, p. 141.
[131] Joseph William Singer, 'The Reliance Interest in Property', (1988) 40 *Stanford Law Review* 614.
[132] *Ibid*., p. 634.
[133] *Ibid*., p. 636.

the marriage, rather than a mere personal right to support payments.[134] Singer argues that there are other, non-familial relationships where property entitlements should accrue over the course of the relationship. In one article, he discusses *Local 1330, United Steel Workers* v. *United States Steel Corporation*, where a steel company decided to shut down a plant that it had operated in a town for many years.[135] The workers' union offered to buy it so that they could run it on their own, but the company refused because it did not want to compete with its former workers. The union sought an injunction to require the company to sell it the plant, or at least to prevent the company from closing it. In essence, they claimed that their long dependence on the plant restricted the company's right to capital and entitled them to property rights in the plant. This was a novel argument, because the liberal conception of ownership does not include any general restriction on the right to consume or destroy the object of ownership.[136] The court in *Local 1330, United Steel Workers* rejected the union's case for that reason: the company's ownership of the plant did not include any obligation to the union or its members.[137] Singer argues that the decision of the court was wrong. Long, mutual dependence should give rise to restrictions on the absolute right to capital.[138] He calls for a shift 'from a perspective that focuses on the owner as an isolated individual whose presumptive control of the resource is absolute within her sphere of power to a perspective that understands individuals to be in a continuing relation to each other as part of a common enterprise'.[139] Clearly, the implications of finding reliance and dependency depend on the facts of a particular case.[140] Nevertheless, he does identify several general principles:

> Owners should not be allowed to waste valuable social resources. The corporation should not be allowed to waste property which has been relied upon by members of the common enterprise; such property is held in trust for the benefit of the common enterprise and especially for the benefit of more vulnerable parties to the relationship.[141]

[134] See *e.g. Pettkus* v. *Becker* [1980] 2 S.C.R. 934 (Can.).
[135] 631 F.2d 1264 (6th Cir. 1980), discussed in Singer, 'Reliance Interest'.
[136] See Honoré, 'Ownership', pp. 118–19.
[137] 631 F.2d 1264 (6th Cir. 1980) at 1266.
[138] As Singer notes, this idea was put forth by the court itself during the hearing: Singer, 'Reliance Interest', p. 152; *Local 1330, United Steel Workers*, 631 F.2d 1264 (6th Cir. 1980) at 1280.
[139] Singer, 'Reliance Interest', p. 657.
[140] *Ibid*., pp. 653ff.
[141] *Ibid*., pp. 659–60.

Singer acknowledges that there are difficulties in allowing reliance to give rise to property rights. Lawyers expect property law to be certain and property to come into existence at a precise point in time. Reliance seems to bring too much uncertainty into property law. Even where there is a broad consensus that one party is weaker than the other – as is often the case in family property matters – it is difficult to apply any sort of test for determining, with any precision, when reliance gives rise to property rights. Nevertheless, if the courts fail to consider reliance interests in property, they will undoubtedly lay themselves open to the charge that they have allowed the right to property to preserve and extend the power of the wealthy.

The best Commonwealth example of the conflict between individualism and reliance arose in India, in relation to Parliament's attempt to regulate the cotton industry. The Sholapur Mills operated important cotton textile works, which it closed in response to a labour dispute. Parliament regarded the closure as an irresponsible act of mismanagement and passed legislation authorising the Government to appoint a new board of directors for the company, with a view to reopening the mills. The new board took office and, amongst other things, it made a call on certain preference shares that were not fully paid up. In *Chiranjit Lal* v. *Union of India*, an ordinary shareholder claimed that the appointment of the board amounted to a taking of property from both the company and the shareholders.[142] The Supreme Court dismissed the application, on the basis that an ordinary shareholder does not have a standing to bring a claim for the company's property and that any infringement of the shareholder's rights was not severe enough to amount to a taking of the shareholder's property. However, in *Dwarkadas Shrinivas* v. *Sholapur Spinning and Weaving Co. Ltd*, a preference shareholder successfully challenged both the call on the unpaid capital and the appointment of the board.[143] Clearly, there is a degree of inconsistency with *Chiranjit Lal* in respect of the finding that a shareholder had standing to question the effect of the appointment of the board on the company itself. In any case, in *Dwarkadas Shrinivas*, the Court held that the legislation restricted the company's powers of management to the point that compensation was required. The reasoning and the decision are very close to that of American court in *Local 1330, United Steel Workers*.

[142] A.I.R. 1951 S.C. 41.
[143] A.I.R. 1954 S.C. 119.

Despite the differences in the reasons given in the two Sholapur Mills cases, it is clear that all of the judges accepted and sought to apply the liberal view of the constitution and property in opposition to Parliament's communitarian views. Parliament responded to the *Dwarkadas Shrinivas* decision with the Fourth Amendment, which provided that legislation which did not bring about a transfer of legal ownership of property to the state did not require compensation.[144] As discussed elsewhere, the matter did not rest; the conflicting visions of the right to property resurfaced in subsequent cases and eventually culminated in the fundamental rights cases and the repeal of the right to property.[145]

Customary interests in land

The judicial reluctance to treat the rights of community members as property weakens systems of communal property. This is illustrated by a series of cases in which the Privy Council held that customary land tenure did not confer ownership on the occupiers of the land.[146] According to the Privy Council, the local king or chief, who administered the land on behalf of the community, held legal rights over land. This doctrine supported the British goal of indirect rule through traditional rulers, as it concentrated political, social and economic power in the hands of the chief. Modern scholars reject the notion that customary land tenure provided no individual rights.[147] Ultimately, the Privy Council failure to recognise individual rights disrupted the internal order of the community and increased the risk of oppression by colonial administrators and local rulers. We can draw an analogy with

[144] See p. 50, above.

[145] See generally pp. 49–53, 93–5, above.

[146] See *Re Southern Rhodesia* [1919] A.C. 211; *Amodu Tijani* v. *Southern Nigeria (Secretary)* [1921] A.C. 399; *Sobhuza II* v. *Miller and Others* [1926] A.C. 518. See especially Lord Haldane in *Sobhuza II* at 525: 'the true character of native title to land throughout the Empire . . . with local variations the principle is a uniform one . . . The notion of individual ownership is foreign to native ideas. Land belongs to the community not to the individual.'

[147] See generally Martin Chanock, 'Paradigms, Policies and Property: A Review of the Customary Law of Land Tenure', in Kristin Mann and Richard Roberts (eds.), *Law in Colonial Africa* (Portsmouth, N.H.: Heinemann, 1991 and London: James Currey, 1991), pp. 69–71; Thomas J. Bassett, 'Introduction: The Land Question and Agricultural Transformation in Sub-Saharan Africa', in Thomas J. Bassett and Donald E. Crummey (eds.), *Land in African Agrarian Systems* (Madison: University of Wisconsin Press, 1993), pp. 3–34; Elizabeth Colson, 'The Impact of the Colonial Period on the Definition of Land Rights', in Victor Turner (ed.), *Colonialism in Africa 1870–1960*. III: *Profiles of Change: African Society and Colonial Rule* (Cambridge: Cambridge University Press, 1971), pp. 193–215.

communal property in corporations: if only the corporation has an interest in corporate property, the rights of individual shareholders would be reduced proportionately.

During the negotiations over the interim Constitution of South Africa, there was some concern that the right to property would weaken the position of the majority of black Africans who did not own the land they occupied. If the courts equated property with ownership, occupiers could find that their position would be weaker because of the constitutionalisation of property. The interim Constitution therefore protects 'rights in property' rather than 'property'.[148] In fact, it seems likely that the South African courts would have followed the Commonwealth view that occupation interests, such as leases, are constitutional property. In *Minister of State for the Army* v. *Dalziel*,[149] in particular, the Australian High Court held that a leasehold interest was protected as constitutional property. In addition, there is some authority for saying that a customary right of occupation is constitutional property. In *Akoonay and Another* v. *Attorney-General*,[150] the applicants had held customary rights to occupy twenty acres of land, which they could transfer freely to anyone but non-indigenous persons without prior consent from the governing authority. As in *Dalziel*, the court applied a rights analysis, and concluded that there were sufficient rights for the customary interests to be treated as constitutional property.[151] In *Akoonay*, the applicants originally obtained their rights in 1943 by clearing the land. They remained in occupation until 'Operation Vijiji', under which the Government moved people into 'established villages'. At the time, the Government did not act with the authority of legislation, and consequently a number of legal claims for return of land were brought against it. However, in 1987, regulations extinguished customary rights.[152] The legislature had some doubts concerning the scope of the 1987 regulations, and so it passed further legislation in 1992 that purported to extinguish all customary rights in land.[153] The applicants

[148] See above, p. 75.

[149] (1944) 68 C.L.R. 261.

[150] [1994] 2 L.R.C. 399.

[151] Following an earlier article, Tom Allen, 'Commonwealth Constitutions and the Right not to be Deprived of Property', (1993) 42 *International and Comparative Law Quarterly* 523.

[152] The Extinction of Customary Land Rights Order 1987, made pursuant to the Land Development (Specified Areas) Regulations 1986 read together with the Rural Lands (Planning and Utilization) Act 1973.

[153] The Regulation of Land Tenure (Established Villages) Act 1992.

challenged the 1992 legislation. Ultimately, the Court of Appeal held that customary rights are constitutional property, but it also held that the 1992 legislation, as draconian as it was, was irrelevant because the applicants' customary rights had already been extinguished by the 1987 regulations. The 1987 regulations took effect before the constitutional right to property came into force, and hence the Court concluded that the applicants had no claim.

The court in *Akoonay* assumed that the extinction of the applicants' rights by the 1987 regulations established that they could hold no constitutional property in the land, but whether the extinction of formal rights should lead inexorably to the conclusion that there is no property is a question worth asking. The communitarian approach would not require formal rights to establish a claim to property. In relation to South Africa, André J. van der Walt argues that, at least in relation to constitutional property, the absence of formal rights does not defeat a claim for constitutional protection of interests in land.[154] Interpreted purposively, the South African constitution may operate as an independent source of rights, rather than merely a protection of private law rights: 'an important part of the function of the new constitutional order was to free land and property distribution patterns from the shackles and restraints of apartheid, and actively to promote the establishment and maintenance of a more just distribution of property and of greater access to and security of tenure of land'.[155] Section 25 promotes these goals by requiring the legislature to enact reform measures, but van der Walt argues that the Constitution provides an immediate guarantee for Africans whose customary rights to occupation were extinguished by apartheid. If this is the case, the Constitution creates 'a situation where those rights could again be recognised, not only by way of new land reform legislation, but also by simply giving those land rights the constitutional nod'.[156]

Social welfare benefits

Individuals benefit in many ways from access to state-owned resources. In the broadest sense, access includes physical access to public lands, treatment in public hospitals, admission to state schools and universities, and entitlements to social welfare benefits. The question is

[154] van der Walt, *Constitutional Property Clause*, pp. 54–71.

[155] *Ibid*., p. 69.

[156] *Ibid*., p. 58; see also Frank I. Michelman, 'Property as a Constitutional Right', (1981) 38 *Washington and Lee Law Review* 1097.

whether these claims are protected as being constitutional property. As in the case of communal property, Commonwealth courts have ruled against treating access to the state's resources as constitutional property, primarily because of a formal analysis of the rights held by the claimant. In general, these rights are neither exclusive nor transferable; hence, according to either one of these formal criteria, the claimant has no property.[157]

Commonwealth courts generally determine whether state benefits are constitutional property by comparing them with private obligations. This form of analysis is apparent in the Indian case, *Madhav Rao Scindia* v. *Union of India*.[158] It is an unusual example, as it involved the withdrawal of payments by the Government of India to former rulers of certain pre-independence states. The Constitution provided for these payments in order to persuade the rulers to join the new Indian state. This case arose because the Indian Government ceased its recognition of certain rulers and therefore stopped making the payments. The rulers claimed that they were thereby deprived of property unconstitutionally. The Supreme Court's analysis treated their claim as though it were a private debt. It stated that property can exist in private debts for ascertained or readily ascertained sums of money; however, there is no property in debts not yet due or debts due but not ascertained or admitted. Property existed only if the debt was due, fixed and 'absolutely owing', or if it had been converted into a judgment debt.[159] From this, it would appear that the principle can be stated in simple terms: a

[157] See *e.g. Saghir Ahmad* v. *Uttar Pradesh* [1955] S.C.R. 707 at 714–15; *Sumayyah Mohammed* v. *Moraine and Another* [1996] 3 L.R.C. 475 at 502. In *Bahadur* v. *Att.-Gen.* [1989] L.R.C. (Const.) 632 at 641, the Court of Appeal of Trinidad and Tobago stated that 'property within the meaning of . . . the Constitution includes . . . less tangible forms such as social welfare benefits, public services and other things to which people are entitled by law and regulations'. The Trinidadian Constitution, s. 4(a), contains a general due process guarantee; hence, it is not clear whether the Court indicated merely that social welfare benefits could not be removed without procedural due process, or whether the full guarantee of compensation would apply (see also *Trinidad Island-wide Cane Farmers' Association Inc. and Att.-Gen.* v. *Prakash Seereeram* (1975) 27 W.I.R. 329 (C.A. T.T.)). In *Transkei Public Servants Association* v. *Government of the Republic of South Africa and Others* [1996] 1 L.R.C. 118 (S.A. S.C.) at 130, Pickering J. refused to rule out the possibility that social welfare benefits might be protected under section 28 of the interim Constitution of South Africa (although the case dealt with employment benefits).

[158] A.I.R. 1971 S.C. 530. See also *Madan Mohan Pathak* v. *Union of India* A.I.R. 1978 S.C. 803; *Deokinandan Prasad* v. *Bihar* A.I.R. 1971 S.C. 1409; *Hewlett* v. *Minister of Finance and Another* [1982] 1 S.A. 490; [1981] Z.L.R. 571 (S.C. Zim.).

[159] A.I.R. 1971 S.C. 530 at 577.

state benefit is property once it is declared to be payable within the terms of the statute.

Several implications follow from the formal analysis. First, the date that the obligation accrues is crucial. A mere declaration that an amount may become payable is plainly not enough to create property. Hence the revocation of a promised benefit that occurs before it is declared to be payable is not a taking of property, but merely a failure to confer property. This is clearly illustrated by the Zimbabwean case, *Hewlett* v. *Minister of Finance and Another*,[160] which concerned compensation awards made to 'victims of terrorism' under legislation passed by the Rhodesian legislature. After independence, the Zimbabwean Parliament repealed the legislation under which awards had been made and cancelled all claims or awards of compensation made under the legislation, whether pending or final. The applicant had held both pending and final awards, and claimed that their cancellation amounted to an unconstitutional acquisition of his property without compensation. The Supreme Court's analysis concentrated entirely upon the wording of the statutory provisions, which stated that compensation 'shall be payable' once awarded by the relevant government board.[161] The final awards were therefore property, but pending claims were not.[162]

The remarkable aspect of *Hewlett* is the Supreme Court's refusal to examine the purpose of the compensation scheme. The Smith Government set up the compensation scheme to encourage white farmers not to leave their farms during the armed struggle. Not surprisingly, the Mugabe Government could see little reason to stand by the scheme after independence. The Court might have concluded that the moral claim to property and compensation was simply not strong enough to amount to property, especially as the awards had racist overtones. However, the Court stated that neither the motives of the legislature nor the applicant's reliance (or lack of it) on the statutory promise were significant.[163] Nevertheless, this did not mean that compensation was required under the Constitution: the Court held that the cancellation of

[160] [1982] 1 S.A. 490; [1981] Z.L.R. 571 (S.C. Zim.). See also the cases cited in n. 107, above, on damages and nuclear accidents.

[161] The Emergency Powers (Stay of Compensation Claims) Regulations 1980 and the War Victims Compensation Act 1980 (No. 22 of 1980) repealed the Victims of Terrorism (Compensation) Act and provided that no compensation would be paid pursuant to it, whether or not it had already been awarded.

[162] Ultimately, his claim failed, as the Court held that the state did not acquire the compensation award from him: see p. 169, below.

[163] [1982] 1 S.A. 490 at 501.

the award was a deprivation of property, but section 16 states that compensation is only payable when property is acquired. Consequently, no compensation was payable. In a powerful argument, Theunis Roux argues that the Court was correct not to force the new government to pay for damage caused during a just war; however, it should have held that the award did not constitute property: 'Hewlett's claim to compensation was only ever as strong as the historically evanescent alignment of the social and economic power undergirding it.'[164] The narrowness of the *Scindia–Hewlett* analysis removes these factors from consideration.

If state obligations become property only when they are absolutely payable, most social welfare benefits would not be property, since most legislation reserves the power to withdraw or modify such benefits.[165] Courts are therefore likely to conclude that the payment is not fixed and owing until the state's power to withdraw or modify the benefit has expired.[166] This follows from the reasoning of the leading American case, *Flemming* v. *Nestor*,[167] which concerned the withdrawal of the claimant's old age benefits. He had made the contributions required by statute for about nineteen years and, after retiring, he received benefits for about seven months. The Government then deported him, on the basis that he was a former member of the Communist Party, and following his deportation it cut off his benefits. The relevant statutes permitted the Government to take this action, so the claimant argued that the benefits were his property and, as such, their withdrawal was a taking under the Fifth Amendment. The Supreme Court disagreed. The

[164] Theunis Roux, 'Constitutional Property Rights Review in Southern Africa: The Record of the Zimbabwe Supreme Court', (1996) 8 *African Journal of International and Comparative Law* 755, p. 775. Cf. *Government of the Republic of Namibia* v. *Cultura 2000* 1994 (1) S.A. 407 (S.C.); *Zambia National Holdings Ltd and Another* v. *Att.-Gen. of Zambia* [1994] 1 L.R.C. 98 (S.C.).

[165] In neither *Hewlett* [1982] 1 S.A. 490, nor *Scindia* A.I.R. 1971 S.C. 530, did the state have reserved powers.

[166] *E.g. Western Uttar Pradesh Electric Power and Supply Co. Ltd* v. *Uttar Pradesh and Others* A.I.R. 1970 S.C. 21: where a licence was granted under a statute that expressly reserved the right of the State to grant a licence to another person, there was no infringement of any property that may exist in respect of the licence if the statutory power was used to grant a licence to a competitor. See also *Sanders* v. *British Columbia (Milk Board)* (1991) 77 D.L.R. (4th) 603, where the British Columbia Court of Appeal held that a revocation pursuant to a different statute would be a deprivation of property, but a revocation pursuant to the statute under which the benefit was initially promised would not be a revocation of property; cf. *Ackerman* v. *Nova Scotia* (1988) 47 D.L.R. (4th) 681. See also *King* v. *Att.-Gen. of Barbados* [1994] 1 L.R.C. 164 (P.C. and C.A. Barbados) and cf. *Revere Jamaica Alumina Ltd* v. *Att.-Gen.* (1977) 26 W.I.R. 486 (S.C. Jam.).

[167] 363 U.S. 603 (1960).

statute stated that his entitlement was subject to withdrawal, and hence any property that he might have had never included any right to continuation of the benefits. So long as the Government complied with the statute, it would not infringe his rights. In this respect, the analysis is no different from the *Scindia–Hewlett* analysis.

In the United States, *Flemming* v. *Nestor* triggered a vigorous debate on the classification of state benefits. In a seminal article, Charles Reich argued that government largesse plays such an important role in modern life that, in many cases, it should be treated as property under constitutional law.[168] For Reich, property is simply a social construct. It has no fixed, natural law meaning; lawyers contract or expand 'property' according to the function that it serves in a particular context. From this, he made two important observations. First, property serves to guarantee that the holder's basic human needs are satisfied. They 'are no longer regarded as luxuries or gratuities; to the recipients they are essentials'.[169] That is, the consequences of depriving the recipients of the benefits without due process or adequate compensation are so harmful to their basic well-being that their benefits must be secure. One way of doing this is by treating the benefits as property.

Secondly, property rewards the deserving. Reich argued that state benefits were often 'fully deserved' because citizens make contributions to the state that are intended to fund their benefits.[170] In *Flemming* v. *Nestor*, for example, entitlement to old age benefits followed from contributions made over the course of a working life. The Government did not put the contributions into a specific fund; nevertheless, Reich argued that making the contributions created expectations that should not have been frustrated. In relation to *Flemming* v. *Nestor*, Reich argued that the long-term stability of old age pensions, coupled with the reasonable expectations of contributors to receive benefits, meant that they should have been treated as property.[171] In any case, there may be a basis for treating social benefits as property even where there are no

[168] 'The New Property', (1964) 73 *Yale Law Journal* 733.

[169] *Ibid*., p. 737.

[170] Charles Reich, 'Individual Rights and Social Welfare: The Emerging Legal Issues', (1965) 74 *Yale Law Journal* 1245, p. 1255.

[171] Reich, 'The New Property', p. 771; see Ackerman, *Private Property*, p. 165: 'the courts have failed to recognize the relevance of takings law in protecting the expectations of millions who have legal property in the Social Security and welfare programs' because they do not recognise 'social property', which Ackerman (p. 117) defines as existing if the claimant can 'point to existing social practices which any well-socialized person should recognize as marking a thing out as [the claimant's] thing'.

contributions relating to the specific benefit. The poor deserve some sort of compensation for the exclusion from the world of property since, according to Reich, it is the exclusion of the poor from the property-owning world that enables the wealthy to concentrate property in their own hands.[172] Social welfare programmes provide them with a form of deserved compensation for their poverty.

Although Reich's view of property has commanded a great deal of attention, American courts have not applied it to the Fifth Amendment's protection against the taking of property without compensation. However, they have applied the due process guarantee of adequate procedural safeguards in a manner that is consistent with Reich's views. In effect, the courts interpret 'property' more generously under the due process guarantee than they do under the takings clause. It is not surprising that they do so, as the guarantee of procedural due process does not require compensation.

The Court in *Flemming* v. *Nestor* also looked at other considerations; in particular, it stated that the social security system had to be flexible enough to enable the legislature to respond to future conditions. Treating benefits as property would make it difficult or impossible for the legislature to modify the benefits to respond to new circumstances. Similar reasoning is found in the Australian case of *Health Insurance Commission* v. *Peverill*,[173] which concerned medicare benefits. The applicant, a doctor, provided certain medical services to his patients, against whom he had a contractual right to payment. Several of his patients discharged their obligation to pay by assigning their statutory claim to medicare benefits to him. Legislation was then passed that retrospectively amended the amount of the benefit, which meant that he was not able to realise the full amount payable to him in respect of the services. He claimed that this amounted to an acquisition of property under section 51(xxxi) of the Constitution, and hence it should have been done on 'just terms'.

The High Court dismissed his claim. As in *Flemming* v. *Nestor*, it was said that the benefits were not property because they could be modified or extinguished before payment. However, as this is the constitutional issue, it is a conclusion rather than the argument itself. The argument concentrates on the ethical claim to property and compensation, and it treats welfare benefits as a gift from the state. Hence, like a gift, no

[172] Reich, 'Individual Rights and Social Welfare', p. 1255.
[173] (1994) 179 C.L.R. 226.

property passes until delivery or payment is made. Since recipients give no consideration, no loss is suffered if payment is never made. The Court also indicated that the applicant might have had a property claim in the form of a debt if he had rendered services to the state directly. Indeed, in *Georgiadis* v. *Australian and Overseas Telecommunications Corporation*,[174] the High Court held that the provision of goods or services to the state under a contract gives rise to a proprietary right to payment.[175] However, the medicare system was structured so that there was no direct relationship between doctors and the state: doctors provided services to patients and the state provided benefits to patients which could be assigned to doctors, but at no time did the state contract with the doctors. Hence, the Court concluded that, as the medicare benefits were provided to the patients, they were provided gratuitously and could be revoked at any time before actual payment. Reich's argument that social welfare benefits are morally deserved seemed to carry no weight.

The belief that the state must have the power to modify welfare schemes to respond to changing circumstances is also apparent in *Peverill*. Similar concerns arise in the general law of state contracts.[176] Common law courts do not allow a public body to avoid a contract merely because it has made a bad bargain. Most courts take the position that a state contract is binding unless it is incompatible with a statutory or public power. In practice, this gives public bodies a wide power to make contracts. While this may be disadvantageous to a public body that finds that it has made a bad bargain, it is clearly to its long-term advantage that it has the power to contract. Without the power to bind itself by contract, it would find it considerably more difficult to obtain supplies and services from private parties (without resorting to its compulsory powers). If this reasoning is applied to social welfare benefits, it raises the following question: is the creation of a proprietary right by a present statement of an intention to make a future payment incompatible with public power to provide social welfare benefits? In both *Peverill* and *Flemming* v. *Nestor*, the courts had no difficulty deciding that it is incompatible. However, in both cases, the reasoning goes no further than a simple assertion of the truth of this proposition. Indeed,

[174] (1994) 179 C.L.R. 297.

[175] See also *Mutual Pools and Staff Pty Ltd* v. *The Commonwealth of Australia* (1994) 179 C.L.R. 155.

[176] See generally Paul P. Craig, *Administrative Law*, 3rd edn (London: Sweet & Maxwell, 1994), pp. 699–707.

one might argue that there may be cases when the state is more likely to achieve its objectives if it is able to provide recipients of social welfare benefits with the security of a proprietary right. Again, Reich makes this point (although not in these terms) by arguing that the security of property is itself an important part of providing relief from poverty. In any case, a communitarian argument that social welfare benefits are property must accept that no form of property is immutable. Social welfare benefits may change with social circumstances and in response to the community interest. The real purpose for declaring benefits to be property is therefore to broaden the scope of judicial scrutiny of changes to welfare schemes, but not to make those schemes immune to change.

Finally, it should be noted that some Commonwealth constitutions include express social and economic rights in the chapters on fundamental rights.[177] There is also an argument that the constitutional rights to security of the person and equal treatment give rise to implied social and economic rights.[178] For example, the Indian courts have interpreted the express rights to life and security of the person to include rights to economic security. The starting point of this development is found in *Tellis* v. *Bombay Municipal Council*,[179] where the Supreme Court held that '[a]n equally important facet of [the right to life] is the right to livelihood because no person can live without the means of living, that is, the means of livelihood'.[180] Life 'means something more than mere animal existence and the inhibition against the deprivation of life extends to all those limits and faculties by which life is enjoyed'.[181] This meant that homeless pavement dwellers in Bombay could not be forcibly removed to rural areas, where they would have no real chance of finding work. Perhaps Reich would argue that they had a property right to remain in the city; the Indian Supreme Court decided that they had a right to livelihood, derived from their right to life.

[177] See generally, Bertus de Villiers, 'Social and Economic Rights', in Dawid van Wyk, John Dugard, Bertus de Villiers and Dennis Davis (eds.), *Rights and Constitutionalism: The New South African Legal Order* (Kenwyn, South Africa: Juta & Co. Ltd, 1994), pp. 599–628.

[178] See generally Tom Allen, 'Commonwealth Constitutions and Implied Social and Economic Rights', (1994) 6 *African Journal of International and Comparative Law* 555.

[179] [1987] L.R.C. (Const.) 351.

[180] *Ibid*. at 368.

[181] *Ibid*.

Conclusions

Purposive interpretation is, supposedly, the preferred method of interpretation of most Commonwealth courts. While the precise nature of purposive interpretation is unclear, one would expect that it would involve an investigation into both the language of the right to property and its underlying purpose. By any standard, most courts have failed to identify a constitutional purpose that might illuminate the meaning of 'property'. Even if we accept Thomas Grey's argument that the meaning of 'property' depends on the function it serves in a particular context,[182] and hence that it has no single or universal meaning, it could still be argued that the constitutionalisation of property gives courts a specific function and a particular context in which to articulate the role of property, and the right to property, in the constitutional order.

Nevertheless, although the courts are often not explicit about the purposes of the right to property, it is apparent that there are certain general principles that most judges would probably agree with. First, most judges would probably describe constitutional property in the terms of liberal property theory, where property is an area of personal autonomy given legal expression in terms of rights enforceable against others rather than obligations owed to others. Secondly, many judges implicitly regard constitutional property as essentially the same as private property. Commentators such as André J. van der Walt argue that this is inappropriate, but cases such as *Akoonay* and *Peverill* suggest that it remains the outlook of many judges.

[182] Grey, 'Disintegration'.

6 Acquisition and deprivation

Introduction

Commonwealth constitutions do not require compensation for every state action that affects property. Consequently, legislation may affect a great many property owners adversely, but only a small number may be entitled to compensation. However, those that do receive compensation are generally treated quite generously. Accordingly, it is of the greatest importance to determine whether a given interference with property gives rise to a right to compensation. In this century, framers and courts have attempted to develop tests for distinguishing those situations where the state's interference with private property gives rise to a duty to compensate from those where it does not. Finding a test that is both workable and fair is difficult, especially in relation to the regulation of property use, where an owner may suffer an economic loss of the same magnitude as an outright acquisition of part or even all of the property. In such circumstances, the justice of awarding compensation to one person and not to another is difficult to discern.

The first section of this chapter examines the threshold of compensatability. The state cannot afford to compensate in every situation where property rights are affected, and so there must be some minimum level of interference before a claim can be made. Many Commonwealth courts have expressed this idea in some form; indeed, it offers some justification for limiting the right to compensation to interests in property rather than any economic interest. The difficulty is defining the minimum level of interference.

The second section focuses on the reason for the government's actions. There are at least some situations where governments should be able to interfere with property without compensation, even if the *de*

minimis threshold is passed. To take one simple example, it is obvious that no compensation is payable for the forfeiture of property used in the commission of a criminal offence. There is a continuing search for general principles that distinguish non-compensatable from compensatable interferences with property on a justifiable basis. Some courts and framers concentrate on the immediate purpose of the government's actions, by making compensation conditional on whether the state acquires property or merely deprives the owner of property. Other courts and framers concentrate on the broader motives of the government, by making compensation conditional on the reason for the state's actions rather than their form. One of the most interesting developments in this area is the increasing use of proportionality as the guiding principle on compensatability.

The reasons for the interference

There are circumstances where the state may take property without providing compensation, irrespective of the degree of interference with property. The state does not owe a duty to compensate when it seizes property to satisfy a tax or when it destroys property that endangers public health or where safety is at risk. Similarly, compensation is not paid for the forfeiture of property, the execution of civil judgments and court orders, or the limitation of actions and acquisition of title by adverse possession, to name some examples. Accordingly, there has been a search for a general principle that explains all these exceptions.[1]

As a broad observation, the tests that have been offered to explain these exceptions fall into two categories. Some courts and framers concentrate on the immediate purpose of the government's actions, by requiring compensation only for the 'acquisition' of property. By this test, compensation is not payable in cases where the state deprives the individual of property without acquiring it, since there is no transfer of rights or wealth to the state. The initial reason for making the distinction seems to have been the desire to avoid requiring compensation for the regulation of property. Typically, regulation does not involve any transfer of rights to the state. Moreover, the acquisition test suits the legalist view of interpretation, since the courts do not ask why the state acquires the property, but merely whether the state has acquired the

[1] See generally André J. van der Walt, '"Double" Property Guarantees: A Structural and Comparative Analysis', (1998) 14 *South African Journal of Human Rights* 560–86.

property. The second type of test is discussed below; briefly, it concentrates on the motives of the government by requiring compensation only when the state acts for certain reasons. Here, the courts do ask why the state sought to take the rights or value of property. These two methods are not mutually exclusive, as many constitutions that employ the acquisition–deprivation distinction also state that motives must be considered.

Although many constitutions expressly guarantee compensation only for the acquisition of property,[2] some courts have extended the guarantee to the deprivation of property. This position was first taken by the Indian Supreme Court in relation to Article 31, as it was originally framed.[3] The relevant provisions provided as follows:

> 31. (1) No person shall be deprived of his property save by authority of law.
>
> (2) No property . . . shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for the compensation for the property taken possession of or acquired . . .

Parliament assumed that Article 31(2) ensured that regulation, injurious affection and similar acts were not compensatable, as long as the state did not acquire title to the property, and that Article 31(1) imposed a general limitation on the powers of the executive and legislature. However, in several cases the Supreme Court stated that there was no justification for limiting compensation to the acquisition of property. In *Dwarkadas Shrinivas* v. *Sholapur Spinning and Weaving Co. Ltd*, Mahajan J. stated that '[i]t is immaterial to the person who is deprived of property as to what use the State makes of his property or what title it acquires in it. The protection is against loss of property to the owner.'[4] He also stated that the duty to compensate could only be limited to acquisitions if the Court adopted a 'close and literal

[2] See *e.g.* Australia, s. 51(xxxi); the Government of India Act 1935, s. 299(2); the Indian independence Constitution, Article 31(2) and 31(2A) (added in 1955 by the Fourth Amendment); Malaysia, Art. 13(2). The Government of Ireland Act 1920, s. 5, states that the legislature may not 'take any property without compensation'; the Constitution of Namibia, Art. 16(2), and the interim and final Constitutions of South Africa, guarantee compensation for the 'expropriation' of property. The position under the Nigerian-model bills of rights is unclear and is discussed below. Only Trinidad and Tobago, s. 4(a), seems to guarantee compensation for the deprivation of property (according to the interpretation in *Trinidad Island-wide Cane Farmers' Association Inc. and Attorney General* v. *Prakash Seereeram* (1975) 27 W.I.R. 329 (C.A. T.T.)).

[3] See generally Herbert Christian Laing Merillat, *Land and the Constitution in India* (New York and London: Columbia University Press, 1970), ch. 7.

[4] A.I.R. 1954 S.C. 119 at 128. See also at 138 *per* Bose J. and 139 *per* Ghulam Hasan J. See

construction' of Article 31(2), which he refused to do.[5] The Court therefore conflated Articles 31(1) and (2) and held that the legislature could not deprive an individual of property without adequate compensation. In *Dwarkadas Shrinivas*, this meant that legislation that allowed the state to appoint a company's board of directors, without compensation, infringed Article 31(2), although in formal terms only a deprivation of the shareholders' rights had occurred.

In *Dwarkadas Shrinivas*, the Court clearly believed that the legislation could not stand; however, it could have done so without conflating deprivation and acquisition. Mahajan J. also stated that an acquisition of property includes the 'procuring of property' without acquisition of legal title.[6] By this reasoning, the Court might have held that the Government's appointment of the board of directors was an acquisition of property and it would not have been necessary to extend Article 31(2) to deprivations of property.[7] In any case, Parliament reversed the *Dwarkadas Shrinivas* by the Fourth Amendment in 1955. The Amendment added clause 31(2A) to Article 31, which provided that 'where a law does not provide for the transfer of the ownership or right to possession of any property . . . it shall not be deemed to provide for the compulsory acquisition or requisitioning of property, notwithstanding that it deprives any person of his property'.[8] As discussed elsewhere, this did not end the conflict between Parliament and the Supreme Court.[9] Indeed, the Amendment itself merely addressed the specific holding in *Dwarkadas Shrinivas*, without resolving the deeper differences.

The framers of the Malaysian Constitution adopted the language of the original Article 31(2) of the Indian Constitution for the Malaysian right to property. They would have been aware of *Dwarkadas Shrinivas* (and the Fourth Amendment), but it is not clear whether they believed that the interpretation in *Dwarkadas Shrinivas* was correct. The issue eventually arose in *Selangor Pilot Association (1946)* v. *Government of Malaysia and Another*.[10] The Federal Court of Malaysia followed the Indian Supreme Court's interpretation of Article 31, and held that a similar construction should apply to Article 13 (the Malaysian

also *West Bengal* v. *Subodh Gopal Bose* [1954] S.C.R. 587 and *Saghir Ahmad* v. *Uttar Pradesh* [1955] S.C.R. 707.

[5] A.I.R. 1954 S.C. 119 at 128. [6] *Ibid*. at 129.

[7] See *e.g. Att.-Gen* v. *Lawrence* [1985] L.R.C. (Const.) 921 (C.A. St Christopher and Nevis), discussed above, p. 127.

[8] It also extended Article 31A; see above, p. 50.

[9] See pp. 49–53 and 93–5, above. [10] [1978] A.C. 337, *reversing* [1975] 2 M.L.J. 66.

provision). The Privy Council rejected the reasoning of *Dwarkadas Shrinivas*, on the basis that '[a]s a matter of drafting, it would be wrong to use the word ''deprived'' in Article 13(1) if it meant and only meant acquisition or use when those words are used in Article 13(2)'.[11] Hence, only an acquisition of property would be compensatable.

Selangor Pilot Association concerns an issue that can arise on the creation of a state monopoly over an industry. In most cases, it is quite clear that the creation of a monopoly deprives a business of its goodwill, but whether there is an acquisition of goodwill by the state monopoly is a more difficult question. In this particular case, legislation gave a state corporation a monopoly over the provision of pilotage services in a port. A firm that had provided pilotage services voluntarily sold its tangible assets to the state corporation. However, the corporation refused to pay for the firm's goodwill, and the firm claimed that the legislation violated Article 13(2) as an acquisition of property without compensation. Outwardly, it appeared that the state corporation had acquired the firm as a going concern, since it had moved into the firm's premises, retained most of its employees and serviced its clientele. Nevertheless, the Privy Council rejected the firm's claim. Viscount Dilhorne stated that there was no acquisition of goodwill, because the goodwill derived from the employment of certain pilots and the state corporation did not acquire the right to employ the pilots from the partnership. The legislation may have deprived the firm of goodwill, but it did not transfer the goodwill to the state corporation.

Selangor Pilot Association demonstrates, at the very least, that limiting compensation to the acquisition of property gives the legislature a very wide power to regulate property. Indeed, in South Africa, the Technical Committee on the drafting of the bill of rights of the interim Constitution explained that it borrowed the dual guarantee formula of the Indian and Malaysian constitutions because the 'word ''deprived'' in section 28(2) is not synonymous with ''expropriation'' which is dealt with in section 28(3)'. Citing *Selangor Pilot Association*, it stated that 'the State may deprive a person of the full use and enjoyment of his rights in property for the purpose of regulating land use, environmental protection, health etc without paying compensation – provided such deprivation or regulation takes place ''in accordance with a law'' '.[12] In *Harksen*

[11] [1978] A.C. 337 at 347 *per* Viscount Dilhorne; see also at 353 *per* Lord Salmon (dissenting on another point).

[12] Technical Committee of Theme Committee Four, Explanatory Memoranda on the Draft Bill of Rights, 9 October 1995, para. 4.2.2; see also para. 3.2.

v. *Lane*[13] the Constitutional Court took the same view, in relation to a challenge to certain provisions of South Africa's Insolvency Act. Section 21 of the Act automatically vested all the property of an insolvent person, and the property of his or her spouse, in the trustee of the insolvent estate. The Act allowed the solvent spouse to apply to the court to have the trustee release of any of his or her property, but in *Harksen* v. *Lane* a solvent spouse claimed that section 21 amounted to an expropriation of her property that failed to satisfy the public purpose or compensation requirements of section 28 of the interim Constitution. However, Goldstone J., for the majority, declared that no expropriation occurred because the Act only divested the solvent spouse of property temporarily. The legislative objective is simply to put the onus on the solvent spouse to prove that the property is his or hers, thereby ensuring that the insolvent estate is not deprived of its property; in essence, it merely allocates the burden of proof in relation to disputes that are likely to develop over ownership of assets. Goldstone J. also said that 'expropriation', under the Constitution, occurs only where there is an intention to acquire property permanently; hence, the vesting order did not 'expropriate' property.[14] Perhaps the Constitutional Court would regard a long-term but temporary taking as an expropriation, but since Goldstone J. suggests that the owner's entire interest must be fully extinguished, it does not seem that he would treat even a lengthy taking as an expropriation if it is not permanent.[15]

Harksen v. *Lane* represents a narrow reading of section 28(3), especially in comparison with the Constitutional Court's reading of the unfair discrimination clause (section 8(2)). On this point, the Court held that the automatic vesting provisions unfairly discriminated against spouses, since the provisions did not apply to other children, business associates, or those in other close relationships with the insolvent. However, the Court also held that the provisions were saved by section 33, the general limitation clause of the interim Constitution. Hence, even if the Court had held that the solvent spouse's property was expropriated, it probably would have held that any expropriation satisfied the requirements of section 28(3) or, alternatively, that it was

[13] Case CCT 9/97, [1998] 2 L.R.C. 171 (C.C. S.A.).

[14] There was also an unsuccessful challenge under section 8. O'Regan J. and Sachs J. dissented on the application of section 8(2) (unfair discrimination).

[15] Contrast *Minister of State for the Army* v. *Dalziel* (1944) 68 C.L.R. 261, where the Australian High Court held that a temporary occupation of land can amount to an acquisition of property, and cf. *Motsi* v. *Attorney-General* [1995] 2 Z.L.R. 278 (H.C.).

saved by section 33. In effect, the Court signalled that it will interpret 'expropriation' quite restrictively.

The right to property in the Nigerian Constitution provides that no property 'shall be taken possession of compulsorily' or 'acquired compulsorily' without compensation. However, beginning with the Ugandan Constitution of 1962, bills of rights incorporated general introductory provisions which declare that every person is entitled to the rights and freedoms contained in the bill of rights, including the freedom from 'deprivation of property without compensation'.[16] We therefore find a further complication on the dual guarantee of the Indian and Malaysian constitutions, as the deprivation clause expressly guarantees compensation. However, it is not clear whether it has substantive force. As explained in chapter 4, some courts have treated the introductory provisions as mere preambles, but in *Société United Docks and Others* v. *Government of Mauritius; Marine Workers Union and Others* v. *Mauritius Marine Authority* the Privy Council held that the opening provision of the Mauritian Bill of Rights confers substantive rights, with the result that there is a separate guarantee for compensation for the deprivation of property without compensation.[17]

Lord Templeman, who delivered the judgment in *Société United Docks*, seemed to be more concerned with the ethical entitlement to compensation than the formal construction of the introductory provision. Remarkably, he did not refer to the Privy Council's judgment in *Selangor Pilot Association*. His reasoning is very close to that of Mahajan J. in *Dwarkadas Shrinivas*. He argued that limiting compensation to the acquisition of property would produce an inexplicable inconsistency in the Mauritian Constitution, because '[l]oss caused by deprivation and destruction is the same in quality and effect as loss caused by compulsory acquisition'.[18] As in *Dwarkadas Shrinivas*, the focus is entirely upon the loss suffered by the individual. Once a court decides that the purpose of the right to property is protection against loss, it is bound to regard the acquisition–deprivation distinction as a purely technical barrier to an otherwise deserving case.

Other Commonwealth courts have been less willing than the Indian Supreme Court or Privy Council (in *Société United Docks*) to extend an

[16] See p. 62, above, for the full text of the Ugandan provision.
[17] [1985] 1 A.C. 585; [1985] L.R.C. (Const.) 801; see pp. 99–101, above.
[18] [1985] L.R.C. (Const.) 801 at 841.

express reference to the acquisition of property to the deprivation of property. The South African position is apparent from *Harksen* v. *Lane*, and the Australian[19] and Zimbabwean[20] courts have consistently refused to dissolve the distinction between acquisitions and deprivations of property. However, these courts differ on the interpretation of 'acquisition', especially in cases where the state enriches itself by depriving the individual of property without taking a formal transfer of the property. Examples include the cancellation of debts owed by the state or the extinction of interests such as easements, restrictive covenants or *profits à prendre* held over public land. The Zimbabwean courts have taken a formal view of these cases, by holding that there is no acquisition of property and hence compensation is not payable. The leading example is *Hewlett* v. *Minister of Finance and Another*,[21] which concerned the Zimbabwean Government's cancellation of awards made by the Smith regime to 'victims of terrorism'. As explained in chapter 5, the Court treated the compensation awards as property.[22] However, it also held that the state did not 'acquire' property from the cancellation of the awards, even though the state realised a clear financial benefit thereby.[23] In this respect, *Hewlett* and *Société United Docks* are similar, since Lord Templeman only referred to the opening provision of the Mauritian Bill of Rights because he believed that the extinction of a debt is not an acquisition of property. In *Hewlett*, the Court also held that an extinction of a debt is not an acquisition, but pointed out that the opening provision of the Zimbabwean Constitution refers to the 'acquisition of property without compensation'. Hence, there was no point in arguing that the opening provision has substantive effect.

Subsequently, the Zimbabwean courts confined *Hewlett* to situations where the state gratuitously incurs the debt. In *Mhora* v. *Minister of Home*

[19] See *e.g. The Commonwealth* v. *Tasmania (The Tasmanian Dam Case)* (1983) 158 C.L.R. 1 at 145 *per* Mason J.; *Georgiadis* v. *Australian and Overseas Telecommunications Corpn* (1994) 179 C.L.R. 297 at 304–5 *per* Mason C.J., Deane and Gaudron JJ.

[20] See especially *Hewlett* v. *Minister of Finance and Another* [1982] 1 S.A. 490; [1981] Z.L.R. 571 (S.C.) and *Davies and Others* v. *Minister of Lands, Agriculture and Water Development* 1996 (9) B.C.L.R. 1209 (S.C); [1997] 1 L.R.C. 123 (S.C. Zim.). See also Gino J. Naldi, 'Constitutional Challenge to Land Reform in Zimbabwe', (1998) 31 C.I.L.S.A 78.

[21] [1982] 1 S.A. 490; [1981] Z.L.R. 571 (S.C.).

[22] See pp. 155–6, above.

[23] [1982] 1 S.A. 490 at 507. (Now see section 16(9a), added by the Constitution of Zimbabwe Amendment (No. 11) Act of 1990: 'Nothing in this section shall affect the making or operation of any Act of Parliament in so far as it provides for the extinction of any debt or other obligation gratuitously assumed by the State or any other person.')

Affairs[24] and *Chairman of the Public Service Commission* v. *Zimbabwe Teachers Association*,[25] courts held that the extinction of debts incurred in exchange for the provision of goods or services does amount to an acquisition of property. In formal terms, these decisions are difficult to reconcile with *Hewlett*: determining whether a debt is acquired should not depend on the reasons for the creation of the debt. The courts might have said that a gratuitously incurred state debt is not property, but they declined to do so.[26]

The Australian courts have been somewhat more generous to property owners. In *Georgiadis* v. *Australian and Overseas Telecommunications Corporation*,[27] legislation extinguished common law claims held by Commonwealth employees for compensation for employment-related injuries. The majority began from the premise that the 'just terms' condition of section 51(xxxi) is intended to protect the individual against arbitrary state action. Accordingly, the state should not be permitted to circumvent the constitutional guarantee by using a form other than that of a transfer of title to achieve the substance of an acquisition of property. Hence, anything that in substance is an acquisition of property is covered by section 51(xxxi). This, of course, leaves open questions regarding the 'substance' of an acquisition. If, for example, a *profit à prendre*, easement or other servitude on land is extinguished, the owner of the land has acquired property, according to the principle in *Georgiadis*.[28] Whether obtaining an indirect benefit would amount to an acquisition is unresolved, as illustrated by *Commonwealth* v. *WMC Resources*.[29] In this case, a mining corporation held an interest in a permit issued under Commonwealth legislation to explore

[24] [1990] 2 Z.L.R. 236 (H.C.). [25] [1997] 1 L.R.C. 479 (S.C.).

[26] The Constitution of Zimbabwe Amendment (No. 11) Act of 1990 added subsection 9a to the right to property (section 16) (see note 23, above). This still leaves some doubt over the matter; for example, it is unclear whether a compulsory assignment to the state of a debt gratuitously assumed by a third party would be compensatable.

[27] (1994) 179 C.L.R. 297.

[28] See *Newcrest Mining (W.A.) Ltd* v. *The Commonwealth* (1997) 71 A.L.J.R. 1346; 147 A.L.R. 42 (H.C.). See also *British Columbia* v. *Tener* (1985) 17 D.L.R. (4th) 1 (S.C.C.), concerning legislation that extinguished a *profit à prendre* in land owned by British Columbia. Wilson J. observed that British Columbia did not acquire the *profit à prendre* in the strict sense, because 'the owner of the fee cannot in law hold a *profit à prendre* in his own land'. Nevertheless, she also noted that the acquisition of an outstanding *profit à prendre* enures to the benefit of the owner of the fee because it 'has effectively removed the encumbrance from its land'. In her view, it would be 'quite unconscionable to say that this cannot constitute an expropriation in some technical, legalistic sense' (17 D.L.R. (4th) 1 at 25).

[29] (1998) 194 C.L.R. 1.

for petroleum in the continental shelf off Australia. Some of the areas of exploration provided by the permit fell within the area of the seabed boundary disputed with Indonesia. Subsequently, the Commonwealth agreed with Indonesia to establish a Zone of Co-operation in the disputed area. It was envisioned that the two countries would establish a joint authority to grant new exploration permits in the area. With this in mind, the Commonwealth passed legislation to extinguish the existing permits, without compensation. The mining corporation then claimed that the extinction of its permits amounted to an acquisition of property that was not on just terms.

The High Court held that no acquisition of property had occurred, although the judges gave different reasons for their conclusions. Brennan C.J. and Gaudron J. held that the Commonwealth had no proprietary interest in the continental shelf. Hence, the extinction of the permits did not enure to its benefit and no acquisition occurred. However, Toohey and Kirby JJ. held that the Commonwealth had received sufficient benefit for the extinction to be treated as an acquisition of property. Even if the extinction of the permit did not enhance the rights of the Commonwealth in respect of specific property, the Commonwealth had acquired the benefit of becoming able to grant new permits (with Indonesia) over the same area. This, according to Toohey and Kirby JJ., was enough to require just terms under section 51(xxxi). As the other judges decided on other points, it is not clear how broadly 'acquisition' will be interpreted in future.[30]

These cases give an odd impression of the methods of constitutional interpretation. Two separate issues were addressed: first, whether acquisition should be interpreted narrowly. The Indian Supreme Court, the Privy Council and the Zimbabwean Supreme Court take the narrow, formal view of acquisition and property. Property is no more than a bundle of rights; hence, there is no acquisition of property unless the state obtains the same or substantially similar rights from the individual. By contrast, the Australian High Court in *Georgiadis* regarded property rights as a means to an end, whether economic, social or political. Debts are financial assets and extinguishing a debt gives the state the same financial advantage as taking an assignment of the debt; hence, it should be treated as an acquisition of the debt.[31]

[30] Gummow J. stated that the rights were not acquired because they were defeasible in any case (as in *Health Insurance Commission* v. *Peverill* (1994) 179 C.L.R. 226); McHugh J. stated that section 51(xxxi) does not affect any rights created by federal law.

[31] Mason C.J. stated that it is sufficient that the extinction of the obligation 'results in a

Secondly, these courts ask whether the constitution protects against deprivation of property without compensation. Here, the formal response of the Indian Supreme Court, the Privy Council and the Zimbabwean Supreme Court to the first issue contrasts with their views on the compensatability of deprivations. The courts in *Société United Docks* and *Dwarkadas Shrinivas* took remarkably generous views of this issue, to the point that they strained the language of the relevant provisions in order to ensure that compensation was paid. It seems that the courts in *Dwarkadas Shrinivas* and *Société United Docks* believed that the acquisition–deprivation distinction was simply too crude to identify cases where compensation is appropriate. This question deserves closer examination.

Two American commentators, Richard Epstein and Joseph Sax, support the application of the acquisition–deprivation distinction.[32] Epstein begins from the premise that the state is constituted by its citizens and hence the state should not have greater power than its citizens acting collectively. From this, he concludes that the state's power to interfere with property without compensation must be derived from the private law power to act in self-defence, as there is no other private law justification for interfering with property without compensation or consent. There are situations where necessity justifies the use or taking of another person's property, but the victim often has a claim for restitution in such cases.[33] For Epstein, private law provides the best explanation for the distinction between compensatable and non-compensatable interference with property. Only where the property represents a danger to other property should there be no compensation; in other words, the police power applies only where the state acts to defend the public.

Epstein's theory is very restrictive, for two reasons. First, it would restrict the state's compulsory powers over property. According to

direct benefit or financial gain' to the Commonwealth ((1994) 179 C.L.R. 297 at 305); Brennan J. stated that there is an acquisition if the release from liability is the 'correlative' of the plaintiff's claim (*ibid*. at 311).

[32] Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge, Mass.: Harvard University Press, 1985); Joseph Sax, 'Takings and the Police Power', (1964) 74 *Yale Law Journal* 36. See also Jeb Rubenfeld, 'Usings', (1993) 102 *Yale Law Journal* 1077.

[33] The private law of most Commonwealth countries is unclear, but it is generally thought that, while necessity may provide a defence to a tort claim for damage to property, the person who pleads necessity may be liable to a claim for restitution: see W. V. Horton Rogers, *Winfield and Jolowicz on Tort*, 14th edn (London: Sweet & Maxwell, 1994), pp. 753–4.

Epstein, where a state wishes to restrict or take property rights and it cannot justify its actions by necessity or self-defence, it may only do so with the consent of the owner. Secondly, he maintains that a restriction of any single right of property is a taking of property. Hence, he would require compensation for many regulations that are not compensatable at present. Given that compensation is usually assessed at market values, there is a real risk that the burden on the treasury would be immense unless, of course, the state abandoned most of its regulatory schemes.

Epstein acknowledges that his views do not represent the current state of the law in the United States. Neither do they represent the views of Commonwealth judges; in particular, Commonwealth courts do not treat every infringement of property rights as a deprivation of property. In a very general sense, they already find the private law analogy useful in determining the meaning of property and the other key terms of the right to property. However, they are unlikely to accept that the sovereign powers over property derive entirely from private law powers over property. For example, although there are passages in their Lordships' speeches in *Burmah Oil* that resemble Epstein's analysis of self-defence and necessity,[34] they did not accept that the sovereign power to destroy property in wartime derives from private law powers to act in necessity. Moreover, they did not accept that the right to compensation depends upon whether the state acquired property or merely destroyed it.[35] In any case, it is not clear that the protection of the private law conception of property is the sole purpose of constitutional law.[36]

Joseph Sax would disagree with the fundamental assumption of *Dwarkadas Shrinivas* and *Société United Docks*; that is, he argues that the purpose of the constitutional right to property is not to protect a core entitlement to property or wealth against government action.[37] Instead, it is to prevent arbitrary or tyrannical acts of government. As such, Sax's argument is a structural argument, as it concentrates on the proper use of government powers. The impact on individuals is less important than

[34] [1965] A.C. 75 at 144–7 and 156. The case is discussed above, pp. 30–3; briefly, it involved a claim for compensation for the destruction of oil refineries by British forces in World War II.

[35] *Ibid*. at 144 and 161.

[36] See André J. van der Walt, *The Constitutional Property Clause: A Comparative Analysis of Section 25 of the South African Constitution of 1996* (Kenwyn, South Africa: Juta & Co. Ltd, 1997), pp. 54–71.

[37] Sax, 'Takings', pp. 54 and 57.

identifying the sovereign powers that should be subject to a duty to compensate, and this is determined by examining how the duty to compensate can ensure (or interfere with) good government.

Sax observes that it has long been recognised that there are situations where the government may interfere with property rights without compensation. For example, the early civilian writers argued that governments had the power to set a just price for goods and services. Similarly, governments could prevent uses of property that endangered health or safety. However, governments could not acquire resources for their own account without payment. Where the government does acquire resources for its own account, the duty to compensate discourages arbitrary action because it removes the opportunity for profit. It is this point that Sax develops in his article.

Sax begins by distinguishing between 'arbitral' and 'enterprise' capacities of government. In its arbitral capacity, the government 'mediates the disputes of various citizens and groups'.[38] Older examples of arbitral laws are the laws of nuisance and early laws regulating prices and moneylending; modern examples include most planning, environmental and trade laws. In such areas, governments resolve conflicts that arise when one person's exercise of property rights conflicts with the exercise of property rights by other persons. By contrast, in its enterprise capacity, the government acquires resources for its account. For example, the acquisition of resources for the armed forces, the civil service, or for public parks and buildings comes within the government's enterprise capacity.

According to Sax, the risk of arbitrary or tyrannical action is much greater when governments act in pursuance of their enterprise functions. There are several reasons for this. First, 'the official procurement process often provides a particularly apt opportunity for rewarding the faithful or punishing the opposition'.[39] Of course, there is a risk that a government may reward or punish when resolving a dispute between two private persons, but Sax believes it is not as serious. Secondly, the government is placed in a conflict of interest whenever it acts in its enterprise capacity; in most cases, it would be in the government's interest to acquire as many resources as possible for as little as possible. By contrast, when acting in its arbitral capacity, a government is more likely to be in a disinterested position. Finally, Sax argues that the arbitral function tends to apply more or less equally to similarly

[38] *Ibid*., p. 62. [39] *Ibid*., p. 64.

circumstanced property owners. This happens because arbitrating between private owners usually involves conflicts between owners in the same neighbourhood, as it is the proximity between owners that brings them into conflict. Laws that restrict the use of property normally apply to all owners in the same neighbourhood equally, even though the burden of compliance may weigh more heavily on some owners. Sax argues that it is the equal application of law that mitigates any appearance of arbitrary action by the government. Where the government acquires resources for its own account, this element of equality is often not present. For example, laws may assist a state corporation by restricting private operators from hiring certain types of employees[40] or engaging in certain types of business.[41] Such laws are clearly intended to be unequal and may appear arbitrary to those affected by them.

Sax's theory does not directly incorporate the acquisition–deprivation distinction, but in most cases it would be consistent with it. That is, there are very few situations where a government acting in its arbitral capacity would acquire resources for its own account; it often shifts resources from one party to another, but it is unlikely to acquire them. However, government acting in its enterprise capacity might deprive an individual of property without going through a formal acquisition of property. Unlike Epstein, Sax would not limit the sovereign powers to necessity and self-defence and would not require compensation in every case where governments reallocate property rights. Epstein considers the reallocation of property rights to be an acquisition of property, with the result that it can only be justified by necessity and it is compensatable when justified. For Sax, a reallocation of rights could be an example of the arbitral function of government.

The Australian courts have construed section 51(xxxi) of their Constitution in a manner that is broadly consistent with Sax's theory.[42] Section 51(xxxi) of the Constitution gives the Commonwealth the power

[40] See *e.g. Selangor Pilot Association (1946)* v. *Government of Malaysia and Another* [1978] A.C. 337 (P.C. Malaysia).

[41] See *e.g. Manitoba Fisheries* v. *The Queen* (1978) 88 D.L.R. (3d) 462 (S.C.C.).

[42] See also *British Columbia* v. *Tener* (1985) 17 D.L.R. (4th) 1 (S.C.C.) at 12, where Estey J. distinguishes between regulations that 'enhance the value of a public park', such as the extinction of the *profit à prendre* on public land, and 'the imposition of zoning regulation and the regulation of activities on lands, fire regulation limits and so on [which] add nothing to the value of public property'. Only the first would be compensatable. See also *Coffee Board* v. *Commissioner of Commercial Taxes, Karnataka* A.I.R. 1988 S.C. 1487 at 1499–501.

to acquire property, although only on 'just terms'. No other section expressly confers the power to acquire property from individuals,[43] but section 51(xxxix) gives the Commonwealth the power to enact laws with respect to 'matters incidental' to any of its other powers. The courts have held that this includes the power to acquire property.[44] The question of compensatability is therefore a question of the characterisation of legislation, as only section 51(xxxi) imposes the just terms requirement.[45] The High Court has therefore held that the framers must have intended section 51(xxxi) to abstract the power to acquire property from the other heads of power,[46] and hence that the acquisition of property must be on just terms. While this is the general rule, it does not apply where it is clear that the framers provided otherwise. For example, section 51(xxxiii) gives the Commonwealth the power to make laws with respect to the acquisition of state railways 'on terms arranged between the Commonwealth and the State'; hence, the section 51(xxxi) requirement of just terms does not apply.

The obvious difficulty relates to the incidental power of section 51(xxxix), since it also confers a power of acquisition. Since the only material difference between the powers is the 'just terms' condition, the first question is whether the imposition of just terms is in some way incompatible with the objective of the legislation purportedly passed under some other head of power. The distinction between compensatable acquisitions under section 51(xxxi) and non-compensatable acquisitions under some other power has been judicially developed in a manner that is generally consistent with Sax's theory. For example, in *Re Director of Public Prosecutions, ex parte Lawler*, the High Court held that the forfeiture of property used for illegal activity cannot be characterised as an

[43] Cf. section 51(xxxiii), which gives the Commonwealth the power to make laws with respect to the acquisition of state railways 'on terms arranged between the Commonwealth and the State', and section 85, which allows the Commonwealth to acquire property from departments of the public service of a state that are transferred to the Commonwealth with compensation to be 'ascertained in, as nearly as may be, the manner in which the value of land, or of an interest in land, taken by the State for public purposes is ascertained under the law of the State in force at the establishment of the Commonwealth'.

[44] See *e.g. Mutual Pools and Staff Pty Ltd* v. *The Commonwealth of Australia* (1994) 179 C.L.R. 155.

[45] A Commonwealth law authorising expropriation that does not come under section 51(xxxi) or any other head of Commonwealth power would be invalid.

[46] See: *Johnston Fear and Kingham and The Offset Printing Co. Pty Ltd* v. *The Commonwealth* (1943) 67 C.L.R. 314 at 318 and 325; *W. H. Blakeley and Co. Pty Ltd* v. *The Commonwealth* (1953) 87 C.L.R. 501 at 521; *Att.-Gen. (Cth)* v. *Schmidt* (1961) 105 C.L.R. 361 at 371; *Trade Practices Commission* v. *Tooth and Co. Ltd* (1979) 142 C.L.R. 397 at 445.

'acquisition of property' under section 51(xxxi), because forfeiture is a penalty and the imposition of a penalty is incompatible with the provision of 'just terms'.[47] Taxes do not come within section 51(xxxi), because the provision of compensation would frustrate the objective of raising revenue.[48] For similar reasons, the courts have held that laws providing for the price controls,[49] land-use restrictions[50] and the sequestration of the property of bankrupts do not fall under section 51(xxxi).[51]

Incompatibility is clear if the failure to compensate is the objective of the legislation, as in *Lawler*. In this respect, *Lawler* is consistent with Sax's theory, since the objective of forfeiture is to punish rather than to add to the government's resources. Another case, *Mutual Pools and Staff Pty Ltd* v. *The Commonwealth of Australia*,[52] suggests that incompatibility also arises when the legislature seeks to resolve competing claims to resources. *Mutual Pools* concerns legislation that provided for refunds of unlawfully collected tax on the construction of swimming pools. The builders had paid the tax, but many of them had collected the tax from their customers. In such cases, the legislation provided that the customers would receive the refund. In *Mutual Pools*, one builder argued it had a restitutionary or contractual claim to the refund, and that claim had been acquired from it without just terms.[53] While the High Court accepted that the extinction of the common law claim amounted to an acquisition of property, it also held that that legislation should not be characterised as a law passed under section 51(xxxi). Several judges justified their conclusion on the basis of the incompatibility principle, by reasoning that the objective of the legislation was to refund the tax to the person who had borne the burden of paying it and that it would be impossible to return the same fund to both the builder and the customer. Hence, compensating the builders would have been incompatible with the legislative objective. Sax would argue that it would be within the state's arbitral capacity to determine which of them should

[47] (1994) 179 C.L.R. 270. See also *Freimar S.A.* v. *Prosecutor General of Namibia and Another* [1994] 2 L.R.C. 251 (H.C.).

[48] See *e.g. Mutual Pools and Staff Pty Ltd* v. *The Commonwealth of Australia* (1994) 179 C.L.R. 155.

[49] *British Medical Association* v. *The Commonwealth* (1949) 79 C.L.R. 201.

[50] *The Tasmanian Dam Case* (1983) 158 C.L.R. 1

[51] *Att.-Gen. (Cth)* v. *Schmidt* (1961) 105 C.L.R. 361 at 372.

[52] (1994) 179 C.L.R. 155.

[53] The claim for a refund arose under either the common law of restitution or under a separate contractual agreement that had been made prior to the legislation regarding the refund; see *Mutual Pools and Staff Pty Ltd* v. *The Commonwealth of Australia* (1994) 179 C.L.R. 155 at 165–6.

be entitled to receive the fund. Mason C.J. came very close to Sax's theory in explaining the cases where an acquisition of property was not characterised as a law under section 51(xxxi). He argued that cases where courts had held that compensation was not payable were linked by the common element that the acquisition of property by the Commonwealth 'was subservient and incidental to or consequential upon the principal purpose and effect sought to be achieved by the law so that the provision respecting property had no recognizable independent character'. In these cases, 'the relevant statute provided a means of resolving or adjusting competing claims, obligations or property rights of individuals as an incident of the regulation of their relationship'.[54] Here, the legislation merely determined which one of two competing private claims to the refund should succeed.

Lawler and *Mutual Pools* describe acquisitions that fall outside section 51(xxxi); as such, Sax would probably describe the acquisitions as part of the state's arbitral function. Other cases concern acquisitions that Sax would describe as examples of the state's enterprise function under section 51(xxxi), with the result that compensation had to be paid. In *Georgiadis* v. *Australian and Overseas Telecommunications Corporation*,[55] the High Court held that the Commonwealth extinguished the common law claims that its employees held against it in order to enhance its resources and, for this reason, compensation should have been paid. If the legislation had applied to all employees, public or private, it may have fallen outside section 51(xxxi), as the purpose of the legislation would not have been to enhance the Commonwealth's resources but to adjust competing private claims to resources.[56] Similarly, in *Mutual Pools*, Brennan J. stated that an acquisition of property comes within section 51(xxxi) if the objective of the relevant law is solely or chiefly the acquisition of property; that is, the acquisition must not be a means to some other end.[57] Dawson and Toohey JJ.'s reasoning in *Mutual Pools* was even closer to Sax's theory, as they state that section 51(xxxi) applies only to the acquisition of property for public use, such as the administration of laws.[58] From this perspective, forfeiture is outside

[54] *Ibid*. at 171; see also Deane and Gaudron JJ., at 189–90: section 51(xxxi) does not apply to 'laws which provide for the creation, modification, extinguishment or transfer of rights and liabilities as an incident of, or a means for enforcing, some general regulation of the conduct, rights and obligations of citizens in relationships or areas which need to be regulated in the common interest'.

[55] (1994) 179 C.L.R. 297.

[56] Cf. *Jooste* v. *Score Supermarket Trading (Pty) Ltd* CCT 15/98 (27 November 1998).

[57] (1994) 179 C.L.R. 155 at 179–81.

[58] *Ibid*. at 198–9.

section 51(xxxi) because the state does not take the property for public use, even if it is ultimately put to a public use.

Sax's theory offers a powerful rejoinder to the argument that there is no ethical distinction between acquisition and deprivation. There are, of course, criticisms that can be made of Sax's theory. In particular, he does not argue that the exercise of the enterprise function would be tyrannical or arbitrary in every case where compensation is not paid, but only that it increases the risk that it would be. The question is whether this makes Sax's test unnecessarily crude. For example, there may be cases where a government might acquire resources in its enterprise capacity without acting arbitrarily and yet without incurring an obligation to compensate. Taxes would be an example, if levied more or less equally. Another example arises where individuals believe that forgoing compensation in a specific case would be in their long-term interests.[59] Nevertheless, these points do not detract from the refutation of the arguments in *Dwarkadas Shrinivas* and *Société United Docks* that the constitutional treatment of deprivations and acquisitions must be the same.

The police power and the motive for state action

Some constitutions provide that an acquisition of property is not compensatable if it serves certain objectives. For example, many Commonwealth constitutions expressly provide that the state need not compensate for taking possession of property that is injurious to the health of human beings, plants or animals. If these limitations were not express, it is likely that courts would have allowed them as implied limitations to the compensation guarantee. In the United States, the courts developed the idea of a sovereign 'police power', which allows the taking of property without compensation. Most Commonwealth courts have adopted the doctrine in one form or another.

In the leading American case, *Mugler* v. *Kansas*, a brewery owner claimed that legislation that prohibited the sale and manufacture of liquor violated the Bill of Rights.[60] The United States Supreme Court recognised that the legislation had 'materially diminished' the value of the property,[61] but it upheld the legislation on the basis that Kansas

[59] See Frank I. Michelman, 'Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law', (1967) 80 *Harvard Law Review* 1165.

[60] 123 U.S. 623 (1887). The sale and manufacture of liquor for medical, scientific and mechanical purposes was permitted.

[61] *Ibid*. at 657.

had the power to restrict the uses of property 'for the protection of the safety, health, or morals of the community'.[62] The Court did not see an immediate conflict between regulation and property rights:

> The principle, that no person shall be deprived of life, liberty, or property, without due process of law . . . has never been regarded as incompatible with the principle, equally vital, because essential to the peace and safety of society, that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community.[63]

Mugler v. *Kansas* withstood the challenge from *Pennsylvania Coal Co*. v. *Mahon*,[64] and it continues to play an important role in the American jurisprudence.

The central idea of *Mugler* v. *Kansas* is that the state has the power to regulate noxious or nuisance-like uses of property. As explained above, Richard Epstein argues that compensation should not be paid for acts of self-defence, and hence that compensation is not payable for the destruction or deprivation of property. This argument brings the noxious use and acquisition–deprivation doctrines into a close relationship, since the regulation of a noxious use could be regarded as a type of self-defence. Hence, there is an argument that limiting compensation to the acquisition of property preserves the police power, since it allows the state to deprive the individual of any right to use the property in a harmful way.

The question is whether modern police power is restricted to the limitations on property imposed by the nineteenth-century doctrine of private nuisance. In the United States, the courts have applied the idea of noxious use to many activities that would not fall under the law of private nuisance. For example, in *Hawaii Housing Authority* v. *Midkiff*, the Supreme Court stated that 'regulating oligopoly and the evils associated with it is a classic example of a State's police powers'. Hence, legislation could force the sale of land simply to achieve a wider distribution of landholding.[65] Some modern scholars, such as Richard Epstein, regard such cases as an unwarranted extension of the regulatory power. Clearly, the growth in regulation challenges the liberal conception of property as an area of autonomy. However, it is consistent with a communitarian view of property. As discussed in chapter 5, communitarians do not

[62] *Ibid*. at 664. [63] *Ibid*. at 665. [64] 260 U.S. 393 (1922); see above, p. 139.

[65] 467 U.S. 229 (1984) at 242. Note that the case concerns the public use requirement; however, the Court did state that 'The "public use" requirement is thus coterminous with the scope of a sovereign's police powers' (*ibid*. at 240.)

treat property as a static entitlement, but as an entitlement that varies according to the community interest.[66]

Joseph Sax puts forward a communitarian view of the noxious use theory in his article 'Takings, Private Property and Public Rights', where he develops the idea of 'public rights' over private land.[67] He argues that owners cannot profit from their land without making demands on other land. These demands might take the form of an established property interest, such as a right of support, or the form of an interest that falls short of a property interest, such as a right of access to a public highway. These various demands create a complex set of interrelationships between property interests. For Sax, these interrelationships constitute a public resource, where private property is a type of entitlement to the public resource. Hence, regulating entitlements to resources affects everyone's shares in the resource. Regulation may be necessary to ensure that the resource is available to others. Sax explains this through the concept of 'spillover effects', which builds on his concept of public rights. When an owner uses property in a manner that affects the public resource and thereby reduces the economic use of other resources, there is a 'spillover effect'. These spillover effects arise in three ways: from the use of land that physically restricts use of other property; from the use of a common resource; or from the use of property that affects health or well-being of others.[68] Sax acknowledges that traditional property doctrines, such as the law of nuisance, already limit spillover effects.[69] However, he argues that the traditional doctrines are insufficient to protect public rights. In particular, where the effects on others are broadly spread, it may happen that practical and legal considerations prevent any single litigant from taking action. Governments should have the power to regulate, without compensation, these spillover effects as a means of vindicating public rights over land.

Early Commonwealth constitutions did not include express limitations on the right to compensation, but the American idea of separate sovereign powers over property is consistent with the Australian construction of the 'just terms' and 'incidental' powers of acquisition. A clear example of the application of the police powers is found in Lord Radcliffe's judgment in *Belfast Corporation* v. *O.D. Cars*,[70] where the House of Lords held that section 5 of the Government of Ireland Act 1920 did

[66] See pp. 143–6, above. [67] (1971) 81 *Yale Law Journal* 149.
[68] *Ibid*., pp. 161–2. [69] *Ibid*., p. 155. [70] [1960] A.C. 490.

not guarantee compensation for restrictions on land use. Viscount Simonds held that the restrictions did not amount to a taking of property. However, Lord Radcliffe held that no compensation was payable, even if a taking had occurred. This seems to contradict the express terms of the Act, since it provides that compensation should be paid for the 'taking of property' and it puts no express limitations on the right to compensation. However, Lord Radcliffe's judgment reflects the Supreme Court's analysis in *Mugler* v. *Kansas*, as he stated that the constitutional law of property contains two distinct principles. The first is the principle that property may not be compulsorily acquired without full compensation. This, plainly, was embodied in section 5 of the Government of Ireland Act 1920. The second is that restrictions on the use of property in the interests of public health and amenity do not normally require compensation. Since the Act did not mention the second principle, he assumed that it continued to apply and hence, even if property was taken, the purpose of the restrictions negated any duty to compensate.[71]

Other developments in the Commonwealth focus on express terms of constitutions that incorporate police power doctrine. In particular, the drafting of the Government of India Act 1935 reflects an attempt in the Commonwealth to incorporate a police powers doctrine. However, Sir Thomas Inskip, the British Attorney-General, does not appear to have been even slightly acquainted with the American doctrine; hence, the limitations on the compensation guarantee were somewhat unusual. First, the guarantee was limited to the acquisition of land and commercial or industrial undertakings. Secondly, the guarantee applied only to takings for 'public purposes'. As explained in chapter 7, this phrase is usually construed as a prohibition on takings for private purposes.[72] However, Inskip informed the House of Commons that the Act preserved the legislature's power to authorise the taking of property for private purposes, without compensation. He only gave one example of a taking for a private purpose – the execution of civil judgments – but made it clear that other acquisitions of property could be protected as takings for a private purpose.[73] Whether these other cases would be similar to

[71] *Ibid*. at 523. As discussed in chapter 5 (pp. 125–6), Viscount Simonds held that the restrictions did not constitute a taking of property because the rights affected did not constitute a property bundle of rights. By approaching the issue in this manner, it was not necessary for him to examine the purpose of the restrictions.

[72] See pp. 203 and 207, below.

[73] 300 H.C. Deb. vol. 300, ser. 5, cols. 1075–9 (1934–5).

those falling under the American police power is uncertain, as the point was never addressed by the courts.

The Indian independence Constitution repeated the first two subsections of section 299 of the Government of India Act 1935. However, the Indian framers were aware of the American doctrine and assumed, correctly, that the courts would hold that the Constitution did incorporate the police power doctrine.[74] The police power was not free of constitutional regulation; Article 19(1)(f) provided that 'All citizens shall have the right . . . to acquire, hold and dispose of property . . .'. This was made subject to Article 19(5), which provided that the State could impose 'reasonable restrictions' on the exercise of property rights.

The independence Constitution also included an express police powers clause in Article 31(5)(b), which provided that the compensation guarantee of Article 31(2) would not affect laws made for the purpose of imposing or levying any tax or penalty, the promotion of public health or the prevention of danger to life or property. Subsequently, in response to *Dwarkadas Shrinivas* and similar decisions, Parliament extended the express police powers by adding Article 31A.[75] It was intended to permit the state either to operate private companies in the public interest or in order to secure their proper management. As Parliament attempted to reduce the scope for judicial review by amendment, the Supreme Court protected its jurisdiction through an imaginative interpretation of the clauses that remained. The Court stated that Article 19(1)(f) provided the basic right to property, and that Articles 19(5) and 31 provided limitations on the right. Moreover, Article 19(5)'s allowance for 'reasonable restrictions' on the right to property also applied to Article 31; hence, no restriction, deprivation or acquisition of rights to acquire, hold or dispose of property was valid unless it was reasonable.[76] This, in turn, depended on a broad test of proportionality. In *State of Madras* v. *V.G. Row*, the Supreme Court stated that '[t]he nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions of the time, should all enter into the judicial verdict'.[77]

The Nigerian Constitution included an extensive list of exceptions to

[74] See *e.g. Kochuni* v. *Madras and Kerala* A.I.R. 1960 S.C. 1080 at 1095 *per* Subba Rao J.

[75] See above, p. 50.

[76] *Madhya Pradesh* v. *Ranojirao Shinde* A.I.R. 1968 S.C. 1053 at 1057–8 *per* Hegde J.; *R. C. Cooper* v. *Union of India* [1970] 3 S.C.R. 530 at 577–8.

[77] A.I.R. 1952 S.C. 196 at 200 *per* Patanjali Sastri C.J. See generally B. P. Jeewan Reddy and

the right to compensation. No attempt was made to draft a general description of the police power; instead, section 31(3) contained a long list of specific exceptions to the compensation guarantee.[78] Other bills of rights based on the Nigerian model include similar limitations on the compensation guarantee. Some of these clauses state that the exceptions do not apply where it is shown that their application would not be 'reasonably justifiable in a democratic society'.[79] There have been very few decisions on the scope of these exceptions, but it is apparent that legislation under one of the exceptions would, in Australia, almost certainly be excluded from the application of section 51(xxxi). It is not clear whether the converse is true; that is, there may be situations that Australian courts would exclude from section 51(xxxi) that might not be covered by one of the exceptions. For example, in *Georgiadis* v. *Australian and Overseas Telecommunications Corporation*,[80] the majority judges indicated that legislation that removed the right to claim common law damages from all employees, rather than just from Commonwealth employees, would probably fall outside section 51(xxxi). As such, it would not be compensatable. Under the Nigerian list, there is no obvious place for such legislation. Similarly, section 31(3) does not seem provide the same scope for regulation as Lord Radcliffe allowed in *Belfast* v. *O.D. Cars* or that the United States Supreme Court allowed in *Mugler* v. *Kansas*.

However, it could be argued that the Nigerian list is not comprehensive. In *The State* v. *Adel Osman*, the Supreme Court of Sierra Leone stated that the limitations in the opening provision of the Bill of Rights provided some justification for the suspension of the Bill of Rights in an emergency. Kutubu C.J. referred to the opening provision (section 5), and then stated that 'our enjoyment of or rights to the enjoyment of such rights and freedoms as are guaranteed by the Constitution are neither absolute nor unlimited in scope, but relative and restricted in all its aspects'.[81] Since many courts now hold that

Rajeev Dhavan, 'The Jurisprudence of Human Rights', in David Beatty (ed.), *Human Rights and Judicial Review: A Comparative Perspective* (Kluwer: Dordrecht, 1994), pp. 205–22.

[78] See p. 60 for the original clause.

[79] See Botswana, s. 8(5); Fiji, s. 9(5)(a); Kenya, s. 75(6); Mauritius, s. 8(4)(a); St Christopher and Nevis, s. 8(6); St Lucia, s. 6(5); Solomon Islands, s. 8(2)(a); Zimbabwe, s. 16(7).

[80] (1994) 179 C.L.R. 297.

[81] [1988] L.R.C. (Const.) 212 at 221. Cf. *Ngui* v. *Republic of Kenya* [1986] L.R.C. (Const.) 308 (H.C. Kenya), where the Court held that the limitations in the opening provisions do not give the legislature the power to enact amendments to the rights and freedoms of the Constitution.

the opening provision is not a mere preamble, it would appear that there is room to find implied limitations beyond those of the express list.[82]

More generally, the courts might accept the Australian argument that the compensation guarantee only applies to certain acquisitions of property. This would mean that there is no constitutional duty to compensate for property taken pursuant to the exercise of any other sovereign power over property. For example, in *Revere Jamaica Alumina Ltd* v. *Attorney-General*,[83] the Jamaican court decided that an acquisition of property under a taxing power lay outside the scope of the right to property altogether. No reference was made to the list of exceptions. Similarly, in *The Union of Campement Sites Owners and Lessees* v. *The Government of Mauritius*,[84] the Supreme Court of Mauritius held that the imposition of a tax is a liability rather than a taking of property. To the extent that the enforcement or execution of a tax liability involves a taking of property, it could be adjudged under the 'reasonably justifiable' proviso; however, the original imposition of liability to pay the tax could not. By contrast, in *Commissioner of Taxes* v. *C. W. (Pvt) Ltd*[85] and *Nyambirai* v. *National Social Security Authority and Another*,[86] the Zimbabwean courts assumed that the right to property does apply to taxation. These cases focus on paragraph (a) of the Zimbabwean list of exceptions, which states that compensation need not be paid for property taken 'in satisfaction of any tax, rate or due'.[87] Since paragraph (a) would apply only if taxation was an acquisition of property, the courts must have assumed that the right to property applies to taxation, and presumably to other powers over property. The interpretation of the Jamaican and Mauritian courts was not considered.

Rationality and proportionality

The Nigerian clause does not impose any general qualification on actions falling within the exceptions.[88] This is the case with several

[82] See *Société United Docks and Others* v. *Government of Mauritius; Marine Workers Union and Others* v. *Mauritius Marine Authority* [1985] 1 A.C. 585; [1985] L.R.C. (Const.) 801; Margaret De Merieux, 'Setting the Limits of Fundamental Rights and Freedoms in the Commonwealth Caribbean', (1987) 7 *Legal Studies* 39, pp. 42–3 and Margaret De Merieux, *Fundamental Rights in the Commonwealth Caribbean Constitutions* (Barbados: Faculty of Law Library, University of West Indies, 1992), p. 75.

[83] (1977) 26 W.I.R. 486 (S.C.). [84] [1984] M.R. 100.

[85] 1989 3 Z.L.R. 361 (S.C.), *affirming* [1988] 2 Z.L.R. 27 (H.C.).

[86] [1996] 1 L.R.C. 64 (S.C.). [87] Section 16(7)(a).

[88] But cf. *The State* v. *Adel Osman* [1988] L.R.C. (Const.) 212 at 221.

other Nigerian-model rights to property.[89] However, the corresponding clause of the Kenyan Constitution concludes by stating that the exceptions apply 'except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society'.[90] This expression is similar to the limitations in the European Convention on Human Rights (although it is not used in Article 1 of the First Protocol).[91] The courts have interpreted this clause in much the same way as the European Court of Human Rights, by treating it as imposing a general requirement of proportionality.

The proportionality test most frequently used by Commonwealth courts was developed by the Canadian courts in relation to section 1 of the Canadian Charter of Rights and Freedoms. Section 1 provides that: 'The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.' In *R.* v. *Oakes*, the Supreme Court stated section 1 requires the government to show that the legislative objective relates to 'concerns which are pressing and substantial in a free and democratic society'. If it does, the government must then satisfy a three-part proportionality test. First, the government must show that the means chosen to achieve the legislative objective are 'rationally connected' to that objective. Secondly, it must show that the legislation impairs the right or freedom as 'little as possible' and, thirdly, it must show that the impairment is proportional to the objective.[92]

The Charter does not contain a right to property; outside Canada, very few property cases have turned on the application of the corre-

[89] See *e.g.* Bahamas, s. 27(2); Barbados, s. 16(2); Belize, s. 17(2); The Gambia, s.22 (2); Ghana, s. 20(4); Guyana, s. 142(2); Jamaica, s. 18(2); Malta, s. 37(2); Nauru, s. 8(2).

[90] See Kenya, s. 75(6); see also Botswana, s. 8(5); Fiji, s. 9(5)(a); Grenada, s. 6(6); Mauritius, s. 8(4)(a); St Christopher and Nevis, s. 8(6); St Lucia, s. 6(5); Solomon Islands, s. 8(2)(a); Zimbabwe, s. 16(7).

[91] Although the Convention limitations require the infringement to be 'necessary'; on the difference between what is 'necessary' and what is 'reasonably justifiable', see Gaius Ezejiofor, *Protection of Human Rights Under the Law* (London: Butterworths, 1964), p. 187 and the Court of Appeal's judgment in *Morgan* v. *Att.-Gen. of Trinidad and Tobago* [1988] L.R.C. (Const.) 468 (P.C.), *affirming* [1985] L.R.C. (Const.) 770 (C.A. T.T.). (Article 1 of the First Protocol does not use the same expression, but the 'fair balance' test of *Sporrong and Lönnroth* v. *Sweden* A 52 (1982); 5 E.H.R.R. 35 is similar: see generally David John Harris, M. O'Boyle and Colin Warbrick, *Law of the European Convention on Human Rights* (London: Butterworths, 1995), ch. 18.)

[92] (1986) 26 D.L.R. (4th) 200, at 227 *per* Dickson C.J.C.; see also *R.* v. *Chaulk* [1990] 3 S.C.R. 1303 and *Edwards Books & Art Ltd* v. *R.* [1986] 2 S.C.R. 713.

sponding provisos in the Nigerian-model constitutions. However, two recent cases from Zimbabwe illustrate the issues that arise under the proviso. *Commissioner of Taxes* v. *C. W. (Pvt) Ltd*[93] concerned a tax on capital gains that was payable only by persons who had earlier challenged the constitutionality of the expropriation of the property on which the tax was levied,[94] and *Nyambirai* v. *National Social Security Authority*[95] concerned compulsory contributions to the national pension scheme.[96] In *Nyambirai*, Gubbay C.J. stated that, in determining whether the infringement of a right is permissible, the Court

> will ask itself whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.[97]

The *Nyambirai* test is quite similar to the *Oakes* test, except that the Canadian provision puts the burden of justification on the government. In *Nyambirai*, Gubbay C.J. leaves off the final part of the *Oakes* proportionality test, but it does not appear that he meant that the balancing of the benefits and costs of the legislation is unimportant. On the facts of *Nyambirai*, the issue did not arise.

In both of the Zimbabwean cases, the courts had no difficulty finding that the first criterion of the *Oakes–Nyambirai* test was satisfied. In *Commissioner of Taxes*, the objective was the raising of revenue by taxation and in *Nyambirai* it was the establishment of a national pension scheme. The interesting question is the nature of evidence used to determine whether an objective is valid. In *Commissioner of Taxes*, the Court referred to the budgetary deficit as evidence of the importance of raising revenue, but it was not clear whether it would have made a difference if there had been no deficit.[98] In *Nyambirai*, the Court referred to evidence that showed that Zimbabwe provided less social security

[93] [1989] 3 Z.L.R. 361.

[94] *May* v. *Reserve Bank* 1986 (3) S.A. 107 (S.C. Zim.) (discussed below, pp. 232–3 and 237–8).

[95] [1996] 1 L.R.C. 64.

[96] In both cases, it was assumed that there had been a compulsory acquisition of property; as explained below, courts of other countries would question this assumption.

[97] [1996] 1 L.R.C. 64 at 75.

[98] See Smith J., in the High Court, [1988] 2 Z.L.R. 27 at 45: 'there could be no doubt of the necessity to ensure that as much money as could possibly be raised by way of taxation should be brought into the coffers of the State'.

coverage than most other countries. Again, it was not clear whether the argument could have been refuted by raising evidence that Zimbabwe provided greater coverage than other countries. More generally, it is not apparent from these cases whether the courts should determine the validity of an objective by a relatively abstract characterisation of an entire field of legislative activity or more particularly by evidence of a narrowly defined problem, to which the impugned legislation is a response. In other words, did the courts in *Commissioner of Taxes* and *Nyambirai* decide that legislatures must have the power to legislate in respect of tax and pensions, or only that the legislature must have power to respond to the actual budgetary or pension shortfalls existing at specific moments in time?

The second criterion of the *Oakes–Nyambirai* test is a test of rationality, as it asks whether the infringement furthers the legislative objective. The courts in *Nyambirai* and *Commissioner of Taxes* differed in their description of rationality, although it appears that they were merely addressing different aspects of the same thing. In *Nyambirai*, the Court stated that the connection between the objective and the legislation was 'self-evident and merits little elaboration', as it accepted the Government's evidence that it could not fund the pension scheme without compulsory contributions from employees and employers. The Court did not question the Government's evidence, and so it is not clear whether a lower threshold than necessity would have satisfied it.[99] In *Commissioner of Taxes*, the Court held that the tax was not rational. A tax had been amended so that it was payable only by shareholders who had brought separate proceedings to challenge the amount of compensation paid for an expropriation of their property. The amended tax was clearly unequal and certainly appeared unfair, but the Court observed that taxes often appear unequal and unfair.[100] Gubbay J.A. (as he then was) stated that the tax would not be 'reasonably justifiable in a democratic society' if it was 'arbitrary or irrational', in the following sense:

> The test . . . is whether the particular classification challenged by the taxpayer rests upon some ground of difference having a fair, equitable and substantial relation to the achievement of a valid legislative objective, so that all persons similarly circumstanced shall be treated alike. If the classification lacks these attributes the legislative action must be taken to be irrational. Accordingly,

[99] See *Nyambirai* [1996] 1 L.R.C. 64 at 76; cf. *Patel* v. *Att.-Gen.* [1968] Z.R. 99 (H.C. Zam.) and the public purpose tests discussed below, pp. 215–16.

[100] [1989] 3 Z.L.R. 361 at 372.

the question to be posed in this case is whether there is some ground that rationally explains the different treatment . . .[101]

As the tax was payable only by those who challenged the initial payment of compensation, he concluded that 'no acceptable rationale immediately appears'; indeed, it 'fails to bear a fair, equitable and substantial relation to the achievement of a valid legislative objective'.[102] In effect, the Government levied the tax in order to punish anyone who challenged the earlier expropriation. Hence, the levy was 'irrational and arbitrary'.[103] It was not the initial imposition of the tax that was unreasonable, but the amendment of the tax for reasons that were not connected with the objective of raising revenue.[104] The true reason for selecting those from whom the exemption was withdrawn was especially difficult to justify in a democratic society, as it was done to penalise those who asked the courts to determine their constitutional rights. By contrast, in *Nyambirai*, there was no suggestion that the applicant was being penalised by being compelled to join the pension scheme.

The third part of the *Oakes–Nyambirai* test arose only in *Nyambirai* itself, although the Court said very little about the scheme itself.[105] It noted that the individual was still free to join a private pension scheme and that the applicant would be entitled to certain pension benefits as a result of joining the scheme, so perhaps the Court thought that the impact on the individual was not very serious. For the Court, the most important factor was the existence of many similar pension schemes in other countries. It did not consider the possibility that there may have been alternative and less intrusive means of achieving the same end. For example, it might have been possible to fund the programme by increasing taxes and changing the scheme to a voluntary one. It is not clear from the report whether the Court felt that there was no need to consider alternatives because the balance between public and private interests was not disproportionate, or because the applicant failed to suggest credible alternatives. In any case, other courts tend to allow

[101] *Ibid*. at 372–3.

[102] *Ibid*. at 373.

[103] *Ibid*.; Gubbay J.A. also referred, with approval, to the following statement from *Chintaman Rao* v. *Madhya Pradesh* [1950] S.C.R. 759 at 763 *per* Mahajan J.: 'the word ''reasonable'' implies intelligent care and deliberation – the choice of a course which reason dictates, and that legislation which arbitrarily or excessively invades the enjoyment of a substantive right does not possess the quality of reasonableness'.

[104] Gubbay J.A. stated that he might have upheld the withdrawal of the exemption if it had been applied equally to all the expropriatees: [1989] 3 Z.L.R. 361 at 374.

[105] [1996] 1 L.R.C. 64 at 76–7.

legislatures a wide discretion on this point. For example, the European Court of Human Rights allows a 'margin of appreciation' to legislatures. Similarly, under the Canadian Charter of Rights and Freedoms, the Supreme Court has stated that 'while Parliament need not choose the absolutely *least* intrusive means of attaining its objective, the means chosen must come *within a range of means* which impair the Charter rights as little as is reasonably possible'.[106]

Although most Commonwealth courts would apply the test used in *Oakes* and *Nyambirai*, some courts indicate that 'reasonably justifiable' provisos involve only a test of rationality. In *Bahamas Entertainment Ltd* v. *Koll and Others*, Sawyer J. stated that the reasonableness of a tax depends on whether it is 'excessive'.[107] He relied on *Attorney-General* v. *Antigua Times*,[108] where a newspaper argued that the imposition of an annual licence fee of $600 infringed its right to freedom of expression under section 10 of the Constitution of Antigua. Section 10 protects freedom of expression, but it also states that there is no contravention of the section to the extent that the law in question makes provision that is 'reasonably required – (i) in the interests of defence, public safety, public order, public morality or public health . . .'. While section 10 makes no particular exception for taxation, the Privy Council stated that '[r]evenue requires to be raised in the interests of defence and for securing public safety, public order, public morality and public health and if this tax was reasonably required to raise revenue for these purposes or for any of them, then [it] is not to be treated as contravening the Constitution'.[109] There was no attempt to balance the infringement of freedom of expression against the necessity of raising revenue. Indeed, since the Privy Council required the applicant to prove that the revenue was not reasonably required, it seems doubtful that the burden could be discharged. The tax would be disallowed only '[i]f the amount of the licence fee was so manifestly excessive as to lead to the conclusion that the real reason for its imposition was not the raising of revenue but the preventing of the publication of newspapers, then that would justify the conclusion that the law was not reasonably required for the raising of revenues'.[110] Proving that a tax is so 'manifestly excessive' is plainly going to be a difficult task for any litigant.

[106] *R.* v. *Wholesale Travel Group Inc.* (1991) 84 D.L.R. (4th) 161 at 187 (emphasis in original).
[107] [1996] 2 L.R.C. 45 (S.C. Bahamas) at 76. See also *Alleyne-Forte* v. *Att.-Gen. and Another* [1997] L.R.C. 338 (P.C. T.T.).
[108] [1976] A.C. 16 (P.C.). [109] *Ibid.*, at 32. [110] *Ibid.*

Moreover, the Privy Council excludes the type of rationality analysis that led the Court in *Commissioner of Taxes* v. *C. W. (Pvt) Ltd*[111] to declare the tax invalid, and the idea of minimal impairment seems to play no role in this type of 'balancing'.

The practical importance of placing the onus on the individual to prove that an infringement is not 'reasonably justifiable' is also illustrated by *Morgan* v. *Attorney-General of Trinidad and Tobago*.[112] It concerned Trinidadian rent control legislation enacted in 1981 that rolled back rents to levels at the end of 1978. In this case, the landowner was forced to reduce his rents from $500 to $150. The legislation contained a declaration that it would take effect even if inconsistent with section 4 of the Constitution.[113] According to section 13 of the Constitution, any Act that so declares, if passed by a three-fifths majority, has effect unless it is 'shown not to be reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual'. It was assumed that the legislation did infringe the landlord's rights under section 4, and hence the question was whether it survived a challenge under section 13.[114] Counsel for the landlord did not claim that rent control generally is not reasonably justifiable, but only that this legislation was not reasonably justifiable because it did not take account of changing circumstances. In particular, it did not allow rent to be increased in line with inflation, and so it could be argued that the impairment of the landlord's rights went beyond what could be justified for the protection of tenants from inflation. In the Court of Appeal, the judges emphasised the failure of the landlord to discharge the burden of proving that the legislation was not 'reasonably justifiable'. The Court put some emphasis on the language of the proviso, as it does not require legislation to be 'necessary' or even 'reasonably necessary'.[115] Lord Templeman, for the Privy Council, simply stated that '[l]andlords have no fundamental right to increases of rent which reflect

[111] 1989 (3) Z.L.R. 361.

[112] [1988] L.R.C. (Const.) 468 (P.C.), *affirming* [1985] L.R.C. (Const.) 770 (C.A. T.T.).

[113] Section 4(a) contains, inter alia, the 'right to the enjoyment of property and the right not to be deprived thereof except by due process of law'.

[114] The Court of Appeal declined to say whether the landlord's rights under section 4 were actually infringed: see [1985] L.R.C. (Const.) 770 at 780–1 *per* Kelsick C.J. and 794–5 *per* Braithwaite J.A. However, Lord Templeman, speaking for the Privy Council, assumed that '[t]he Act of 1981 interferes with the right of the landlord to the enjoyment of his property by depriving him of $350 per month which he was enjoying by way of rent in 1981 pursuant to a contract of letting freely and lawfully negotiated' ([1988] L.R.C. (Const.) 468 at 470).

[115] See [1985] L.R.C. (Const.) 770 at 781 *per* Kelsick, C.J.

inflation',[116] and observed that many countries have rent control legislation of one form or another. Since the case turned on section 13, Lord Templeman must have believed that the infringement of the rights under section 4 was so trivial that it could not be classified as an infringement of a 'fundamental right', and hence that principles of proportionality and minimal impairment were irrelevant.

General limitation clauses: Namibia and South Africa

The inclusion of a general limitation on rights in section 1 of the Canadian Charter of Rights and Freedoms led to similar developments in Namibia and South Africa, where framers also included clauses allowing general limitations on rights. In Namibia, Article 22 is the counterpart to section 1 of the Canadian Charter; in South Africa, section 33 of the interim Constitution and section 36 of the final Constitution are the counterparts.[117] The interpretation of these clauses has tended to follow the Canadian cases on section 1 of the Charter.[118] In particular, in *S.* v. *Makwanyane*,[119] the Constitutional Court of South Africa adapted the *Oakes* test to section 33 of the interim Constitution, and the framers of the final Constitution explicitly incorporated the test in section 36.

Nevertheless, the relationship between sections 25 and 36 of South Africa's final Constitution is problematic. Section 25 allows deprivations and expropriations of property on certain conditions; section 36 allows infringements of rights on certain conditions. This raises two questions: if legislation satisfies the conditions of section 25, can it be attacked for failing to satisfy conditions of section 36? And if legislation fails to satisfy conditions of section 25, can it be saved by satisfying the conditions of section 36? The Panel of Constitutional Experts assumed

[116] [1988] L.R.C. (Const.) 468 at 471.

[117] See also the interim Constitution of Malawi, s. 44.

[118] It should be noted, however, that the influences on the African limitation clauses have been quite varied. German law, in particular, is reflected in the language of the limitation clauses of the Namibian and the South African interim Constitutions; in particular, the idea of the 'essential content' of the right to property borrows from German ideas. Ultimately, the Canadian, German and African approaches to general limitation clauses do not differ radically. This is to be expected, as the Canadian provision is based on the limitations on rights found in the European Convention on Human Rights, which are themselves loosely based on the German limitations. See generally, André J. van der Walt, 'The Limits of Constitutional Property', (1997) 12 *South African Public Law* 275.

[119] Case No. CCT/3/94 (Judgment 6 June 1995); 1995 (3) S.A. 391 (C.C.), paras. 104–7 *per* Chaskalson P.

that courts would analyse cases by asking first whether the impugned legislation infringes the rights contained in section 25.[120] The courts would then ask whether any infringement could be saved by any of the specific limitations of section 25. If so, that would end the inquiry; if not, the courts would ask whether infringement could be saved by general limitation of section 36. In other words, legislation that satisfies the conditions of section 25 cannot be struck down for failing to satisfy section 36; however, legislation that does not satisfy section 25 can be saved by section 36. In practical terms, this leaves very little scope for section 36, if any, as there are only two types of infringements of section 25 that might be saved by section 36.[121]

The first is a deprivation of property that cannot be saved by section 25(1) because the law is either not of general application or it is arbitrary. In practical terms, it is difficult to imagine how such a law could satisfy section 36. Section 36 states expressly that any laws that are saved by it must be laws of general application. While it does not state expressly that laws must not be arbitrary, it is difficult to see how an arbitrary law could satisfy the five criteria of section 36(1).

The second is an expropriation of property that cannot be saved by section 25(2) because the law is not a law of general application, or because the expropriation is not for a public purpose or in the public interest, or because any compensation that is paid does not satisfy the criteria of section 25(3). Again, it is difficult to imagine how such a law could satisfy section 36. Section 36 already rules out laws that are not of general application. Expropriation that is not for a public purpose or in the public interest must surely fail to satisfy the criteria of section 36(1), since the criteria (especially section 36(1)(b)) balance the public benefit against private loss. Arguably, section 36 might save legislation that does not provide compensation according to the criteria of section 25(3), but as section 25(3) requires compensation that is 'just and equitable, reflecting an equitable balance between the public interest and the interests of those affected', it already embodies the balancing principle of section 36.

It appears, therefore, that the Panel of Experts' reading of sections 25 and 36 leaves section 36 with little or no role to play with respect to property. André J. van der Walt argues that this reading is incorrect, because it assumes that sections 25 and 36 are mutually exclusive.[122] He

[120] Memorandum for Discussion Purposes, 20 February 1996.
[121] See below.
[122] van der Walt, 'The Limits of Constitutional Property'.

maintains that section 36 represents the essence of the South African vision of the bill of rights, which is the idea that private and community interests must be balanced against each other. This idea of balancing – or tension – between public and private interests affects the interpretation of every provision and concept of the bill of rights. So, for example, 'property' cannot refer to the private law conception of property, but to a distinct constitutional conception of property that may well be considerably broader than the private law conception. Hence, the specific limitations of section 25 do not stand in opposition to section 36 or exclude section 36; instead, 'section 25 mostly *confirms* the general provisions in section 36, except for a couple of places where the general provisions are *individualised* or *made more specific* for the purposes of the property clause'.[123] On this reading, section 36 provides 'the overall framework within which problematic terms in section 25 such as ''public purpose'', ''in the public interest'', ''arbitrary'' and so on have to be interpreted and applied; and the specific limitation provisions in section 25 focus and particularise the general limitation provisions on the property clause'.[124] To take one example, consider the interpretation of 'public purpose' and 'public interest'. Most Commonwealth courts ask whether an expropriation serves a public purpose or is in the public interest by asking whether the legislative objective is legitimate and whether the expropriation passes a fairly low threshold of rationality. According to van der Walt, South African courts should interpret these phrases in the light of section 36(1), which could mean that a test of proportionality would also apply. Hence, the courts may ask whether the legislative objective could be achieved by a less restrictive means.

Proportionality as the overarching principle

The proportionality test has not played an important role in the Commonwealth jurisprudence on property to date, although there is a type of balancing process evident in many cases. For example, the diminution of value test for determining whether regulation is severe enough to constitute a taking of property involves a balancing of different interests. Similarly, the conception of property itself incorporates inherent limitations on absolute rights, and these limitations are based on the public interest. However, there are certain points where Commonwealth courts tend to take a rigid view and seem to foreclose the application of a full proportionality test. In particular, most courts

[123] *Ibid*., p. 327 (emphasis added). [124] *Ibid*., p. 322.

and framers assume that the constitution guarantees full market value for property.[125] Consequently, comparatively few individuals whose interests are adversely affected by the state receive compensation, but those who are compensated are treated quite generously. There is no principle of partial compensation; the individual is entitled either to full compensation or to no compensation whatsoever. As a matter of general principle, a proportionality test would require only that the individual's loss should be proportionate to the public benefit. Hence, the amount of compensation would depend partly upon the importance and amount of the public benefit. In the Commonwealth, the possibility that a balance could be struck at something less than full compensation has not even been raised by most courts.

There is, of course, the recent exception of the South African interim and final Constitutions. Sections 28(3) and 25(3) of the interim and final Constitutions, respectively, require 'just and equitable' compensation, but specifically provide that the market value of the property is only one factor to be taken into account in determining whether compensation is 'fair and equitable'. The South African approach to compensation is closer to that of the European Court of Human Rights with respect to Article 1 of the First Protocol of the European Convention on Human Rights.[126] Previously, other Commonwealth courts had doubted the relevance of the Convention, as the structure of the Convention right to the enjoyment of possessions seems quite different from the rights to property of Commonwealth constitutions.[127] In *Sporrong and Lönnroth* v. *Sweden*, the European Court of Human Rights stated that Article 1 sets out three overlapping rules regarding rights to property. The first rule is the right to peaceful enjoyment of property.[128] It applies to all forms of regulation that restrict the exercise of rights of property. The second rule covers the deprivation of possessions, and it is comparable with the guarantee of compensation for compulsory acquisition. It applies only where the property owner has suffered a total or near-total loss of property at the hands of the state. The third rule recognises that the state may control the use of property and impose taxes on property without incurring an obligation to compensate the property owner.

The overarching principle of Article 1 is that there must be a 'fair balance' between 'the demands of the general interest of the

[125] See ch. 8, below.
[126] See generally Harris, O'Boyle and Warbrick, *Law of the European Convention*.
[127] See *e.g. Minister of Home Affairs* v. *Bickle and Others* [1983] 2 Z.L.R. 400 (H.C. and S.C.).
[128] A 52 (1982), para. 61; 5 E.H.R.R. 35.

community and the requirements of the protection of the individual's fundamental rights'.[129] The three rules are not distinct or unconnected, but the achievement of a 'fair balance' may be different under each.[130] The crucial point is that, unlike most Commonwealth rights to property, Article 1 does not contain an express guarantee of compensation and the European Court of Human Rights has not interpreted it as providing such a guarantee. Hence, the first rule of Article 1 guarantees only that the regulation of property should reflect a fair balance between community and private interests. Under the second rule, the infringement of private interests is so great that compensation is normally required, but full compensation is not required in every case. In *Lithgow* v. *United Kingdom*, the Court held that the measure of compensation for the nationalisation of property need not be the same as it is for the typical compulsory purchase of land.[131] Similarly, in *James* v. *United Kingdom*,[132] the Court stated that, where a state seeks to achieve economic or social justice, compensation need not be given at full market value. This follows from the general idea of a 'fair balance': the greater the public gain, the greater the loss that individuals should be expected to bear. Furthermore, while some compensation would normally be required under the second rule, it is not always required under the first and third rules. Hence, where the infringement with property is less than an outright acquisition of title, the Court would also look to other means of ensuring that a fair balance is struck. In particular, the availability of a procedure for challenging the state's actions is also relevant.[133]

Most Commonwealth courts have assumed that their constitutions set out a single right to property. Hence, the Convention's reference to three rules limits its comparative value.[134] However, there has been an interesting development in the Privy Council's judgment in *La Compagnie Sucrière de Bel Ombre Ltee* v. *The Government of Mauritius*.[135]

[129] *Ibid*., para. 69. [130] *Ibid*. [131] A 102 (1986), para. 120; 8 E.H.R.R. 329.

[132] A 98 (1986), para. 54; 8 E.H.R.R. 123.

[133] See *e.g. Sporrong and Lönnroth* v. *Sweden* A 52 (1982); 5 E.H.R.R. 35; *Handyside* v. *U.K.* A 24 (1976); 1 E.H.R.R. 737; and *AGOSI* v. *U.K.* A 108 (1986); 9 E.H.R.R. 1.

[134] See *e.g. Minister of Home Affairs* v. *Bickle and Others* [1983] 2 Z.L.R. 400 (H.C. and S.C.).

[135] [1995] 3 L.R.C. 494. See also *Alleyne-Forte* v. *Att.-Gen. and Another* [1997] L.R.C. 338, where it was claimed that parking regulations that authorise the towing of cars, and the payment of a towing fee for the release of the car (both before the legality of parking or the towing is determined) violate section 4 of the Constitution of Trinidad and Tobago (the right to the enjoyment of property and not to be deprived thereof except by due process of law). The Privy Council rejected the claim, on the basis that '[t]he right of property recognised in section 4(a) calls for a balancing exercise. A court investigating an alleged infringement of this right is concerned to see whether in the

Landowners challenged legislation that required them to renew leases with tenant farmers, on the basis that it deprived them of property without compensation, contrary to section 3 of the Constitution of Mauritius. While it could have been argued that the restrictions only affected some rights in the bundle of rights and hence did not constitute a deprivation of 'property',[136] Lord Woolf, for the Privy Council, did not take this approach.[137] Instead, he adopted the European Court's analysis of property rights.

The Mauritian Constitution, like many other Commonwealth constitutions, refers to rights to property in two separate provisions. Section 3, the opening provision of the Bill of Rights, states briefly that the Constitution protects against the deprivation of property without compensation, and section 8 goes into some detail about the compulsory acquisition of property. In *Société United Docks*, the Privy Council held that both provisions enacted rights; in other words, section 3 was not a mere preamble.[138] In *La Compagnie Sucrière de Bel Ombre Ltee*, Lord Woolf stated that section 3 corresponds to the first rule of *Sporrong and Lönnroth*, section 8 corresponds to the second rule and the limitation clause of section 8 corresponds to the third rule. Although section 3 of the Constitution protects the individual against the 'deprivation of property *without compensation*', he concluded that it does not guarantee compensation in every case: '[regulations] would only contravene the protection provided by section 3 if, because of the lack of any provision for compensation, they do not achieve a fair balance between the interests of the community and the rights of the individuals whose property interests are adversely affected'.[139] Lord Woolf did not go

particular case a fair balance was struck between the requirements of the general interest of the community and the requirements of the protection of the fundamental rights of the individual . . . Without a power to remove vehicles at once, the object of the regulations would be stultified.' Considering the 'comparatively modest amounts involved', the balance was not unfair ([1997] L.R.C. 338 at 342 *per* Lord Nicholls).

[136] Cf. *Belfast Corpn* v. *O.D. Cars Ltd* [1960] A.C. 490; *Davies and Others* v. *Minister of Lands, Agriculture and Water Development* [1997] 1 L.R.C. 123 (S.C. Zim.); *British Medical Association* v. *The Commonwealth* (1949) 79 C.L.R. 201.

[137] The Mauritius court said that deprivation would occur only if property was reduced to a 'valueless shell'. Lord Woolf disagreed: 'to refer to a ''valueless shell'' is to overstate the situation which needs to exist before there is a constructive deprivation' ([1995] 3 L.R.C. 494 at 506). However, he also remarked that '[e]ven in the case of section 3 there is difficulty in bringing the increased control of land which [the legislation] involves within its language' ([1995] 3 L.R.C. 494 at 504).

[138] [1985] 1 A.C. 585; [1985] L.R.C. (Const.) 801; see above, pp. 99–101.

[139] [1995] 3 L.R.C. 494 at 504–5 (emphasis added).

further than this, as he stated that the Mauritian Supreme Court's decision was consistent with the general principle of proportionality.

It is uncertain whether *La Compagnie Sucrière de Bel Ombre Ltee* represents a significant change in the Mauritian right to property. 'Possessions', under the Convention, is roughly equivalent to 'property' under the Mauritian and other Commonwealth constitutions. However, the First Protocol of the Convention, as interpreted in *Sporrong and Lönnroth*, probably covers a greater range of restrictions on property than the Commonwealth ideas of 'acquisition of property'.[140] As Commonwealth constitutions are generally interpreted as guaranteeing full compensation, it is understandable that Commonwealth courts would wish to restrict the situations where a prima facie infringement of the right to property arises. If *La Compagnie Sucrière de Bel Ombre Ltee* does represent a real departure from the Commonwealth approach, the right to property would apply to a greater number of situations, but guarantee something less than it now does.

In some respects, *La Compagnie Sucrière de Bel Ombre Ltee* represents a triumph of the doctrinal approach, because it shifts the emphasis away from the terms of the provisions to broad, judicially developed criteria of the 'fair balance' and proportionality. That is, as long as it is not necessary to require full compensation in every case where an acquisition (or deprivation) of property (or property rights) has occurred, the emphasis can shift to a more general question of whether an adequate balance has been struck. David Beatty would argue that this is a positive step in the Commonwealth jurisprudence of property rights,[141] as he believes that shifting the emphasis to proportionality would produce a 'very practical, fact oriented, non conceptual' review process, rather than a review process that tries to 'identify the linguistic core of some very general and ill-defined word or phrase'[142] such as 'property', 'acquisition' or 'deprivation'. Since scepticism over the review process frequently arises over the judicial attempt to define inherently flexible concepts, such as property or acquisition, he believes that the trend should lead to judgments that obtain broader acceptance than those

[140] *E.g.* compare *Sporrong and Lönnroth* v. *Sweden* A 52 (1982) with *Davies and Others* v. *Minister of Lands, Agriculture and Water Development* [1997] 9 1 L.R.C. 123 (S.C. Zim.) and *Handyside* v. *U.K.* A 24 (1976), or *AGOSI* v. *U.K.* A 108 (1986) with *Re Director of Public Prosecutions, ex parte Lawler* (1994) 179 C.L.R. 270.

[141] David Beatty, 'Human Rights and the Rules of Law' and 'The Last Generation: When Rights Lose their Meaning', in Beatty, ed., *Human Rights and Judicial Review*.

[142] Beatty, 'Human Rights and the Rules of Law', p. 51.

produced by the more traditional modes of judicial analysis. Perhaps a general proportionality test, and the balancing process, would not be more certain than the linguistic, conceptual analysis that now dominates the Commonwealth analysis of the right to property, but it is equally possible that the balancing process would be more easily accessible and understood. It seems unlikely, however, that any Commonwealth court would abandon the other methods of constitutional interpretation. The courts are not likely to find that any economic loss falls within the right to property, as the constitutional provisions refer to 'property' rather than 'loss'. In this sense, literalism will continue to exert its influence on Commonwealth jurisprudence. Other methods of interpretation, whether historical, structural or ethical, also illuminate issues that the courts will continue to find important.

Conclusions

In this century, the circumstances in which a property owner has had a constitutional right to compensation have been extended from the simple compulsory acquisition of land. Framers of constitutions are responsible for certain aspects of this extension of property rights; for example, the decision to make the right applicable to all forms of property was highly significant. At the same time, framers have sought to protect other powers over property with increasingly detailed exceptions and provisos to the compensation guarantee. Perhaps this can be attributed to the dominance of literal interpretation; if the courts are expected to rely on the plain meaning of the enactment, the enactment should be as precise as possible.[143] As courts move away from legalism, there is more reason to draft constitutional provisions with greater generality. In fact, this seems to be the current trend in drafting; the South African and Namibian property clauses and the derogations to them are considerably less detailed than those of earlier, Nigerian-model constitutions.

The effects of the support for purposive interpretation on the right to property remain unclear. The judicial analysis tends to follow the incremental, case-by-case approach typical of doctrinalism. For example, most courts believe that a formal transfer of legal title to property is not substantially different from an informal transfer of the economic value

[143] Indeed, it is interesting to note some of the property clauses drafted in more recent years reflect the influence of the rise of purposive interpretation, in the sense that they are more open-ended than earlier clauses.

of the property; hence, a transfer of value is compensatable under most constitutions. In some cases, doctrinal argument has been supplemented by structural and ethical argument, but in most jurisdictions the paucity of case law makes it difficult to draw general observations with any confidence. From the judiciary's perspective, there is no need to articulate general principles as long as the incidence of cases on constitutional property rights remains fairly low. Hence, there are a number of overlapping principles that define the state's duty to compensate. For example, many of the cases where compensation was not payable could have been decided on any one of the following principles: that the degree of interference was not severe enough; that there was merely a deprivation of property (depending on the language of the constitutional provisions); that the government acted for a reason for which no compensation is payable; or that public and private interests were fairly balanced.

By way of comparison, the private law regarding the protection of property interests is not governed by a single principle or theory. Property interests are protected by a number of different torts, whereby the success of a claim depends on the nature of the interference, the standard of fault and the remoteness of damage, among other factors. There are also torts that protect 'near-property' interests such as reputation and pure economic loss. Even attempting to encapsulate liability for carelessly inflicted damage to property in succinct tests of foreseeability or proximity is difficult. Hence, it is not surprising that the courts show little interest in articulating a single principle to cover harm arising from the exercise of sovereign powers. Moreover, the inductive method of developing doctrine, which most Commonwealth courts use in property cases, does not usually produce general principles until a critical mass of judgments has been produced. At present, the body of cases is fairly slight. Hence, it is not surprising that it is Australia that seems closest to developing a general theory, as it has the most extensive body of cases on the distinction between compensatable and non-compensatable interference with property.

7 Public purpose

This chapter is concerned with the purposes for which the legislature may exercise its powers over private property. Early civilian writers agreed that the sovereign powers over property could only be exercised in the public interest, although the precise nature of the public interest was disputed.[1] In the English constitution, the principle of parliamentary supremacy has meant that property can be taken for any purpose, public or private. Nevertheless, the legislature usually gives some indication of the purposes for which property may be taken, and the courts do not allow compulsory powers of acquisition to be used for an improper purpose.[2]

Most Commonwealth constitutions contain some limitations on the purposes for which the legislature may authorise the acquisition of property.[3] India's independence Constitution stated that property could not be expropriated 'for public purposes' unless compensation was paid. A number of Nigerian-model constitutions include detailed purpose clauses. For example, the Constitution of Kenya states that property may be taken only if it is 'necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of property so as to

[1] See generally F. A. Mann, 'Outlines of a History of Expropriation', (1959) 75 *Law Quarterly Review* 188, pp. 201ff.; William B. Stoebuck, 'A General Theory of Eminent Domain', (1972) 47 *Washington Law Review* 553, pp. 589–98.

[2] See above, pp. 22–4.

[3] Some constitutions do not include an express purpose requirement; see *e.g.* Barbados, s. 16; Belize, s. 17; Dominica, s. 6; Grenada, s. 6; Guyana, s. 142; Jamaica, s. 18; Malaysia, Art. 13; Malta, s. 37; Nigeria, s. 42; Trinidad and Tobago, s. 4(a); Zambia, Art. 16. Federal constitutions may indirectly limit the expropriatory power of a legislature to certain purposes; see *e.g. Att.-Gen. of Canada* v. *Att.-Gen. of Quebec* [1947] A.C. 33.

promote the public benefit'.[4] Other constitutions are still more detailed; for example, the Constitution of Botswana repeats the list of purposes given in the Constitution of Kenya, and adds that property may be taken 'in order to secure the development or utilization of the mineral resources of Botswana'.[5] More recently, the drafting of the South African Constitution was bedevilled by confusion over the scope of 'public use', 'public interest' and 'public benefit'. The interim Constitution permits expropriation only for 'public purposes' but, after some debate, it was decided that the final Constitution should permit expropriation 'for a public purpose or in the public interest'.[6] The confusion suggests that there is a significant difference between these terms but, as this chapter demonstrates, it is becoming increasingly unlikely that courts would declare any legislation invalid on the basis that it violates any of these clauses.

Judicial deference is strongest in relation to the broad policy objectives of governments and legislatures. At most, courts may question the means of pursuing these objectives. This chapter examines two areas where the choice of means may raise doubts about the validity of a taking. The first concerns the redistribution of property. In some cases, redistribution is intended to further social welfare goals, such as the alleviation of poverty or the provision of greater security of tenure for tenants. In other cases, it is related to economic development. Land or other resources may be supplied to a private business in the hope of securing the supply of vital resources or stimulating the local economy. No court would doubt that social welfare or economic development is a valid governmental objective, but some courts have questioned whether they should be pursued by the compulsory redistribution of property from one private person to another.

The second area concerns the use of compulsory powers to acquire property. Most governments acquire their resources without coercion, for the simple reason that acquiring property compulsorily tends to be cumbersome and expensive.[7] The decision to acquire compulsorily may therefore appear arbitrary to the owner whose property is taken,

[4] See Kenya, s. 75(1); see also Bahamas, s. 27(1); The Gambia, s. 22(1); Ghana, s. 20(1); Mauritius, s. 8(1); Solomon Islands, s. 8(1).

[5] Botswana, s. 8(1)(a).

[6] Interim Constitution, s. 28(3); final Constitution, s. 25(2)(a). See Matthew Chaskalson, 'Stumbling Towards Section 28: Negotiations over the Protection of Property Rights in the Interim Constitution', (1995) 11 *South African Journal of Human Rights* 222, p. 237.

[7] See generally Thomas W. Merrill, 'The Economics of Public Use', (1986) 72 *Cornell Law Review* 61, pp. 97–102.

especially if compensation falls short of the value of the property to the owner and the property could have been purchased on the open market. In such cases, redistribution is not the issue; it is the arbitrariness of forcing one individual owner to contribute to the public benefit.

The redistribution problem

The framers of the United States Constitution believed that the security of property was important both to individual owners and to the continuing economic and political stability of their nation. They feared that state and federal legislatures would use their new powers over property to redistribute property without a view to the broader public interest.[8] For this reason, it was not sufficient to require compensation for expropriation, since legislatures could still use the power of eminent domain for private advantage. The Fifth Amendment therefore states that 'nor shall private property be taken for public use, without just compensation'. Most state constitutions contain similar provisions, and the Fourteenth Amendment also provides that no state shall 'deprive any person of life, liberty, or property without due process of law'. State and federal courts held that, by implication, these provisions ruled out takings for private use.[9]

Throughout most of the nineteenth century, the courts applied the public use requirement quite strictly. While it was not necessary to show that the state would acquire title to the property, it was not generally sufficient to show merely that the proposed use would benefit the public. Under the 'narrow use' doctrine, it was also necessary to show that the property would be available for use by the public.[10] Hence, legislatures could delegate the power of eminent domain to private developers of mill-dams and railways, even if it meant that the property went from one private person to another.[11] In

[8] See generally Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and its Legacy* (Chicago and London: University of Chicago Press, 1990).

[9] See Lawrence Berger, 'The Public Use Requirement in Eminent Domain', (1978) 57 *Oregon Law Review* 203, p. 205; Stoebuck, 'General Theory', pp. 593ff.; Anon., 'The Constitutionality of Excess Condemnation', (1946) 46 *Columbia Law Review* 108, pp. 109–10.

[10] See *e.g. Missouri Pacific Railway* v. *Nebraska* 164 U.S. 403 (1896); *Citizens Savings & Loan Association* v. *Topeka* 87 U.S. 655 (1875) at 663; *Wilkinson* v. *Leland* 27 U.S. 627 (1829).

[11] See generally Anon., 'The Public Use Limitation on Eminent Domain: An Advance Requiem', (1949) 58 *Yale Law Journal* 599; Stoebuck, 'General Theory', pp. 588–99; Thomas J. Coyne, '*Hawaii Housing Authority* v. *Midkiff*: A Final Requiem for the Public Use Limitation of Eminent Domain?' (1985) 60 *Notre Dame Law Review* 388.

an indirect manner, the narrow use doctrine allowed governments to subsidise the private development of important infrastructure, through the conferral of powers normally exercised only by organs of the state.[12]

At the time, similar developments were occurring in Britain. In the eighteenth century, Parliament often conferred the power to expropriate on private enterprises that provided services to the public,[13] but the scale of expropriation increased dramatically during the railway booms of the nineteenth century. As in the United States, it was thought that railway companies needed the power to expropriate in order to become viable commercial enterprises.[14] As explained in chapter 2, in Britain the debate over the purposes for which property could be expropriated took place in Parliament rather than the courts, since Parliament conferred the power to expropriate in private Acts. Special committees of both Houses held quasi-judicial hearings to consider petitions for the private Acts, where the petitioners had to show that conferring powers of expropriation would be in the public interest. The railway companies tended to find the strongest opposition from the House of Lords, where '[i]n a score of real and imagined ways, the encroachment of railways threatened to compromise not only the chief source of the gentry's wealth, but the status, prestige, and political influence that flowed from landownership'.[15] Many of the peers felt that railway expansion was not sufficiently important to justify upsetting established social and political patterns. These patterns were based on ownership of land; in a sense, the gentry clung to a near-feudal sense of ownership that defined the nation's political and economic structure. Hence, they believed that a general resistance to compulsory expropriation would be in the public interest. Their sense of ownership was challenged by the capitalist tendency to value all forms of property, including land, more for its economic function than for its traditional social or political functions. Ultimately, the popular support for railway construction was so great that, in most cases, companies were able to obtain the compulsory powers of acquisition. As in the United States, there was still a general sentiment that land should be expropriated

[12] Harry N. Scheiber, 'The Road to *Munn*: Eminent Domain and the Concept of Public Use in the State Courts', (1971) 5 *Perspectives in American History* 329, pp. 387–8.
[13] Rande W. Kostal, *Law and English Railway Capitalism, 1825–1875* (Oxford: Oxford University Press, 1994), p. 112.
[14] *Ibid*., chs. 3, 4.
[15] *Iibd*., p. 147.

only if the public benefited thereby,[16] but in England it was generally assumed that railway projects did produce a public benefit. In the House of Lords, the fear that the railway boom would undermine social structures and stability gave way to a narrower concern for the welfare of the individual landowners. This was satisfied if landowners received adequate compensation for their property.[17] In a sense, the 'status, prestige, and political influence that flowed from landownership' had become less important than the wealth that it represented; so long as the wealth was protected, the landowner had no complaint.

By the end of the nineteenth century, under American, British and colonial law, it therefore appeared that expropriation would be allowed whenever the public would have access to the land, even if the land went into private hands. In the United States, the Supreme Court soon took a broader view of public use, at least in relation to the development of economic infrastructure. In particular, in *Mt Vernon – Woodberry Cotton Duck Power Co*. v. *Alabama Interstate Power Co*., the Court upheld the compulsory purchase of land and water rights for the construction of a hydroelectric dam, although the public would have no access to the property itself. As put by Justice Holmes:

> [i]t may sometimes be hard to draw the line that is supposed to limit the authority of the legislature to exercise or delegate the power of eminent domain. But to gather the streams from waste and to draw from them the energy, labor without brains, and so to save mankind from toil that it can be spared, is to supply what, next to intellect, is the very foundation of all our achievements and all our welfare. If that purpose is not public we should be at a loss to say what is. The inadequacy of use by the general public as a universal test is established.[18]

In effect, the Court no longer required public access to land itself, but access to the services produced from the land.

British and colonial courts took the same view, as demonstrated by a Privy Council case from India, *Hamabai Framjee Petit* v. *Secretary of State for India*.[19] While this case only concerned the interpretation of a private

[16] *Ibid*., p. 180, refers to the House of Lords Select Committee Report on Compensation for Lands taken for or Injured by Railways, H.C. Parl. Papers (1845), vol. X, p. 420: 'Public Advantage is the only ground upon which a Man can justly be deprived of his Property and Enjoyments.'

[17] Kostal, *Railway Capitalism*, p. 179. In fact, the propertied interests in Parliament fared quite well in Britain, as compensation tended to be higher than it was in the rest of Europe or the United States: *ibid*., pp. 150–75.

[18] 240 U.S. 30 (1915) at 32.

[19] (1914) 42 I.A. 44.

lease, it subsequently became quite influential on the interpretation of the public purpose requirement of the independence Constitution. The lease was subject to the government's right to resume possession for a 'public purpose'.[20] The government gave notice to resume possession for the purpose of providing residential accommodation for government servants. The lessee challenged the notice on the basis that there was no public purpose, because the public was not given access to the land. However, the Privy Council stated that: 'the phrase ["public purpose"], whatever else it may mean, must include a purpose, that is, an object or aim, in which the general interest of the community, as opposed to the particular interest of individuals, is directly and vitally concerned'.[21] At the time, it was difficult, though not impossible, to obtain suitable accommodation in Bombay, and the government could not recruit civil servants unless it offered them suitable accommodation. Hence, using the land to provide private accommodation therefore served a public purpose because the community was 'directly and vitally concerned' with the civil service.

These cases suggest that Commonwealth courts would construe a constitutional test of public use or public purpose quite broadly. However, at this point the Commonwealth law on purpose requirements took a surprising turn. Sir Thomas Inskip, the British Attorney-General responsible for drafting the Government of India Act 1935, believed that requiring compensation for all compulsory acquisitions of property would force the legislature to compensate for the execution of civil judgments. Accordingly, section 299(2) made compensation payable only when property was acquired 'for public purposes'.[22] Clearly, Inskip believed that the Indian legislature should have the power to acquire property for private purposes. Article 31(2) of the independence Constitution borrowed the language of section 299, including the reference to public purposes. In the Constituent Assembly, however, there was an implicit assumption that the American understanding of a public purpose requirement would apply, with the result that property could be acquired *only* for a public purpose. The position was clarified in 1955 by the Fourth Amendment, which substituted the following for the original Article 31(2): 'No property shall be compulsorily acquired or requisitioned save for a public purpose . . .', but the Supreme Court had already reached this

[20] Compensation was payable if possession was resumed.
[21] Referring to Bachelor J. in the High Court, (1915) 39 Bom. 279 at 291.
[22] H.C. Deb., vol. 300, ser. 5, cols. 1075–9 (1934–5).

conclusion in *Bihar* v. *Singh*.[23] This case concerned the annulment of certain rights of *zamindar* landlords under the Bihar Land Reforms Act 1950.[24] A landlord challenged the Act on the basis that it merely transferred rights from the landlords to tenants, to the sole benefit of the individual tenants; in other words, it did not serve a public purpose. Although the Supreme Court upheld the legislation, it assumed that Article 31(2) barred the acquisition of property for private purposes.

Mahajan J. stated the public purpose requirement was satisfied because '[z]amindaris are not being taken for the private benefit of any particular individual or individuals, but are being acquired by the State in the general interests of the community'.[25] This seems entirely reasonable; indeed, he referred to the Constitution's Preamble and the directive principles for support. However, he also made a surprising reference to the early American doctrine, as he stated that: 'in the concept of public purpose there is a negative element in that no private interest can be created in the property acquired compulsorily; in other words, property of A cannot be acquired to be given to B for his own private purposes'.[26] This is a remarkable statement, given the background of the *Hamabai* case and the reasons for including the public purpose requirement in section 299 of the Government of India Act 1935. In any case, Mahajan J. believed that the Act satisfied the public purpose test, because '[t]here is no question in these circumstances of taking property of A and giving it B. All that the Act achieves is the equality of the status of the different persons holding land in the State.'[27] But as the Act achieved equality by reallocating private property rights, it is difficult to follow his argument. *Bihar* v. *Singh* therefore seems to make more sense if Mahajan J.'s reference to the early American doctrine is ignored. That is, a redistribution of property from A to B can be upheld if it produces some sort of broader public benefit. Certainly, this is how *Bihar* v. *Singh* was treated in subsequent cases. Together with the *Hamabai* case, it provided the basis for decisions in which land was taken to provide housing for civil servants,[28] homeless persons[29] and refugees.[30]

[23] A.I.R. 1952 S.C. 252.
[24] On the *zamindari* system, see pp. 43–4, above.
[25] A.I.R. 1952 S.C. 252 at 312.
[26] *Ibid*. [27] *Ibid*.
[28] *Bombay* v. *R. S. Nanji* [1956] S.C.R. 18; *Bombay* v. *Ali Gulshain* [1955] 2 S.C.R. 867.
[29] *Bombay* v. *Bhanji Munji* [1955] 1 S.C.R. 777. See also *New Munyu Sisal Estates Ltd* v. *Att.-Gen.* [1972] E.A. 88 (H.C. Kenya) at 89.
[30] *Lachhman Das* v. *Municipal Corpn* [1969] 3 S.C.R. 645.

Bihar v. *Singh* foreshadowed further developments in the American public use doctrine. This is most clearly shown by the notorious case of *Hawaii Housing Authority* v. *Midkiff*,[31] which concerned legislation intended to redistribute land in Hawaii. Under the traditional tenure system of Hawaii, land was concentrated in the hands of a small minority and occupied by tenants. The legislation provided that, where a sufficient number of tenants sought to purchase land, the state was authorised to condemn the land for sale to the tenants. One of the landowners argued that this was unconstitutional, because the only purpose of the transfer of land was the transfer itself. However, the Supreme Court declared that the purpose of the Act was not to benefit individuals, but to attack 'certain perceived evils of concentrated ownership',[32] which had created 'artificial deterrents to the normal functioning of the State's residential land market and forced thousands of individual homeowners to lease, rather than buy, the land underneath their homes'.[33] Nevertheless, it seems doubtful that anyone but the tenants benefited appreciably from the change in landholding.[34] In this regard, *Hawaii Housing Association* v. *Midkiff* and *Bihar* v. *Singh* present an interesting contrast. Both legislative programmes transferred property rights to tenants, but the courts in each case perceived the public interest differently. In *Bihar* v. *Singh*, improving the security of the tenants was itself in the public interest; in other words, the general theme was one of social welfare. In *Midkiff*, by contrast, it seems that the public interest lay in the creation of a market in land.

In *Bihar* v. *Singh*, Mahajan J.'s apparent support for the narrow, early American doctrine raised other problems for the Indian courts. In particular, Indian state legislatures authorised the expropriation of land for transfer to private persons for subsequent development into industrial sites. The early indications were that the Indian Supreme Court would follow the path of *Mt Vernon – Woodberry Cotton Duck Power Co*. v. *Alabama Interstate Power Co.*[35] and *Hamabai Framjee Petit* v. *Secretary of*

[31] 467 U.S. 229 (1984).
[32] *Ibid*. at 245.
[33] *Ibid*. at 242.
[34] An even stronger example of a narrow benefit is *James* v. *U.K.* A 98 (1986); 8 E.H.R.R. 123, a case on Article 1 of the First Protocol of the European Convention on Human Rights. Here, the European Court of Human Rights declared that a lease enfranchisement scheme, whereby tenants under long leases were entitled to purchase the freehold, 'can properly be described as being ''in the public interest'' ', as it was 'calculated to enhance social justice within the community' (para. 41).
[35] 240 U.S. 30 (1915).

State for India.[36] In *Babu Barkya Thakur* v. *State of Bombay*, the Court held that requisitioning land for a company served a public purpose because the company's presence stimulated the local economy.[37] In such a case, the private benefit is more immediate and perhaps greater than the public benefit (in so far as they can be compared), but the presence of any general public benefit is sufficient. However, in *Arora* v. *State of Uttar Pradesh*, the Supreme Court held that the expropriation of land for the construction of a private factory did not serve a public purpose.[38] The case is not directly on the point, since it concerned the interpretation of the Land Acquisition Act 1894. However, the Court did state, regarding the Act, that 'it could not be the intention of the legislature that the Government should be made a general agent for the companies to acquire lands for them in order that the owners of companies may be able to carry on their activities for private profit'.[39] It was not enough that the company might produce goods that would be useful to the public.[40] The Court specifically referred to the narrow doctrine of *Bihar* v. *Singh* and the early American cases, thereby demonstrating that Mahajan J.'s dicta still carried some force in Indian law.[41]

Despite the authority of *Arora* v. *State of Uttar Pradesh*, the Indian borrowing of the early American doctrine was repudiated in *Arnold Rodricks* v. *Maharashtra*,[42] which concerned the Land Acquisition (Bombay Amendment) Act 1953. This Act purported to authorise 'the acquisition of land for purposes of the development of areas . . . and subsequent disposal thereof in whole or in part by lease, assignment or sale, with the object of securing further development'. The petitioner argued the statute would go beyond the constitutional limit of expropriating for a 'public purpose', because it authorised the state to buy and develop for the sole purpose of resale to private buyers. This is exactly what the Supreme Court opposed in *Arora* v. *State of Uttar Pradesh*, and yet in this case it upheld the Government's plans. Sikri J., for the majority, stated that a shortage of residential and industrial sites made it 'imperative' for the Government to act. He acknowledged that the allotment of the sites directly benefited individuals;

[36] (1914) 42 I.A. 44.
[37] A.I.R. 1960 S.C. 1203; [1961] 1 S.C.R. 128.
[38] A.I.R. 1962 S.C. 764; see also *Bombay* v. *Bhanji Munji* [1955] 1 S.C.R. 777.
[39] A.I.R. 1962 S.C. 764 at 770 *per* Wanchoo J.
[40] *Ibid*.
[41] *Ibid*. at 772–3.
[42] A.I.R. 1966 S.C. 1788; [1966] 3 S.C.R. 885.

nevertheless, it served a public purpose because the 'main idea' in expropriating the land 'was not to think of the private comfort or advantage of the members of the public but the general public good'.[43]

The principle that emerged from these cases was that the public purpose was served if the 'general interest of the community was directly and vitally concerned' with the broader programme of which the expropriation formed a part.[44] As such, it was equivalent to a public interest test and it rarely provided a substantial barrier to governments. Despite the frequent amendments passed by the Indian Parliament during its long dispute with the Supreme Court over compensation for property, the public purpose requirement remained in place until Article 31 was finally repealed. As in the United States, it was the compensation guarantee, rather than the public purpose requirement, which was the real check on state action.

In the Commonwealth generally, the modern interpretation of public use and public purpose is so broad that it seems doubtful that a court would declare legislation unconstitutional on the sole ground that it authorises a redistribution of property. Only one Commonwealth case stands against this general trend. In *Trinidad Island-wide Cane Farmers' Association Inc. and Attorney-General* v. *Prakash Seereeram*,[45] legislation deemed all cane farmers, including the applicant, to be members of a private farmers' association and compelled them to make contributions to it. In effect, the legislation set up a compulsory pension or savings scheme. The Court held this amounted to a compulsory acquisition of the applicant's property, and that it was invalid because it did not serve a public purpose.[46] There is no express public purpose requirement under Trinidad and Tobago's Constitution, but section 4(a) recognises the 'right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law'. According to the Court, the section contains the implied restriction that 'private property may not be taken from one person and given to another for private use'.[47] The Court based its reasoning on nineteenth-century American cases on the Fifth

[43] *Ibid*.

[44] *Bombay* v. *R. S. Nanji* [1956] S.C.R. 18 at 26.

[45] (1975) 27 W.I.R. 329 (C.A. T.T.).

[46] The Court also held the legislation was invalid because it did not provide adequate compensation.

[47] (1975) 27 W.I.R. 329 at 339. Cf. Canadian cases on similar provisions of the Canadian Bill of Rights, where due process has been given procedural content only (at least in relation to economic rights): *Curr* v. *The Queen* (1972) 26 D.L.R. (3d) 603 at 613–14 *per*

Amendment[48] and ignored the Supreme Court's subsequent repudiation of the narrow use doctrine. Indeed, *Trinidad Island-wide Cane Farmers' Association* v. *Seereeram* suggests that the legislature could not introduce compulsory pension plans or automobile insurance schemes.[49] For this reason, it is exceptional: there are no recent cases from the United States or any other Commonwealth jurisdiction where expropriatory legislation has been declared ultra vires for failing to serve a public purpose.

The only situations where a public purpose requirement seems likely to provide a check on government action are those where ostensibly democratic institutions are dominated by a specific and narrow interest. This is illustrated by *Zambia National Holdings Ltd and Another* v. *Attorney-General of Zambia*, where the Zambian Supreme Court queried the validity of a transfer of state property to a corporation controlled by the United National Independence Party, on the basis that the party had exercised undue influence over the executive and Parliament during the period when Zambia was a one-party state.[50] Perhaps if this case had involved the expropriation of property for direct transfer to the party, the courts would have invoked the purpose requirements.

In conclusion, the purpose requirements have had very little impact on legislative programmes for the redistribution of property. However, the fear of the framers of the United States Constitution that majoritarian governments would threaten economic and political stability has not materialised. This can be explained partly by the operation of other legal principles, such as the limitations on executive action arising under administrative law. There are also extra-legal factors: the right to vote does not necessarily translate into political power and consequently the propertyless do not exert the control over democratic

Laskin J.; *Smith Kline & French Laboratories Ltd et al*. v. *Att.-Gen. of Canada* (1986) 34 D.L.R. (4th) 584 (Federal C.A.) *affirming* (1985) 24 D.L.R. (4th) 321 (Federal T.D.).

[48] *Missouri Pacific Railway* v. *Nebraska* 164 U.S. 403 (1896) and *Chicago Burlington Quincy Railroad Co*. v. *Wilson* 166 U.S. 266 (1896).

[49] Cf. *Nyambirai* v. *National Social Security Authority and Another* [1996] 1 L.R.C. 64 (S.C. Zim.), where the validity of a similar scheme was upheld.

[50] [1994] 1 L.R.C. 98 (S.C.) at 110–11. The case arose on a challenge by the corporation to compulsory acquisition proceedings; inter alia, the corporation challenged the motives of the acquisition, but the Court implicitly suggested that the recovery of state property transferred to UNIP (the official party) and its organs was a public purpose. Cf. *Government of the Republic of Namibia* v. *Cultura 2000* [1994] (1) S.A. 407 (S.C.), *Clunies-Ross* v. *The Commonwealth of Australia* (1984) 155 C.L.R. 193 and Michael Taggart, 'Expropriation, Public Purpose and the Constitution', in Christopher Forsyth and Ivan Hare (eds.), *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC* (Oxford: Clarendon Press, 1998), pp. 110–12.

political processes that the American framers assumed they would. The financial burden imposed by the constitutional obligation to provide full compensation to the expropriatee is also an important consideration. The judicial reluctance to enforce purpose clauses does not necessarily represent a belief that redistribution is undesirable; it may mean only that judges believe that purpose clauses have no useful role to play in controlling redistribution. In any case, most judges probably believe that the right to property protects the individual from the state, and that the individual is fully protected by the guarantee of full compensation. As long as property is treated as a commodity or merely a token of wealth, an individual has no complaint if the commodity is replaced with a sum of money. Only if property carries some other actual or symbolic value would there be a need for some other limitation on the state's powers over property, such as a public purpose requirement.[51]

The holdout problem[52]

The decision to take property compulsorily raises a further issue. In practice, most owners are willing to part with their property for a sufficiently high price. The immediate purpose of resorting to the compulsory process is therefore to obtain the property at a 'reasonable' price. In most cases, governments wish to avoid the 'holdout problem', which arises if a buyer needs the property to complete a project and it is only available from one seller. A seller who is aware of the buyer's need for the property would hold out for a price that would extract virtually all of the economic profit the buyer hopes to gain from the transaction. The best negotiating strategy for a buyer in this position is to conceal their projected profit from the seller, which most buyers do by concealing the intended use of the property. This strategy is usually not available to government buyers, since their decisions are normally made openly.[53] This is one justification for the availability of the power of eminent domain: without it, holdout sellers would be able to drive

[51] See *e.g.* Cyprus, Art. 23(9) and (10) and the Government of Ireland Act 1920, s. 5, which give special protection to property of religious institutions.

[52] See generally Merrill, 'Economics of Public Use'; Jack L. Knetsch, *Property Rights and Compensation: Compulsory Acquisition and Other Losses* (Toronto: Butterworth & Co. (Canada) Ltd, 1983), ch. 5; William A. Fischel, *Regulatory Takings: Law, Economics, and Politics* (Cambridge, Mass. and London: Harvard University Press, 1995), pp. 68–71.

[53] Knetsch, *Property Rights*, p. 69.

up the cost of public projects and capture most of the benefit of transferring private property into public hands.[54]

Most commentators and courts accept that avoiding holdouts is a legitimate use of sovereign powers over property.[55] It does, however, lead to the question: should the sovereign powers be available only when there is a holdout? In the absence of a holdout, a compulsory acquisition has the effect of coercing a transfer where consent could have been obtained quite easily. This focuses the public purpose question on the compulsory nature of the government power, by making it the purpose of coercion, rather than the use of the property, that is important. The argument in favour of limiting the sovereign powers to holdout cases raises the point made by Joseph Sax in his 1964 article, 'Takings and the Police Power'.[56] Sax argued that the right to property should be used to prevent the state from acting arbitrarily or tyrannically and this is most likely to occur when the state acquires resources for its own benefit. Sax did not argue that every uncompensated acquisition of resources would be arbitrary or tyrannical, but that it would be difficult for the individual to prove that a given acquisition was. The real purpose of compensation is to 'shield citizens from the burden of proving discrimination or lack of restraint in every case'.[57] It also reduces the incentive for the government to abuse its powers, as it is often less costly to acquire property through the open market if full compensation must be paid for a compulsory acquisition.[58] Nevertheless, it is doubtful that the compensation guarantee would provide a full safeguard in every case where the government could have obtained the resources on the open market. As explained in chapter 8, not all constitutions guarantee full market value for property and very few constitutions guarantee to compensate for the full extent of the owner's loss.

In the Commonwealth, the holdout problem has not been raised in relation to public purpose issues. This is perhaps explained by the fact that governments are unlikely to force a sale where the property is readily available on the open market, because the procedures required to acquire compulsorily can be quite costly. It may be the case, however,

[54] The issue also applies to the police and regulatory powers over property, as regulations could be negotiated with individual owners.

[55] See Merrill, 'Economics of Public Use', pp. 81–2; Knetsch, *Property Rights*, ch. 5.

[56] (1965) 74 *Yale Law Journal* 36.

[57] *Ibid*., p. 67.

[58] Governments are unlikely to use eminent domain in any event: Merrill, 'Economics of Public Use', pp. 97–102.

that the principles of assessment allow the acquiring authority to obtain property compulsorily at something less than the full market price. Where this is the case, some courts are not comfortable with use of the compulsory powers. The best example, although not directly on the point, is *Fraser* v. *The Queen*, where a government authority expropriated a plot of land solely for obtaining a supply of rock for the construction of a causeway.[59] The land was not intended for the causeway itself and it had little value except as a convenient source of rock for the causeway. The acquiring authority valued the land as wasteland and offered only $5,505 in compensation. The Supreme Court held that the land should have been valued at around $360,000, which was the amount that the authority would have expected to pay for the rock if it had not expropriated the land.

The case was argued solely on the compensation point, but it is worth noting that Cartwright J. observed that the Government acquired the land only for the rock; in essence, he treated this as an expropriation of rock rather than land.[60] He was concerned that the rock was readily available from other sources and the landowner was quite willing to sell the rock at the market price. In effect, the authority saw an opportunity to use its expropriatory powers to obtain rock at a price considerably below the market price. The public interest justified the construction of the causeway, but the real question is whether public interest justified the avoidance of the existing market for the rock. From the landowner's perspective, the Government's action was arbitrary, in the sense that there was no valid reason why he should have been selected out of a class of suppliers to provide rock at a price that made the transfer almost gratuitous.[61] Although only compensation was disputed, the Court plainly believed that the Government had abused its compulsory powers over property. Hence, it removed the unjust advantage obtained by the Government by requiring it to pay the market price when the sole purpose of using the compulsory powers is to avoid paying the market price.[62]

[59] (1963) 40 D.L.R. (2d) 707 (S.C.C.); cf. Gerry A. Rubin, *Private Property, Government Requisition and the Constitution, 1914–1927* (London and Rio Grande: The Hambledon Press, 1994), on the United Kingdom Government's efforts to secure supplies of goods that were available on the open market, but at prices that it considered unreasonable.

[60] *Ibid*. at 709–11.

[61] Cf. *Commissioner of Taxes* v. *C W (Pvt) Ltd* [1989] 3 Z.L.R. 361 (S.C.), *affirming* [1988] 2 Z.L.R. 27 (H.C.), discussed above, pp. 187–9.

[62] See generally Knetsch, *Property Rights*, ch. 5. As explained in chapter 8, pp. 234–5, below, the Court's justification for awarding higher compensation was questionable.

Fraser v. *The Queen* shows that both the use of the property and the use of the coercive power raise questions of fairness. However, it must be acknowledged that the courts would be reluctant to hold that the use of the compulsory power is constitutionally improper if the proposed use of the property is not improper. Again, there are no cases directly on the point, but it is suggested by the relaxed standard of review adopted by most Commonwealth courts and framers. Most of the Nigerian-model constitutions with purpose clauses state that the acquisition of property must be 'necessary or expedient' for achieving the public purpose,[63] and the Zimbabwean Constitution states that the acquisition must be 'reasonably necessary'.[64] In *Patel* v. *Attorney-General*, it was argued that Zambian exchange control regulations infringed the Zambian right to property because they were not 'necessary or expedient' for a 'purpose beneficial to the community'.[65] The Zambian High Court held that 'expediency' only requires that legislation is 'desirable'.[66] Moreover, the Court did not ask for strict proof; instead, it held that it was enough that 'there is sufficient volume of international opinion in favour of [exchange] control'.[67] In other cases, the courts have applied a lower level of scrutiny. For example, in *R.* v. *Hinds*, Lord Diplock stated that

> in order to rebut the presumption [of constitutionality] their Lordships would have to be satisfied that no reasonable member of the Parliament who understood correctly the meaning of the relevant provisions of the Constitution could have supposed that [the law enacted] was reasonably required for the protection

Under Canadian law (and the law of most Commonwealth countries), the special suitability of land to the expropriator's purposes should be irrelevant to the assessment of compensation.

[63] Bahamas, s. 27(1); Botswana, s. 8(1)(a); Fiji, s. 9(1)(c); The Gambia, s. 22(1); Ghana, s. 20(1); Kenya, s. 75(1); Mauritius, s. 8(1); Solomon Islands, s. 8(1). Constitutions with purpose clauses but no express standard of scrutiny are: Nauru, s. 8(1); St Christopher and Nevis, s. 8(1); St Lucia, s. 6(1).

[64] Zimbabwe, s. 16(1)(a).

[65] [1968] Z.R. 99 (the right to property was subsequently amended and it does not contain a purpose clause). The argument proceeded on the basis that the purpose and compensation clauses of the right to property should be read disjunctively, although it is quite clear from the provision itself that they should be read conjunctively. That is, it was assumed that no compensation would be payable if the controls were 'necessary or expedient' for a 'purpose beneficial to the community'.

[66] [1968] Z.R. 99 at 113. Contrast with the executive power to destroy property without legislative authority; in *Burmah Oil* v. *Lord Advocate* [1965] A.C. 75, it was assumed that necessity justified the exercise of the royal prerogative; see generally Rubin, *Private Property*, on how the uncertainty surrounding the required degree of necessity was unresolved in the requisition cases of World War I.

[67] [1968] Z.R. 99 at 113; the relevant section of the Zambian Constitution was section 18(1)(a).

of any of the interests referred to, or in other words, that Parliament was either acting in bad faith, or had misinterpreted the provision of the Constitution under which it purported to act.[68]

R. v. *Hinds* concerned the right to a fair trial and its relatively lax standard of rationality has been strongly criticised.[69] However, as *Patel* indicates, the courts would probably apply a low standard of rationality to the right to property. In this respect, *Hinds* is consistent with the international trend on the rationality of takings.[70] In particular, the courts of the United States have virtually abdicated any power they may have had as to whether a taking is connected to a public use. This began with *Old Dominion Land Co.* v. *United States*, where the Supreme Court stated that it would defer to the legislature's determination that property was taken for 'public use' unless 'it is shown to involve an impossibility'.[71] Subsequently, in *Berman* v. *Parker*, it stated that 'when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive'.[72] More recently, in *Hawaii Housing Authority* v. *Midkiff*, the Court held that the public use requirement is satisfied if the taking is 'rationally related to a conceivable public purpose';[73] if the legislature 'determines there are substantial reasons for an exercise of the taking power, courts *must* defer to its determination that the taking will serve a public use'.[74] The emphatic language of *Midkiff* leaves no room for questioning the legislature.

In the Commonwealth, the level of scrutiny in relation to the holdout problem has not been examined closely at the constitutional level. Scrutiny is higher in administrative law, but even here there are cases that suggest that the reduction of cost is a valid reason, by itself, for the acquisition of property.[75] The general question was addressed in a recent South African case, *Administrator, Transvaal* v. *J. Van Streepen*

[68] [1977] A.C. 195 (P.C. Jam.). See also *Mootoo* v. *Att.-Gen. (Trinidad and Tobago)* [1979] 1 W.L.R. 1335 (P.C.) at 1339; *Att.-Gen.* v. *Antigua Times Ltd* [1976] A.C. 16 at 32; *Francis* v. *COP* [1973] A.C. 761.

[69] Margaret De Merieux, *Fundamental Rights in the Commonwealth Caribbean Constitutions* (Barbados: Faculty of Law Library, University of West Indies, 1992), p. 79.

[70] See *e.g. James* v. *U.K.* A 98 (1986), para. 54 (E.C.H.R.) and cf. *Zambia National Holdings Ltd and Another* v. *Att.-Gen. of Zambia*, [1994] 1 L.R.C. 98 at 110 where it was stated that the burden lay upon the applicant to show that an acquisition was motivated by bad faith.

[71] 269 U.S. 55 (1925) at 66.

[72] 348 U.S. 26 (1952) at 32.

[73] 467 U.S. 229 (1984) at 241. See generally Coyne, '*Hawaii Housing Authority*'.

[74] 467 U.S. 229 (1984) at 244 (emphasis added).

[75] At the administrative level, courts are generally reluctant to construe a statutory power of expropriation as authorisation to purchase for resale at a profit: see generally

(Kempton Park) (Pty) Ltd,[76] where a private rail link was expropriated for a public highway. In order to minimise the amount of compensation to the link owner, the state proposed to expropriate other land to construct a new link for the owner. The land expropriated for the link was plainly not intended for the construction of the highway itself; it merely facilitated construction by reducing its total cost. Nevertheless, the Court held that expropriation was in the public interest. While *Van Streepen* only concerns the interpretation of a statutory power of expropriation, it is consistent with American authorities on the 'public use' requirement of the Fifth Amendment.[77] In particular, in *United States*, *ex rel. Tennessee Valley Authority* v. *Welch*,[78] the Supreme Court upheld the expropriation of land that was isolated by the installation of a dam, although the land was not necessary for the construction of the dam itself. It was taken only because the cost of providing services to the land would have been greater than the cost of moving the residents; that is, the land was expropriated for the sole purpose of saving revenue.[79]

While these cases suggest that Commonwealth courts would probably not use the holdout problem as the starting point for a new public purpose doctrine, they also reveal a fundamental inconsistency in overall approach to purposes and takings. As explained in chapter 6, many constitutions make compensation conditional on whether the government's immediate purpose is to acquire property or merely to deprive the owner of property. In such cases, both the purpose and the means of achieving the purpose are relevant. For example, a government may decide to protect a state-owned enterprise from competition. It may choose to achieve this objective by expropriating competing private companies or by prohibiting other companies from engaging in the same business as the state enterprise. The first method is clearly compensatable as an acquisition of property, but at least some courts

Municipal Council of Sydney v. *Campbell* [1925] A.C. 338, *Galloway* v. *London Corpn* (1866) L.R. 1 H.L. 34, *Rolls* v. *London School Board* (1884) 27 Ch.D. 639.

[76] 1990 (4) S.A. 644 (A); see Andrea Eisenberg, '"Public Purpose" and Expropriation: Some Comparative Insights and the South African Bill of Rights', (1995) 11 *South African Journal of Human Rights* 207, pp. 218–21.

[77] Although Smalberger J.A. distinguished between 'public purpose' and the 'public interest', in that a public purpose is shown only if there is direct use of property for a public project, but a public interest is shown if the use is indirect; hence, he states that 'the acquisition of land by expropriation for the benefit of a third party cannot conceivably be for public purposes' (1990 (4) SA 644 at 661).

[78] 327 U.S. 546 (1946).

[79] See also Anon., 'An Advance Requiem'.

would hold that the second is not, on the basis that no acquisition occurred.[80] In both cases, the courts would probably not question the purpose of enhancing the competitive position of a state enterprise and the power of the state to take action to achieve that purpose, but compensatability depends on the means chosen for achieving that purpose. However, where it is not compensatability but the taking itself that is in issue, it seems that only the purpose of the taking or regulation is relevant. That is, in *Fraser* v. *The Queen* and *Administrator, Transvaal* v. *J. Van Streepen (Kempton Park) (Pty) Ltd*, the purpose of constructing a causeway or public highway could not be challenged and hence the means chosen to achieve that purpose were also beyond challenge.[81]

The *Van Streepen* and *Welch* cases raise a further question about the holdout problem. In general, governments expropriate property for its value in use. In other words, they take property in order to use it in a specific way. Nevertheless, there may be circumstances where governments wish to acquire property for its exchange or investment value; for example, the government may wish to acquire property to earn profit on an immediate resale. While this falls outside the purposes authorised by most statutes,[82] it is not clear whether it violates the constitutional purpose requirements.[83]

Early American cases applied the narrow use doctrine to the acquisition of property for its exchange or investment value. These American cases held that taking property for the purpose of adding or retaining state revenues was not an exercise of the power of eminent domain. Instead, it was an exercise of the taxing power and would need to satisfy the constitutional requirements of a tax.[84] For this reason, constitutional

[80] See above, pp. 163–71.

[81] See Merrill, 'Economics of Public Use'.

[82] See *e.g. Municipal Council of Sydney* v. *Campbell* [1925] A.C. 338.

[83] This issue also arises in connection with the meaning of property and compensation. Early Commonwealth cases suggested that money could not be taken, because the only possible compensation for money is money; see *Bihar* v. *Singh* A.I.R. 1952 S.C. 252; *Madhya Pradesh* v. *Ranojirao Shinde* A.I.R. 1968 S.C. 1053; *Madan Mohan Pathak* v. *Union of India* A.I.R. 1978 S.C. 803 at 821–4; *IRC and Att.-Gen.* v. *Lilleyman and Others* (1964) 7 W.I.R. 496 (C.A. British Caribbean); *Trinidad Island-wide Cane Farmers' Association Inc. and Att.-Gen.* v. *Prakash Seereeram* (1975) 27 W.I.R. 329 (C.A. T.T.) at 372; *Bata Shoe Co. Guyana Ltd and Others* v. *Commissioner of Inland Revenue and Att.-Gen.* (1976) 24 W.I.R. 172 (C.A. Guyana); cf. *Att.-Gen. of The Gambia* v. *Jobe* [1985] L.R.C. (Const.) 556 (P.C.).

[84] In most Commonwealth countries, the only constitutional issues would arise over the distribution of taxation powers in a federal state. See, however, *IRC and Att.-Gen.* v. *Lilleyman and Others* (1964) 7 W.I.R. 496 *per* Cummings J., at first instance, where it was suggested that the Constitution did not permit British Guiana to impose new taxes;

lawyers believed that eminent domain could not be used to acquire money and choses in action, on the basis that the only possible use of such property was to augment state revenue. Eventually, with the movement away from the 'narrow use' doctrine, the American courts accepted that money and choses in action could be taken under eminent domain.[85]

As explained above, Mahajan J. seemed to approve of the narrow use doctrine in *Bihar* v. *Singh*, although he still upheld the redistribution of land.[86] *Bihar* v. *Singh* also raised the issue of exchange value, and on this point the narrow use doctrine proved decisive. One objective of the land reform programme was to relieve the tenants from arrears of rent owed to the *zamindar* landlords. The legislation provided that the arrears would be payable to the state of Bihar, with compensation to be paid to *zamindars* at 50 per cent of the face value of the arrears. The Supreme Court held that the acquisition of the rent arrears did not serve a public purpose, even though the legislature regarded it as an essential part of a programme that the Court had decided did serve a public purpose.[87] The Court seemed to believe that the only conceivable purpose for expropriating a debt would be the augmentation of state revenue. It therefore concluded that money and choses in action could not be reached by eminent domain, because '[t]here could be no possible necessity for taking either of them under the power of ''Eminent Domain''. Money in the hands of the citizen can be reached by the exercise of the power of taxation.'[88] This put Indian law at least several decades behind the American developments; in fact, it appears that the Indian Court was not even aware of the contemporaneous American cases.[89] To some extent, the Indian courts relaxed the doctrine in later

see, *contra*, *Bata Shoe Co. Guyana Ltd and Others* v. *Commissioner of Inland Revenue and Att.-Gen.* (1976) 24 W.I.R. 172 *per* Crane J.A. at 187–90.

[85] Cf. *United States ex rel. Tennessee Valley Authority* v. *Welch* 327 U.S. 546 (1946) and Anon., 'An Advance Requiem'.

[86] A.I.R. 1952 S.C. 252.

[87] See Das J. (dissenting): 'it is an entirely wrong approach to pick out an item out of a scheme of land reforms and say that item is not supported by a public purpose . . . The proper approach is to take the scheme as a whole and then examine whether the entire scheme of acquisition is for a public purpose': A.I.R. 1952 S.C. 252 at 291.

[88] A.I.R. 1952 S.C. 252 at 280 *per* Mukherjea J.; see also *Madhya Pradesh* v. *Ranojirao Shinde* A.I.R. 1968 S.C. 1053.

[89] Mahajan J. referred to the 'well accepted proposition of law that property of individuals cannot be appropriated by the State under the power of compulsory acquisition for the mere purpose of adding to the revenues of the State': A.I.R. 1952 S.C. 252 at 275.

cases. In particular, in *Madan Mohan Pathak* v. *Union of India*, the Supreme Court acknowledged that the state might wish to acquire debts for some purpose other than augmenting revenues.[90] Bhagwati J., for the majority, cited the example of the extinction of debts owed by impoverished persons to moneylenders. 'Acquiring' these debts would not augment state coffers, since it was unlikely that the state would collect on the debts; often the state's purpose would be simply to relieve the debtors of their obligations. Hence, so long as the relief of the debtors serves the public interest, acquiring their debts satisfies the public purpose requirement.[91] *Pathak* therefore relaxed the stance taken in *Bihar* v. *Singh*. Nevertheless, the Court reaffirmed the principle that eminent domain could not be used if the primary purpose was to raise funds.[92] This shows that the public use or public purpose for which the property is taken must be capable of specific description. This is one distinction between the use of tax revenue and the use of expropriated property; with taxes, it is generally impossible to identify the specific use of a given taxpayer's money. If money or other property is expropriated solely for its exchange value, it is used in the same manner as tax revenue. It seems that the judges in *Bihar* v. *Singh* and *Pathak* assumed that there is no other use for money. However, there are situations where the state raises money for a specific purpose and in fact devotes that money to that purpose. In such a situation, it should be possible to find a sufficient connection between the money and the purpose to satisfy the public purpose requirement of the right to property. In essence, the American courts accepted this argument when they held that excess condemnation could serve a public use. This is also where the Court in *Trinidad Island-wide Cane Farmers' Association* v. *Seereeram*[93] viewed the facts too narrowly. As explained above, money was compulsorily acquired for a savings fund. So long as the fund was used for a specific public purpose, there is no reason why the court should not have permitted the compulsory acquisition of the money. Similarly, in *IRC and Attorney-General* v. *Lilleyman and Others*,[94] legislation imposed levies, at varying rates, on every individual employed or resident in British Guiana. The revenue was intended for development works. So long as the development works served a public purpose, the

[90] A.I.R. 1978 S.C. 803.
[91] *Ibid*. at 821–4 *per* Bhagwati J.
[92] *Ibid*. at 823.
[93] (1975) 27 W.I.R. 329.
[94] (1964) 7 W.I.R. 496.

levy itself should have fulfilled the public purpose requirement of the right to property.[95]

Conclusions

Commonwealth courts have given the purpose requirement only a marginal role in controlling the power of the legislature. This situation may change if new constitutional theories come to the fore. There are two possibilities that deserve mention. The first would be the rise (or resurgence) of an alternative view of the function of property. So long as money is regarded as a substitute for property, courts are likely to hold that compensation is sufficient protection for any property owner. However, if property assumed a social or political function distinct from wealth, the purpose requirement would serve a more important function.

The second would be a rise of a constitutional theory tied to a particular economic theory. If the judiciary believes the constitution is intended to preserve the political and economic order, it would have reason to strike down legislation that appears to threaten that order. In the early days of the American Constitution, the theory was against redistribution, and it found its judicial expression in the narrow use doctrine. A theory based on socialism would clearly produce a different but potentially coherent approach to defining a 'public purpose'. The expropriation of capital assets for transfer to private persons would not be justifiable, although the transfer of other assets might be.

At present, it is doubtful, however, that the courts would confront the legislature over the policy of property reforms. It therefore seems unlikely that the purpose requirements would have any role in controlling state economic policy in the near future. In practical terms, the right to property is merely a guarantee of compensation. Controls over the purposes of expropriation are likely to develop elsewhere and to be enforced by organs other than the judiciary. Examples can already be found. The World Bank and other international sources of finance have

[95] The confusing element of these cases lies in the duty to compensate the property owner. Not surprisingly, the courts have found it contradictory that the expropriation of money gives rise to a duty to compensate, which itself must be made in money. In such cases, it would make more sense to consider the taking of money as a tax, for which no compensation is payable. Of course, there is no difficulty if compensation need not be made in money, or if it need not represent the full value of the expropriated property. These points did not arise in these cases.

more influence on the economic policies of many states than the judiciary (in its constitutional role). At the national level, those with property often find that control over government policy can be achieved more easily by dominating access to the legislature, the civil service and the other organs of the modern state. In other words, the institutions that appeared to threaten the institution of property, and that the purpose requirement was originally intended to control, are now often used to support it.

8 Compensation

Constitutional law and compensation standards

In the vast majority of cases, an owner of property cannot resist expropriation on the grounds that the state intends to act for a constitutionally improper purpose. Hence, most cases focus on the amount and payment of compensation. Most constitutional rights to property state that the owner must receive compensation for expropriated property.[1] Some constitutions specifically state that compensation must be 'fair', or 'just', or 'adequate'. The interpretation of these provisions has been guided by the judicial belief that the primary purpose of compensation is to ensure that the owner of property is treated fairly. The protection of public funds may enter into consideration, but the central theme is one of fairness to the individual. This leads most courts to assume that compensation should be no less than the market value of the property that is taken.

This chapter begins by examining the market value principle. An idea as broad as fairness must be set in some sort of context in order to provide a guide to the courts. The assumption that market value must be paid derives from the nineteenth-century English view that compensation should indemnify the owner against the loss of the property. One question that is asked is whether other perspectives on fairness would lead to other compensation standards.

A second context is provided by the compensation standards of the

[1] Australia, s. 51(xxxi), only guarantees 'just terms' for the acquisition of property; Nauru, s. 8(1), guarantees 'just terms' for deprivation of property. Trinidad and Tobago, s. 4, guarantees the right not to be deprived of the enjoyment of property except by 'due process of law'. Vanuatu, s. 5, protects against the 'unjust deprivation of property', without expressly guaranteeing compensation.

European Convention on Human Rights. Article 1 of the First Protocol guarantees a right to the peaceful enjoyment of possessions, but it does not guarantee compensation for every infringement of property rights. According to the European Court of Human Rights, it is sufficient if there is a fair balance between public and private interests. Compensation is an important element in determining whether there is a fair balance, but it is not the only element. In some cases, the nature of the public interest may justify compensation below the market value of the property or even a denial of any compensation; in other cases, the availability of procedural rights may affect the balance. Plainly, the Convention puts a different perspective on the role of compensation. Most Commonwealth courts do not share this view; however, this chapter includes a discussion of the interim and final Constitutions of South Africa, where the compensation standards are considerably more flexible that those of other Commonwealth rights to property.

Full compensation for loss

Most Commonwealth courts assume that a constitutional guarantee of 'compensation' is a guarantee of full compensation. This position seems to have been adopted without close analysis, as courts tend to assume that the constitution simply entrenches certain general principles of the statutory law on the expropriation of land. The most striking example of judicial inflexibility on compensation is provided by the Supreme Court of India's interpretation of Article 31(2) of the Constitution. Article 31(2) provided that no law could authorise the compulsory taking or acquisition of property 'unless the law provides for the compensation for the property taken possession of or acquired and either fixes the amount of compensation, or specifies the principles on which the compensation is to be determined and given'. The Constituent Assembly was informed that the courts would not 'question the adequacy of compensation from the standard of market value; they will not question the judgment of Parliament unless the inadequacy is so gross as to be tantamount to a fraud on the fundamental right to own property'.[2] There was some evidence to support this interpretation, since section 299 of the Government of India Act 1935 contained a similar compensation provision and legislation had authorised the

[2] K. M. Munshi, Constituent Assembly Debates, vol. 9, no. 32, pp. 1299–300, quoted in Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford: Clarendon Press, 1966), p. 99.

acquisition of property at less than market values, without interference from the courts.[3] However, in *State of West Bengal* v. *Bela Banerjee*,[4] the Supreme Court held that Article 31(2) only gave a narrow discretion to the legislature. *Banerjee* concerned legislation that allowed the state of West Bengal to acquire land compulsorily at rates based on market values, subject to the condition that the amount paid should not exceed the market value on 31 December 1946.[5] Land values increased steadily after 1946 and eventually an expropriatee protested that using the 1946 date to set an upper limit on compensation violated Article 31(2). On the face of it, the legislation seemed to satisfy Article 31(2) as it 'specified principles' for calculating compensation. However, Sastri C.J., speaking for the Court, stated that there is a 'basic requirement of full indemnification of the expropriated owner'.[6] The discretion apparently granted by Article 31(2) must be limited: 'While it is true that the legislature is given the discretionary power of laying down the principles which should govern the determination of the amount to be given to the owner for the property appropriated, such principles must ensure that what is determined as payable must be compensation, that is, a just equivalent of what the owner has been deprived of.'[7]

In *Banerjee*, the Court plainly believed that property owners have an ethical claim to full compensation. While the Constitution gave the executive the power to disallow legislation that did not provide adequate compensation, the Court clearly doubted the executive would

[3] See *ibid*., pp. 93–4. But see *N. B. Jeejeebhoy* v. *Assistant Collector, Thana Prant, Thana* A.I.R. 1965 S.C. 1096, where the Indian Supreme Court held that an acquisition under pre-Constitution law (*i.e.* where section 299 of the Government of India Act 1935 applied) would require compensation that was a 'just equivalent'.

[4] A.I.R. 1954 S.C. 170.

[5] Recent Caribbean cases have followed this point. See *San Jose Farmers' Co-operative Society Ltd* v. *Att.-Gen.* (1992) 43 W.I.R. 63 (C.A. Belize), where the Court held that backdating valuation two years prior to the second publication of the notice of intention to expropriate would not provide 'reasonable compensation', as guaranteed by section 17(1)(a) of the Constitution. See also *Windward Properties Ltd* v. *Government of Saint Vincent and the Grenadines* [1996] 2 L.R.C. 497 (P.C.); St Vincent's Land Acquisition Act 1946 provided that the date of valuation was twelve months prior to publication of a prescribed notice in the Gazette. The Court of Appeal held that this violated the right to property (section 6 of the Constitution) because it could disadvantage the land owner. The Privy Council overruled this, on the basis that the specific legislation was valid under saving provisions applicable to the Land Acquisition Act 1946. The Privy Council did not indicate whether the backdating would be valid in the absence of the savings provisions. See also *Grand Anse Estate Limited* v. *Governor-General of Grenada* (Civil Appeal No. 3 of 1976, C.A. West Indies Association States) (unreported; but see the discussion in *San Jose Farmers' Co-operative* at 81–2).

[6] A.I.R. 1954 S.C. 170 at 172. [7] *Ibid*.

ensure that the ethical claim of property owners would be met. This explains the Court's bold decision in *Vajravelu* v. *Special Deputy Collector, West Madras*.[8] It followed the Fourth Amendment to the Constitution, which the Indian Parliament had passed in response to *Banerjee*. The Amendment added the italicised words to Article 31(2), leaving it as follows:

> No property shall be compulsorily acquired or requisition save for a public purpose and save by authority of a law which provides for the compensation for the property so acquired or requisitioned and either fixes the amount of compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined and given; *and no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate*.

While the Amendment appeared to restore the legislature's discretion, the *Vajravelu* decision cast some doubt on its true effect. Subba Rao C.J., for the Court, stated that a legislature had no power to acquire property unless the relevant legislation provided 'a just equivalent of what the owner has been deprived of or specif[ied] the principles for the purpose of ascertaining the ''just equivalent'' of what the owner has been deprived of'.[9] As this appears to repeat the *Banerjee* principle, it cast considerable doubt on the effect of the Fourth Amendment. While Subba Rao C.J. stated that legislation could not be challenged on the basis that compensation was inadequate, he also said that legislation could not provide 'illusory' compensation or for compensation to be ascertained according to principles that have no relation to the value of the property.[10] In this particular case, valuation took into account the actual use of the property, but not its potential uses. This, according to Subba Rao C.J., would not give the owner a 'just equivalent'; however, rather confusingly, he also stated that the legislation satisfied Article 31(2), because the challenge related only to the adequacy of compensation.[11]

[8] A.I.R. 1965 S.C. 1017. Note the surprising comment of Hidayatullah C.J. in *Gujarat* v. *Shantilal Mangaldas* A.I.R. 1969 S.C. 634 at 637–8, where he states that his concurrence in *Vajravelu* should have been given in *N. B. Jeejeebhoy* v. *Assistant Collector, Thana Prant, Thana* A.I.R. 1965 S.C. 1096 (instead of *Vajravelu*), another case decided the same day but under pre-Constitution law.

[9] *Vajravelu* v. *Special Deputy Collector, West Madras* A.I.R. 1965 S.C. 1017 at 1024.

[10] *Ibid*.

[11] *Ibid*. at 1026–7. However, the Court also held that the legislation in *Vajravelu* failed to satisfy Article 14 (equality before the law). Two statutes provided for the compulsory acquisition of land in Madras: the Land Acquisition Act 1894 and the Land Acquisition (Madras Amendment) Act (23 of 1961). The 1894 Act required a *solatium* of 15 per cent; the 1961 Act only required a *solatium* of 5 per cent. The 1961 Act was intended to apply

Subsequently, in *India* v. *Metal Corporation of India*,[12] the Supreme Court seemed to assume that *Vajravelu* confirmed the continuing validity of *Banerjee*, with the result that the Fourth Amendment had little impact on the law. This time, the Court held that legislation did not satisfy Article 31(2), because it authorised the acquisition of machinery at cost price less depreciation as claimed under income tax laws, irrespective of the market value at the time of acquisition.

The conflict between the Congress Party and the Supreme Court intensified, as the party blamed the Court for blocking important economic reforms. In 1967, the Court gave its decision in *Golak Nath* v. *State of Punjab*, the first of the fundamental rights cases.[13] The Court held that the fundamental rights, including the right to property, formed part of an unamendable core of the Constitution. It seemed that Parliament could not reverse the *Vajravelu* and *Metal Corporation* decisions. In a more conciliatory mode, the Court subsequently declared, in *State of Gujarat* v. *Shantilal Mangaldas*, that the Fourth Amendment meant that legislation that specified the amount of compensation could not be challenged on the basis that it did not provide a 'just equivalent', because any challenge could only be on the basis that compensation was not adequate.[14] Similarly, no 'just equivalent' challenge could be made to legislation that laid down principles for determining compensation. The courts would intervene only if the compensation is 'illusory or can in no sense be regarded as compensation'.[15] The facts of *Shantilal Mangaldas* show how far the Court was prepared to allow the legislatures to depart from full compensation. It concerned a legislation that authorised municipalities to consolidate and redistribute plots of land as part of town planning schemes. Any owners who lost land as a result were entitled to compensation, which would be determined according to the value of the land at the date of the declaration of intention to make a scheme. This produced an especially harsh result in *Shantilal Mangaldas*, because the declaration of intention was made in 1927, but

to land acquired for housing schemes. The Court held that the 1961 Act violated the right to equality before the law, because a landowner whose land was taken for a housing scheme would get less than a landowner whose land was taken for some other purpose: see *ibid*. at 1027–8. Cf. *New Munyu Sisal Estates Ltd* v. *Att.-Gen.* [1972] E.A. 88 (H.C. Kenya) at 90.

[12] A.I.R. 1967 S.C. 637.

[13] [1967] 2 S.C.R. 762. See also *Kesavananda* v. *Kerala* (1973) 4 S.C.C. 225 and see above, pp. 49–53 and 93–5.

[14] A.I.R. 1969 S.C. 634 at 650.

[15] *Ibid*.

the final scheme was not in fact published until 1957. Nevertheless, the Court refused to judge the Act by its application to specific facts, and since the Act did lay down principles for determining the amount of compensation, it would stand. The Court made a point of disapproving of its decision in *Metal Corporation*.[16] However, its statement in *Shantilal Mangaldas*, that it would strike down legislation which provided no compensation at all or compensation that was 'illusory', shows that it was not willing to give up its ultimate power of review.[17] But, given the background to *Shantilal Mangaldas*, and its disapproval of *Metal Corporation*, it seemed likely that the Court would strike down legislation in only unusual cases.

In 1970, Herbert Christian Laing Merillat, a commentator on the Indian developments, believed that *Shantilal Mangaldas* would provide a basis for reconciliation between Parliament and the Congress Party. The Court 'had taken some of the sting out of *Golak Nath*. It was showing a judicial statesmanship that was bound to be reassuring to many of its critics in the immediate aftermath of that remarkable decision.'[18] In fact, reconciliation was not achieved. The Congress Party split over economic policy, and Prime Minister Gandhi's more radical group gained ascendancy and began to push for far-reaching reforms. The differences within the Party and between Parliament and the Supreme Court focused on the nationalisation of the country's leading commercial banks. The Banking Companies (Acquisition and Transfer of Undertakings) Act of 1969 authorised the acquisition of the banking undertakings (the banks were permitted to carry on non-banking activities). A special tribunal was charged with assessing compensation; the total payable would be assessed by valuing various classes of assets according to different rules, less the total liabilities of the bank. Controversy arose because the method of valuation excluded compensation for the bank's goodwill.[19] In *R. C. Cooper* v. *Union of India*, the Court held that the nationalisation could go forward only if the method of valuation changed,[20] despite the suggestion in *Shantilal Mangaldas* that it would show greater deference to the legislature. In *R. C. Cooper*, it held

[16] *Ibid*. at 652–3.

[17] *Ibid*. at 650.

[18] Herbert Christian Laing Merillat, *Land and the Constitution in India* (New York and London: Columbia University Press, 1970), p. 285.

[19] There were other grounds of complaint; in particular, certain long-term leases were not valued and compensation was payable in the form of ten-year interest-bearing government securities.

[20] [1970] 3 S.C.R. 530.

that the compensation would be illusory because the method of assessment would not take the value of goodwill and the leases into account.[21] It appeared that the Court was returning to the 'just equivalent' measure of compensation of *Banerjee*.

Shantilal Mangaldas still left the option to Parliament of fixing the amount of compensation in the legislation, which it did. New legislation specified the amount of compensation payable to each bank; according to *Shantilal Mangaldas*, the amount could not be challenged on the basis that it was not adequate. *Shantilal Mangaldas* left open the possibility that a challenge might have been made that the amount was illusory, and *R. C. Cooper* shows that the Court would still require a 'just equivalent'. However, the new legislation did not reach the Court; events were overtaken by the enactment of the Twenty-fourth and Twenty-fifth Amendments, which overruled the fundamental rights doctrine of *Golak Nath* and once again made the amount of compensation non-justiciable. In *Kesavananda* v. *State of Kerala*, the Supreme Court reaffirmed the fundamental rights doctrine, but held that the right to property under Article 31 was not part of the unamendable core of the Constitution.[22]

The Indian cases sent out a warning to other Commonwealth countries intent on embarking on comprehensive economic reform. In Zambia, a constitutional amendment passed in 1969 gave the National Assembly a non-reviewable power to set the principles on which compensation would be calculated.[23] Subsequently, a number of companies were nationalised without compensation for future profits or business goodwill; so far as the Government was concerned, such claims were too speculative and contingent to be compensatable.[24] Variations on the original formula of Article 31(2) appear in a number of Caribbean constitutions.[25] In Guyana, the Constitution was amended in 1971 to allow nationalisation of the bauxite industry at about a third or half of

[21] *Ibid*. at 594–610 (the goodwill might have had value to the banks if they could have continued in business, but the Court also held that the payment of compensation over the ten-year period deprived the banks of the funds needed to continue in business).

[22] (1973) 4 S.C.C. 225.

[23] Zambian Constitution, Article 18(3)(c) (note that the current Article 16(1) guarantees 'adequate compensation'). See generally Samuel Amoo, 'Law and Development and the Expropriation Laws of Zambia', in Muno Ndulo (ed.), *Law in Zambia* (Nairobi: East African Publishing House, 1984).

[24] See Kenneth Kaunda, 'Zambia towards Economic Independence', in Bastiaan de Gaay Fortman (ed.), *After Mulungushi* (Nairobi: East Africa Publishing House, 1969), pp. 34–74 at p. 67.

[25] See Jamaica, s. 18 and Barbados, s. 16.

the market value.[26] Framers and commentators thought that the courts would not intervene with the legislature's exercise of discretion under these clauses,[27] but *Yearwood* v. *Attorney.-General*[28] shows that this cannot be assumed. *Yearwood* concerns section 8 of the Constitution of St Christopher and Nevis, which provides that property may not be acquired compulsorily except 'under the provisions of a law that prescribes the principles on which and the manner in which compensation therefor is to be determined and given'. The legislation in question provided for the acquisition of certain sugar estates, with compensation to be the commercial value of the property as it stood nearly three years before acquisition. There was also an overall ceiling on compensation of $10 million. Payment was partly in cash, with the remainder in bonds and other securities or out of the profits of the acquired property. In a manner reminiscent of the Indian cases, the High Court of St Christopher and Nevis declared the legislation unconstitutional, because the principles for the assessment of compensation did not guarantee that the landowners would receive a just equivalent in money for their property. Whether other courts will follow this line is uncertain.

The weakening of compensation guarantees has, to some extent, been reversed in recent years. In Zambia, for example, the Constitution was amended once again to restore the justiciability of compensation.[29] The interesting point is that it only the legislatures and governments seem to note the Indian experience; most courts continue to assume that 'compensation' means full compensation. Even here, there is room for allowing the legislature a broad discretion. One basic question concerns the difference between objective and subjective methods of valuation; objective valuation is usually based solely on the market value of property, whereas subjective valuation also takes items such as disturbance costs and sentimental values into account. Most of the older statutory schemes required subjective valuation of loss, but modern statutes generally require only objective valuation. In general, constitutional cases do not distinguish between methods of valuation, although it appears that most courts regard objective valuation, based on market

[26] See generally Francis Alexis, *Changing Caribbean Constitutions* (Bridgetown, Barbados: Antilles Publications, 1984), pp. 162–70.

[27] In Jamaica, Premier Norman Manley informed the House of Representatives that the courts would only decide the means by which compensation would be paid: *Proceedings of the House of Representatives* 1961–2, p. 755. See also Alexis, *Caribbean Constitutions*, p. 161n.

[28] (1977) 3 C.L.B. 593 (H.C. St Christopher and Nevis).

[29] Article 16(1) now guarantees 'adequate compensation'.

values, as the constitutional minimum. However, one remarkable example to the contrary is the decision of the Botswana Court of Appeal in the *Bonnington Farm* case.[30] Botswana's Constitution states that a law authorising expropriation must provide for 'adequate compensation'.[31] The Court held that this means that compensation should, 'in so far as money can do it', put the applicant 'back into the same position as he would have been had the land not been expropriated'.[32] Hence, compensation should take into account the expenses that would be involved in locating and purchasing a similar property. The Court plainly relied on the older statutory principle of full indemnification for loss, but it did not justify its creation of a similar constitutional principle and it seems highly questionable.

Even if the courts hold that full compensation can be determined by purely objective valuation, there is still discretion in choosing the assumptions on which valuation should be based. For example, the 'market value' of property depends on the assumptions regarding the location and timing of the hypothetical sale. In some cases, valuers must also decide whether the property should be valued by itself or as part of a larger asset, and whether valuation should take legal restrictions on sale or use into account. The constitutional issue is the degree to which these choices are constrained by the requirement for full compensation. As the Indian cases show, the courts are often unwilling to allow the legislature or executive any discretion in making the assumptions necessary for determining the market value of property. There are also a number of Caribbean cases where the courts have also been unwilling to allow discretion.[33] General principles of statutory law or the judicial review of administrative action do not necessarily govern constitutional cases on the judicial review of legislative action, but Commonwealth courts only acknowledge this point occasionally and inconsistently. For example, the review of public purposes is

[30] *Att.-Gen.* v. *Western Trust (Pty) Ltd*, High Court of Botswana, Civil Cause No. 37 of 1981 and Civil Appeal No. 12 of 1981, discussed in Clement Ng'ong'ola, 'Compulsory Acquisition of Private Land in Botswana: The Bonnington Farm Case', (1989) 22 C.I.L.S.A. 298.

[31] Section 8(b)(i).

[32] As quoted in Ng'ong'ola, 'The Bonnington Farm Case', p. 310.

[33] See *San Jose Farmers' Co-operative Society Ltd* v. *Attorney-General* (1992) 43 W.I.R. 63 (C.A. Belize), *Grand Anse Estate Limited* v. *Governor-General of Grenada* (Civil Appeal No. 3 of 1976, C.A. West Indies Association States) (unreported; but see the discussion in *San Jose Farmers' Co-operative* at 81–2), and cf. *Windward Properties Ltd* v. *Government of Saint Vincent and the Grenadines* [1996] 2 L.R.C. 497 (P.C.).

characterised by a high degree of deference, and yet the review of the meaning of property is characterised by a very low degree of deference. The courts approach compensation issues with the same lack of deference as they approach property issues, and they are just as unlikely to consider whether their lack of deference is appropriate.

Questions concerning methods of valuation arose in *May* v. *Reserve Bank of Zimbabwe*,[34] which concerned the Zimbabwean Government's expropriation of all shares in foreign companies held by Zimbabweans. The relevant legislation required payment of 'adequate compensation', which was stated to be the 'market value of the security concerned' unless 'in the particular circumstances of a case' a greater or lesser amount than the market value constituted adequate compensation.[35] The difficulty arose over the identification of the relevant market, as the shares traded on both the Zimbabwe and Johannesburg stock exchanges, with the Zimbabwe prices including a substantial premium over the Johannesburg prices for the same shares.[36] Investors paid the premium because the system of exchange controls barred them from buying or selling on foreign exchanges. However, they were allowed to trade foreign shares on the Zimbabwean exchange, so long as the total pool of foreign shares traded on the Zimbabwean exchange remained at a constant level. The premium was therefore like a quota or entry fee to the local market for foreign shares. The demand for foreign shares remained strong because investors speculated that exchange controls would be lifted; if this occurred, it was thought that the value of the Zimbabwean currency would decrease, with a consequent rise in the value of foreign shares. However, the expropriation closed the Zimbabwean market in foreign shares. The 'market value of the security concerned' therefore depended on whether the shares were valued on the Johannesburg market or the Zimbabwean market immediately before the acquisition. The Government insisted that the Johannesburg market was the relevant market; or, to put it another way, it refused to compensate for the premium payable on the Zimbabwe exchange. McNally J.A. and the dissenting judges (Beck and Gubbay JJ.A.) stated that the relevant market was the Zimbabwean stock exchange, on the basis that it was the only market open to Zimbabweans. Dumbutshena

[34] 1986 (3) S.A. 107 (S.C.).

[35] Exchange Control (Amendment) Regulations 1984 (No. 3), s. 12A.

[36] Immediately before expropriation, the price of securities quoted on the Zimbabwe stock exchange, with the premium, was about 30 per cent higher than the prices quoted on the Johannesburg stock exchange.

C.J. took the view that the Johannesburg market was the relevant market,[37] on the basis that the Zimbabwean market could not be used because it ceased to exist upon the acquisition of the shares by the Government; hence, the only possible market for valuation was the Johannesburg market. None of these interpretations is entirely unreasonable; the difficulty with the judges' reasoning lies in the assumption that statutory and constitutional interpretation are the same. *May* v. *Reserve Bank* is properly described as a case on statutory law, since the applicant argued only that the Government's interpretation of the relevant statute was incorrect. It was not argued that the statute was unconstitutional. However, the statute employed the same wording as section 16 of the Constitution, and both Dumbutshena C.J. and McNally J.A. referred to section 16 as the starting point of analysis.[38] But, having referred to it, their discussion of the authorities makes no distinction between constitutional and statutory interpretation.[39] In particular, they state that the purpose of compensation is to indemnify the owner against loss, but do not explain whether they refer to the purpose of compensation under this particular statute or to the purpose of the constitutional guarantee.

From the foregoing, it is clear that the courts believe that the award of compensation must focus on the loss suffered by the property owner. Plainly, this belief reflects the dominance of the liberal theories of property and the constitution. The liberal theory seeks to protect private property from the state, but the courts have not examined whether the current emphasis on full compensation is the best means of achieving this protection.

[37] Although McNally J.A. held that the Zimbabwe market was the relevant market, for reasons explained below, he also held that the premium should be ignored in assessing compensation. Sandura J.A. concurred with both judgments, without explaining which market was the relevant market. Beck and Gubbay JJ.A. (dissenting) agreed with McNally J.A. that the Zimbabwe market was the relevant market, but would have held that the premium should have been considered.

[38] 1986 (3) S.A. 107 at 116 *per* Dumbutshena C.J. and at 123 *per* McNally J.A.

[39] Although in a brief passage at the end of his judgment (*ibid.* at 129–30), McNally J.A. noted that section 16 only guarantees protection in respect of the acquisition of property. From this, he suggested that compensation should be limited to the value of the property acquired by the state. When property has no value to the state, no compensation should be paid. This, of course, negates any notion of compensating for loss, since the owner's loss and the taker's gain are often not the same. He did not place his reliance on this point, and acknowledged that it was not argued fully. Nevertheless, in this passage he went further than his colleagues (and many other Commonwealth judges) in recognising that a distinction could be made between the purposes of constitutional and statutory guarantees.

The Canadian case, *Fraser* v. *The Queen*, illustrates this point.[40] Land was expropriated to obtain a supply of rock for the construction of a causeway. As explained in chapter 7, the need to acquire the land compulsorily could be questioned, as the causeway was not to be constructed over the land and the rock was available on the open market from other sources.[41] Nevertheless, once it was accepted that the acquisition was for a valid purpose, the general rule would have required the valuer to ignore the special suitability of the property to the expropriating authority.[42] Hence, the land should have been valued without considering the special value of the rock to the Government, with the result that compensation would have been quite modest. However, the Supreme Court of Canada held that the compensation should have been set at the amount that the Government would have expected to pay for the rock if it had not expropriated the land. This came to almost sixty times the value of the land as wasteland. *Fraser* v. *The Queen* has been quite controversial because the landowner seemed to receive far more than he lost; in effect, his compensation was based on the value of the property to the expropriator, rather than the extent of his own loss.[43] Unjust enrichment, rather than indemnification against loss, seems to have been the Court's guiding principle.[44]

Fraser v. *The Queen* is not directly applicable to constitutional

[40] (1963) 40 D.L.R. (2d) 707 (S.C.C.).

[41] See pp. 213–14, above.

[42] See *e.g.* Acquisition of Land (Assessment of Compensation) Act 1919, re-enacted as the Land Compensation Act 1961, s. 2; *Pointe Gourde Quarrying and Transport Co.* v. *Sub-intendent of Crown Lands* [1947] A.C. 565 (P.C.); *Diggon-Hibben* v. *The King* [1949] S.C.R. 712 at 724: 'It is the value to the owner as it existed at the date of the taking and not the value to the taker which is to be determined.'

[43] Law Reform Commission (Australia), *Lands Acquisition and Compensation*, Report No. 14 (Canberra: Australian Government Publishing Service, 1980), p. 119; *St John Priory of Canada Properties* v. *St John* (1972) 27 D.L.R. (3d) 459 (S.C.C.) at 464–5 *per* Pigeon J. (diss.). At the federal level, the decision was reversed by the Expropriation Act 1970. Subsequent Canadian cases on provincial legislation have restricted *Fraser* v. *The Queen* to its specific facts; see *e.g. Manitoba* v. *Gillis Quarries Ltd* (1996) 136 D.L.R. (4th) 266 (C.A. Man.). For support of the Court's decision in *Fraser* v. *The Queen*, see Jack L. Knetsch, *Property Rights and Compensation: Compulsory Acquisition and Other Losses* (Toronto: Butterworth & Co. (Canada) Ltd, 1983), ch. 5.

[44] Ritchie J. purported to follow *Raja Vyricherla Narayana Gajapatiraju* v. *Revenue Divisional Officer, Vizagapatam* [1939] A.C. 302 and *Sidney* v. *North Eastern Railway Co.* [1914] 3 K.B. 629, which state that compensation should reflect the 'undeveloped potentiality' of land, but it is doubtful that these cases would apply when the potentiality is entirely attributable to the scheme of expropriation, as it was in *Fraser* v. *The Queen*. Cartwright J. treated the expropriation as an expropriation of rock rather than land; hence, the landowner should have been paid the market price for the rock.

interpretation because it is only concerned with statutory provisions. However, it demonstrates that compensation may serve purposes other than indemnifying individuals from loss. In particular, Joseph Sax's theory that the compensation guarantee protects against arbitrary action gives a different perspective on *Fraser* v. *The Queen*.[45] Sax argues that the risk of arbitrary action is greatest when the state acquires resources for its own account, as it did in *Fraser* v. *The Queen*. In such circumstances, the compensation guarantee ensures that the state does not profit unfairly from the use of its compulsory powers. In effect, the compensation guarantee is roughly analogous to the no-profit rule applicable to trustees and other fiduciaries. In *Fraser* v. *The Queen*, the Court clearly believed that the Government abused its compulsory powers and the award of compensation ensured that it would not profit thereby.

Even if the courts feel constrained to concentrate on the owner's loss rather than the taker's gain, there are different methods of characterising loss that they could consider. In fact, the courts rarely consider alternative methods. In *Bonnington Farm*, for example, the Court assumed that only a subjective loss would satisfy the constitutional standard.[46] It did not examine the possibility that an objective basis for assessing loss would satisfy the compensation requirement. One question, therefore, is whether there are other ways of describing and measuring loss that might still be regarded as fair or adequate.

One alternative concentrates on the difference between short-term and long-term losses. Frank I. Michelman's article, 'Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law',[47] examines this point. Michelman argues that a rational government would only take property if the benefits of acquisition exceed the cost. If this is the case, the government would compensate only when the 'settlement costs' of compensating are less than the 'demoralisation costs' of denying compensation. Demoralisation costs arise as investors reduce or divert investment from a jurisdiction where assets are at a greater risk of an uncompensated expropriation.[48] The settlement cost

[45] 'Takings and the Police Power', (1964) 74 *Yale Law Journal* 36.

[46] See Ng'ong'ola, 'The Bonnington Farm Case', p. 311.

[47] (1967) 80 *Harvard Law Review* 1165.

[48] Michelman, *ibid*., p. 1214, defines demoralisation costs as 'the total of (1) the dollar value necessary to offset disutilities which accrue to loser and their sympathisers specifically from the realisation that no compensation is offered, and (2) the present capitalised dollar value of lost future production (reflecting either impaired incentives or social unrest) caused by demoralisation of uncompensated losers, their

is the monetary value of the 'time, effort, and resources which would be required to reach compensation settlements adequate to avoid demoralisation costs'.[49] Hence, Michelman does not seek to lay down a general rule prescribing the level of compensation for every case where compensation is payable. In particular, he does not state that compensation, where payable, must equal the market value of the property or indemnify the owner against all losses. Indeed, under Michelman's analysis, it may be possible to eliminate demoralisation costs by paying an amount less than the full market value of the property.

Michelman argues that his economic analysis can be applied to the ethical claim to compensation, as there would be no perception of unfairness in many of the cases where economic analysis suggests that compensation should not be paid. For example, the settlement costs of regulations that control the use of property by a broad cross-section of the public are likely to be higher than the demoralisation costs. Affected persons might feel aggrieved, but if they can see that the burden is broadly shared and that the cost of compensation might force up their taxes, they might not feel that they are treated unfairly. That is, it is the long-term distributions of gains and losses that affect the perception of fairness. By contrast, the compensation rules of most Commonwealth countries concentrate on short-term gains and losses, and may result in compensation being paid in circumstances where a long-term view of fairness does not require it.

The second point from Michelman's analysis relates to loss and the political risk of expropriation. Plainly, risks such as natural disaster, theft or the loss of key personnel affect the value of property. Ordinarily, the high-risk property trades at a discount to low-risk property. One important issue is whether the discount attributable to the political risk of an uncompensated expropriation should be ignored when compensation is assessed. Some writers argue that the state should not compensate if the owner purchased the property at a discount, since the discount is sufficient to offset the loss arising from expropriation.[50] Some buyers would use the discount to diversify their holdings and thereby reduce the impact of the loss of any single asset; others would

sympathisers, and other observers disturbed by the thought that they themselves may be subjected to similar treatment on some other occasion'.

[49] Michelman, *ibid*., defines settlement costs as 'the dollar value of time, effort, and resources which would be required in order to reach compensation settlements adequate to avoid demoralisation costs'.

[50] See *e.g.* Michelman, *ibid*., p. 1238.

simply purchase insurance, if available. In either case, it can be argued that the owner has no claim to compensation for the loss of a single asset because he or she has suffered no real loss. As Michelman puts it, the owner 'got exactly what [he/she] meant to buy'.[51]

This issue arose in *May* v. *Reserve Bank of Zimbabwe*.[52] Despite holding that the relevant market was the Zimbabwean market, McNally J.A. stated that 'adequate compensation' was less than full market value because the premium was an entirely distinct asset from the shares. McNally J.A.'s valuation of the premium raises the issue of political risk. He likened the premium to a bet made by purchasers of shares on the possibility that the Government would lift the restrictions on trading. Hence, when the expropriation made it impossible for that to occur, the investors' losses were no more than they had already accepted by paying the premium. The investors were 'people who have gambled and lost' and were therefore 'no more entitled to compensation for the premium than an unlucky State Lottery ticket holder is entitled to have his dollar back'.[53] Dumbutshena C.J.'s reasoning also addresses the point of political risk, as he observed that the Rhodesian government announced in 1976 that it was considering the expropriation of foreign securities, without providing compensation for the premium. For Dumbutshena C.J., this was sufficient to destroy any legitimate expectation that the owners had of compensation for the premium. McNally J.A. was not willing to give the announcement such weight; in his view, the announcement did not affect legitimate expectations, because the Constitution guaranteed 'adequate compensation', and that was their expectation.

There is not a great difference between the approaches of McNally J.A. and Dumbutshena C.J.: neither judge could see a valid reason to compensate for the loss of a high-risk asset when the risk itself materialises, although McNally J.A. was clearly concerned that a government could lower property values before expropriation by threatening to expropriate without compensation. Indirectly, a government could circumvent the guarantee of compensation merely by threatening to act unconstitutionally. Dumbutshena C.J. did not address this possibility. This highlights an unusual aspect of *May* v. *Reserve Bank*: the political 'risk' *increased* the value of the shareholder's interest. In most cases, political risk decreases the value of property. The Court in *May* v. *Reserve Bank* was not called upon to consider whether a decrease in value

[51] *Ibid*., p. 1238. [52] 1986 (3) S.A. 107. [53] *Ibid*. at 128.

caused by political risk should ignored. So, for example, if prices for certain goods were discounted because of a perceived risk of expropriation at unfavourable prices, should compensation be made at the pre-discount prices? Michelman would argue that anyone who bought at the discounted price should receive nothing for his or her goods; it is not clear how Dumbutshena C.J. or McNally J.A. would react.[54]

William A. Fischel takes the opposite position to Michelman.[55] He argues that the owner should get the full value of the property *without* the discount for political risk. This seems to give the owner more than fairness or justice requires because he or she will get more than he or she paid for it, and more than he or she could get from any other buyer. Nevertheless, Fischel argues that payment of the undiscounted value is necessary to ensure that the owners, as a general class, are treated fairly. That is, someone who buys at a discount does not suffer if compensation is paid at the discounted price, but the previous owner lost out when the price was first discounted to reflect risk. The previous owner has no constitutional right to compensation for the initial discounting, because the mere risk of expropriation is not an expropriation of property.[56] However, the previous owner would not suffer the loss if there was a promise of full compensation, because prices would not be discounted in the first place. Hence, adding back the discount protects property owners generally. Fischel raises worthwhile points about risk, but it is doubtful that the courts would incorporate them into the constitutional standards of fairness and justice. Again, the courts remain narrowly focused on the short-term loss of the party before it, rather than the loss suffered by property owners as a class.

Lawrence Blume and Daniel L. Rubinfeld add a further perspective on political risk.[57] They regard the compensation guarantee as a type of insurance against the political risk of expropriation. The insurance 'premiums' are paid in the form of higher taxes. Blume and Rubinfeld

[54] *I.e.* if the premium was a separate asset, their position is consistent with Michelman's position, as they awarded no compensation; but if the premium was attached to a share, they ignored the effect of political risk and it would be consistent to award the undiscounted value of the goods.

[55] William A. Fischel, *Regulatory Takings: Law, Economics, and Politics* (Cambridge, Mass. and London: Harvard University Press, 1995), ch. 5. See also Jack L. Knetsch and Thomas E. Borcherding, 'Expropriation of Private Property and the Basis for Compensation', (1979) 29 *University of Toronto Law Journal* 237.

[56] See *e.g. Davies and Others* v. *Minister of Lands, Agriculture and Water Development* [1997] 1 L.R.C. 123 (S.C. Zim.); *Gujarat* v. *Shantilal Mangaldas* A.I.R. 1969 S.C. 634; but cf. *Sporrong and Lönnroth* v. *Sweden* A 52 (1982) (E.C.H.R.); 5 E.H.R.R. 35.

[57] 'Compensation for Takings: An Economic Analysis', (1984) 72 *California Law Review* 569.

argue that there is no point in providing insurance to owners who would not have obtained it if it were available privately; plainly, these owners would decide that the cost of insurance outweighs the benefit of reduced risk. Moreover, these owners may feel that they are treated unfairly if the state compels them to pay for insurance that they do not want.

Blume and Rubinfeld argue that a two-part test discloses the owners who would insure against the risk of uncompensated expropriation. These owners are likely to be '(i) those who generally face a higher loss, and (ii) those who are more risk averse'.[58] To some extent, Commonwealth cases do reflect these two points. For example, the first point is reflected, to a degree, in the exclusion of injurious affection and ordinary regulatory losses from the constitutional protection of property; in many cases, these losses are likely to be less severe than the losses from the ordinary acquisition of property. Point (ii) is more problematic, since it is difficult to measure risk aversion. In general, those who can diversify their property holdings can reduce or control the risk of property loss, and it is wealthier owners who are better able to diversify their property holdings.[59] Hence, Blume and Rubinfeld would restrict compensation to owners who are not well off and to circumstances where the loss represents a large proportion of the owner's total wealth. This can be seen in many government-run programmes designed to provide compensation for loss of income, as high earners are not normally compensated fully for lost income. The defence for the income ceilings is that higher earners can decide whether to obtain supplementary insurance or to self-insure by diversifying their sources of income. In the case of compensation for expropriation, Blume and Rubinfeld would distinguish between the expropriation of a family home and the expropriation of commercial property. Full compensation should be paid for homes because, for most homeowners, it is their most important investment and they have only a limited capacity to reduce the risk of loss by diversifying their investment. By contrast, owners of commercial property are better placed to diversify their holdings and thereby reduce the risk of loss; hence, there is little reason for the state to guarantee compensation.

It cannot be said that the arguments of Michelman or Blume and Rubinfeld (or other economic and ethical analyses of compensation) have had much impact on the constitutional principles of compensation

[58] *Ibid*., p. 601. [59] *Ibid*., p. 606.

in the Commonwealth. However, they demonstrate how the Commonwealth tendency to concentrate on short-term losses represents a choice of context that may be open to attack. The courts have failed to recognise that, even if we assume that the sole purpose of compensation is the correction of loss, there are different conceptions of loss.

Proportionality and compensation

The development of a jurisprudence of property rights based on a general principle of proportionality has been raised in an earlier chapter.[60] Clearly, compensation reduces the impact of expropriation on the owner, and hence it plays an important role in ensuring that there is a balance between private and public interests. In chapter 6, it was argued that, as a matter of general principle, proportionality should not dictate any particular level of compensation. A public objective of great importance could justify a greater intrusion on private interests. At present, most Commonwealth courts take a rigid view on proportionality, in the sense that there are only two ways in which the balance between public and private interests can be struck: either the state is under no duty to compensate the individual or it must compensate fully. Even under the Australian Constitution, which only requires 'just terms', recent dicta suggest that the courts will not allow property to be taken for less than its market value. In *Georgiadis* v. *Australian and Overseas Telecommunications Corporation*,[61] legislation extinguished common law claims held by Commonwealth employees for compensation for employment-related injuries. The Commonwealth argued that any acquisition of property (in the form of common law claims for compensation) was on 'just terms', because the legislation also provided benefits for injured employees under a no-fault compensation scheme. Brennan J. rejected this argument, on the basis that the benefits under the scheme would not equal the amount that an injured worker could obtain under the common law. He stated that:

> [i]n determining the issue of just terms, the Court does not attempt a balancing of interests of the dispossessed owner against the interests of the community at large. The purpose of the guarantee of just terms is to ensure that the owners of property compulsorily acquired by government presumably in the interests of the community at large are not required to sacrifice their property for less than

[60] Above, pp. 194–9.
[61] (1994) 179 C.L.R. 297.

its worth. Unless it be shown that what is gained is full compensation for what is lost, the terms cannot be found to be just.[62]

Brennan J. offers no authority for this statement, and it is contrary to a line of cases decided during or soon after World War II. In these cases, the High Court stated that 'just terms' should not be equated with full compensation but rather with a lower standard of 'fairness', which would take into account the interests of the community. *Nelungaloo Proprietary Limited* v. *The Commonwealth* concerned a marketing scheme under which the Australian Wheat Board compulsorily acquired wheat for resale. The marketing scheme was quite complicated, but the policy underlying it was reasonably clear: as long as the export value of wheat was below a guide price, wheat growers would receive a subsidy; but if the export value of wheat exceeded the guide price, wheat growers would subsidise domestic consumers. The export price eventually rose above the guide price and, in *Nelungaloo*, farmers claimed that the price they were paid for the wheat fell short of the price they could have obtained in the absence of the marketing scheme, and hence their wheat was taken from them on terms that were not 'just terms'. Their claim was dismissed, partly on the basis that they had not proved that they could have received a better price, but also on the basis that section 51(xxxi) does not guarantee full compensation or market prices in any event. Dixon J. stated that just terms 'appears to refer to what is fair and just between the community and the owner of the thing taken . . . Unlike ''compensation'', which connotes full money equivalence, ''just terms'' are concerned with fairness.'[63]

The pooling scheme in *Nelungaloo* bears some similarities to the compensation scheme in *Georgiadis*. Plainly, the farmers in *Nelungaloo* and the employees in *Georgiadis* lost in some circumstances: farmers lost when the price of wheat went above the guide price, and employees lost if they were victims of negligence. However, the farmers were better off when wheat prices fell below the guide price, just as injured employees who could not prove negligence were better off. It is surprising, therefore, that Brennan J. did not set 'just terms' in the broader perspective of the scheme as a whole. It is also surprising that he insisted that the interests of the community are irrelevant. By contrast, in *Minister of State for the Army* v. *Dalziel*,[64] which concerned the acquisition of property for

[62] *Ibid*. at 310–11.

[63] *Nelungaloo Proprietary Ltd* v. *The Commonwealth* (1947–8) 75 C.L.R. 495 at 569.

[64] (1943–4) 68 C.L.R. 261. On military necessity, see also *Nelungaloo* (1947–8) 75 C.L.R. 495 at 558.

the military during the war, some members of the High Court indicated that the public interest is relevant (just as Dixon J. did in *Nelungaloo*). Starke J. stated that:

> The constitutional power given to the Commonwealth by s. 51(xxxi) is a legislative power and not, as in the Fifth Amendment of the Constitution of the United States of America, a provision that private property shall not be taken for public use without just compensation. Under the Australian Constitution the terms of acquisition are, within reason, matters for legislative judgment and discretion. It does not follow that terms are unjust merely because 'the ordinary established principles of the law of compensation for the compulsory taking of property' have been altered, limited or departed from, any more than it follows that a law is unjust merely because the provisions of the law are accompanied by some qualification or some exception which some judges think ought not to be there. The law must be so unreasonable as to terms that it cannot find justification in the minds of reasonable men.[65]

Starke J. dissented in *Dalziel*, but in the later case of *Grace Bros Pty Ltd* v. *The Commonwealth* he quoted from his earlier judgment,[66] and subsequently other judges approved of this statement.[67] Other members of the Court in *Dalziel* agreed that the 'just terms' condition must not be equated with full compensation. They also agreed that the legislature has a measure of discretion; however, they were more willing to examine the grounds on which the actual payment was assessed. In particular, in *Dalziel*, the Court held that terms would not be just if no allowance was made for loss of profit or occupation during the period in which the property was requisitioned. It also appears that the majority believed that market values, although not determinative, would at least be relevant. Even so, however, it is doubtful that the majority would have agreed with Brennan J.'s dicta in *Georgiadis*.

By contrast, the European Convention on Human Rights gives proportionality a more prominent role in rights to property and compensation in particular. Article 1 of the First Protocol protects the 'peaceful enjoyment of possessions' but, unlike the property provisions of Commonwealth constitutions, it does not contain an express guarantee of compensation. Moreover, the European Court of Human Rights has

[65] (1943–4) 68 C.L.R. 261 at 291; see also Williams J. at 308.

[66] (1946) 72 C.L.R. 269 at 285 *per* Starke J.; see also at 279–80 *per* Latham C.J. and 291–2 *per* Dixon J.

[67] See *e.g. Gould* v. *Gould*, Appeals Nos. EA46 and 50 of 1993, File No. SY3210 of 1992 (Family Court of Australia), paras. 131–6 *per* Fogarty J. and para. 4 *per* Nicholson C.J. and Finn J.: 'just terms' requires fairness, but not the full monetary equivalent of property that is taken.

stated that it does not contain an implied guarantee of compensation in every case where there has been an interference with the enjoyment of possessions. In *Sporrong and Lönnroth* v. *Sweden*, the Court held that Article 1 only requires states to achieve a 'fair balance' between 'the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights'.[68] The fair balance test involves a far more flexible approach to proportionality and compensation than hitherto found under most Commonwealth constitutions.

In *Lithgow* v. *United Kingdom*, the European Court of Human Rights stated that 'the taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference which could not be considered justifiable under Article 1'.[69] Most Commonwealth courts would agree, as they ensure that owners receive at least the market value of the property. However, *Lithgow* v. *United Kingdom* states only that the amount should be '*reasonably* related to its value', and that this would only be required in 'normal' circumstances.[70] It also appears that the European Court of Human Rights is more willing than Commonwealth courts to defer to the legislature's judgment in relation to the valuation of property. Plainly, the Court's relationship with national governments differs from the relationship of a Commonwealth court to its government and hence the approach to deference is bound to differ.[71] Nevertheless, it is interesting to note that the European Court of Human Rights has stated that there is no reason to differentiate between the deference shown on the justification of the taking and the deference shown in relation to the terms and conditions of the taking.[72] By contrast, Commonwealth courts tend to show far more deference on the purpose requirements than they do in relation to the compensation requirements.

Lithgow v. *United Kingdom* also demonstrates that there may be circumstances where the ordinary principles of valuation should not be applied. The Court in *Lithgow* stated that the complexity of nationalising

[68] A 52 (1982), para. 69; 5 E.H.R.R. 35.

[69] A 102 (1986), para. 121; 8 E.H.R.R. 329.

[70] *Ibid.* (emphasis added).

[71] Although note that the Privy Council regards its relationship to national courts as the same as the European Court of Human Rights' relationship to the courts of member states; *e.g.* in *La Compagnie Sucrière de Bel Ombre Ltee* v. *The Government of Mauritius* [1995] 3 L.R.C. 494 at 505, it stated that the idea of the 'margin of appreciation' should apply to its supervision of national courts.

[72] A 102 (1986), para. 122; 8 E.H.R.R. 329.

an industry justifies a departure from the measure of compensation applicable to the typical compulsory purchase of land.[73] Hence, it was not unreasonable to value the shares of nationalised companies at a date over three years prior to the taking of the property, despite the subsequent volatility of share prices.[74] The 'interests of legal certainty' justified a degree of arbitrariness in valuation. There is a sharp contrast with the rigidity of the approach in *State of West Bengal* v. *Bela Banerjee*, where the Indian Court did not investigate the relevance of the purpose of the acquisition.[75]

Another interesting Convention case is *James* v. *United Kingdom*, where the Court stated that '[l]egitimate objectives of ''public interest'', such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value'.[76] *James* v. *United Kingdom* concerned legislation that permitted tenants under long leases to purchase the freehold. The landowners argued that the purchase price was too favourable to tenants because the valuation of the freehold did not include the value of the buildings. As the landowners held legal title to both the land and the buildings, their formal argument makes sense. However, the Court accepted the United Kingdom's argument that many tenants had effectively paid for the buildings through rental charges and costs of upkeep. Hence, the tenants had a moral entitlement to the value of the buildings, although not a legal entitlement, and it was reasonable for the national authorities to consider it in assessing compensation.

It seems unlikely that Commonwealth courts would adopt a principle of partial compensation similar to that of *James* v. *United Kingdom*.[77] There are circumstances where the objective of legislation justifies a

[73] *Ibid*., paras. 120–1.

[74] Shareholders in aircraft and shipbuilding companies received compensation for their shares on the basis of the average value of the shares over a six-month reference period. The reference period was chosen in order to value the shares before the impending nationalisation would have had an impact on the market prices. However, the reference period had ended three and a half years before the shares were actually acquired, during which time the shares had realised a considerable appreciation in value. The Court (*ibid*., para. 132) stated that the method of valuation was not unreasonable because the reference period ended on the date of the election of the Labour Government, at which point the possibility of nationalisation became much greater and would have had an effect on share prices.

[75] A.I.R. 1954 S.C. 170; cf. *Windward Properties Ltd* v. *Government of Saint Vincent and the Grenadines* [1996] 2 L.R.C. 497 (P.C.).

[76] A 98 (1986), para. 54; 8 E.H.R.R. 123.

[77] There are exceptions; McNally J.A.'s judgment in *May* v. *Reserve Bank of Zimbabwe* 1986 (3) S.A. 107 could be read as an acknowledgement that 'adequate compensation' does

denial of compensation, but it is a complete denial of compensation that is justified. In this regard, there is an interesting parallel between *James* v. *United Kingdom* and an Australian case, *Mutual Pools and Staff Pty Ltd* v. *The Commonwealth of Australia*.[78] As explained in chapter 6, *Mutual Pools* involved the refund of an improperly collected sales tax.[79] Where the sellers had passed on the cost to their buyers, it was refunded to the buyers. The High Court held that the failure to refund the tax to the sellers was not a compensatable acquisition under section 51(xxxi) of the Constitution. There is a strong similarity with the facts of *James* v. *United Kingdom*; in *Mutual Pools*, the High Court based its decision on the buyers' moral claim to the tax refund, and in *James* v. *United Kingdom*, the European Court based its decision on the tenants' moral claim to the value of the buildings. There is a difference, however. In *James* v. *United Kingdom* the landlords still received some compensation for the freehold, but in *Mutual Pools* the sellers received nothing. Arguably, the sellers were not treated unfairly, since they did not pay the tax out of their own pockets. However, they would have suffered indirectly, as the imposition of the tax must have lowered the demand for their product and thereby reduced their overall revenue. The fairest scheme would have been a division of the refund between the sellers and the buyers, under which the sellers would have received partial compensation for the loss of the refund. However, the current view of compensation rules out this sort of flexibility for Commonwealth courts.

Lithgow v. *United Kingdom* and *James* v. *United Kingdom* concern complete deprivations of the owner's property; under the European Convention on Human Rights, other types of interference with the enjoyment of possessions and controls on their use are treated separately. In such cases, the European Court of Human Rights has stated that compensation is not always necessary to strike a fair balance. Other factors are relevant, such as the availability of procedures by which the interference can be challenged.[80] Again, under Commonwealth constitutions, there is either a right to full compensation or no right to compensation; the existence of procedural rights has been irrelevant to the issue of compensation in the cases to date. Once the court concludes that

not necessarily require payment of the full market value or restoration of the owner to the position prior to expropriation.

[78] (1994) 179 C.L.R. 155.

[79] See above, pp. 177–8.

[80] See *e.g. Sporrong and Lönnroth* v. *Sweden* A 52 (1982); 5 E.H.R.R. 35; *AGOSI* v. *U.K.* A 108 (1986); 9 E.H.R.R. 1; *Air Canada* v. *U.K.* A 316 (1995); 20 E.H.R.R. 150.

property has been taken, it follows that the owner is entitled to both full compensation and any procedural rights guaranteed by the constitution. There is no room in the current doctrine for requiring partial compensation or an alternative procedural guarantee for a partial taking of property.

The difference is not as great as it might appear, because in many Commonwealth systems there are separate constitutional or common law entitlements to due process or natural justice in respect of interferences with property rights. Moreover, it is often open to the courts to decide that regulations or other controls over use are takings of part of the property rather than regulation of all of the property. Full compensation would then be awarded for that part of the property. In fact, courts rarely find that a partial taking has occurred, but in any case the concentration would remain solely on full compensation for the part of the property that is taken. The Convention principle of a 'fair balance' is not relevant. Under the Convention, compensation is merely a means of achieving a fair balance, but under Commonwealth constitutions its role is more difficult to discern. It appears that compensation is the end sought by the constitutional guarantee and not merely a means of achieving an end.

There is a possibility that some Commonwealth courts may accept the European Court's view of the role of compensation. As explained in chapter 6, the Privy Council in *La Compagnie Sucrière de Bel Ombre Ltee* v. *The Government of Mauritius*[81] stated that section 3 of the Mauritian Constitution fulfils a function similar to the Convention's guarantee of peaceful enjoyment of possessions. Section 3, the opening provision of the Mauritian Bill of Rights, refers only to the 'deprivation of property without compensation'; section 8 deals specifically with the compulsory acquisition of property. The relationship between the sections is discussed elsewhere, but in essence the Privy Council held in *La Compagnie Sucrière de Bel Ombre* that only section 8 would apply to an outright expropriation of property and that section 3 applies to all other forms of the deprivation of property. The significant point, in relation to compensation, is that Lord Woolf stated that section 3 only requires 'a fair balance between the interests of the community and the rights of the individuals whose property interests are adversely affected.'[82] Under section 3, the position is the same as it is under the Convention:

[81] [1995] 3 L.R.C. 494; see above, pp. 196–8.
[82] *Ibid*. at 504–5.

compensation is merely a means of ensuring a fair balance, but it is not required in every case.

South Africa: 'just and equitable' compensation

Section 25 of the final South African Constitution breaks from the Commonwealth tradition of guaranteeing full compensation.[83] As the full text of section 25(3) shows, the courts are directed away from the assumption that compensation must not be less than the market value of the property. It reads as follows:

> 25. (3) The amount, timing and manner of compensation must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant factors, including –
>
> (a) the current use of the property;
> (b) the history of the acquisition and use of the property;
> (c) the market value of the property;
> (d) the extent of state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
> (e) the purpose of the expropriation.

A superficial reading of the opening words of section 25(3) suggests that it does not differ greatly from similar provisions of other Commonwealth constitutions. While it requires 'just and equitable' compensation and an 'equitable balance' between public and private interests, other courts have interpreted similar expressions so as to require compensation at market value (at a minimum). However, paragraph (c) makes it clear that market value is merely one of a number of relevant factors. The reference to the 'equitable balance' therefore seems much closer to the 'fair balance' that must be achieved to satisfy the European Convention on Human Rights. For example, if South African courts take the same approach as the European Court of Human Rights, *Lithgow* v. *United Kingdom* and *James* v. *United Kingdom* suggest that paragraph (e) could justify compensation below market values when property is taken to rectify social injustice or to broaden the state's role in the economy.

Paragraphs (a) and (c) are relevant factors in valuation under most statutory schemes, although value in use is generally used only where market values cannot be determined. However, paragraph (a) might apply where market values are driven by speculation. It might also be relevant where the state seeks to prevent property owners from reaping

[83] For a general discussion, see André J. van der Walt, *The Constitutional Property Clause: A Comparative Analysis of Section 25 of the South African Constitution of 1996* (Kenwyn, South Africa: Juta & Co. Ltd, 1997), ch. 6.

windfall profits as a result of public expenditure on reconstruction. The current situation in South Africa bears some similarities with the situation in English law in the period immediately following World War II, where reconstruction and development was also a priority of the state. It was clear that development would increase the demand for land and cause property values to increase. Since the state took primary responsibility for development, many in the Government believed that the increase in value due solely to development should accrue to the state. Accordingly, legislation declared that all 'development value' belonged to the state.[84] In effect, owners were still compensated for the value of the land in its existing use, but were not compensated for the anticipated increment that would follow the development of the area.

Paragraph (b) raises interesting possibilities for the South African courts. The specific question of land reform and restitution of property is dealt with below, but as a general principle, paragraph (b) suggests that payment of full market value is not necessary where it would give legitimacy to a morally questionable claim to property. For example, in *Zambia National Holdings Ltd and Another* v. *Attorney-General of Zambia*, the Zambian Supreme Court held that transfers of state property to a political party were invalid, although they had been authorised by the legislature.[85] The mode of acquisition was such that the transferees had no ethical claim to the property or to compensation for the state's reassertion of title to the property. Similar considerations could apply where economic wealth was amassed with the assistance of legislative and executive support for oppressive labour practices. Paragraph (d) raises similar issues, especially if South Africa uses investment incentives to attract inward investment. It might not offend notions of fairness for the investor to receive market value for the property on a private sale, but to expect the state to pay market value for such property seems to provide a double payment to the investor.

Land reform receives special attention in section 25. The redistribution of land to redress historical wrongs would almost certainly pass the public purpose tests and, in any case, section 25 permits the government to undertake land reform. Subsection 25(4) confirms the importance of the 'nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources', by

[84] See generally Keith Davies, *Law of Compulsory Purchase and Compensation*, 5th edn (Croydon: Tolley Publishing Co. Ltd, 1994), ch. 8.

[85] [1994] 1 L.R.C. 98 (S.C.); cf. *Government of the Republic of Namibia* v. *Cultura 2000* 1994 (1) S.A. 407 (S.C.).

providing specifically that they are within the public interest and therefore may justify the expropriation of property. Section 25(5) requires the state to take 'reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis'. Section 25(6) and (9) require the state to enact legislation to compensate or secure the land tenure of any person or community whose tenure is insecure because of 'past racially discriminatory laws or practices'. Section 25(7) entitles 'any person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices . . . either to restitution of that property or to equitable redress' to the extent provided by an Act of Parliament.[86] While it may be possible to satisfy many claims under these provisions, it may also be necessary for the state to expropriate land in order to satisfy at least some of the claims. The existence of a constitutional duty to compensate at market values could make it impossible to finance the redistribution. Accordingly, section 25(8) provides that:

> No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

Section 36(1) is the general limitation clause to all the rights in the Bill of Rights.

The precise interrelationship of these provisions in relation to compensation is not yet clear. Section 25(3) requires an 'equitable balance', taking into account, inter alia, the history of the acquisition and use of the property and the purpose of the expropriation. Section 36(1) is based on the limitation clauses of Nigerian-model constitutions. It involves a similar balancing test for determining whether an infringement of a right is justified. Since both sections involve a balancing of public and private interests, and since both require the court to consider the historical background and the government's purpose for acquiring the property, it is not clear how the level of compensation could be so low as to amount to an infringement of section 25 and yet be justified under section 36. Section 25 is infringed if the amount of compensation is such that balance between the public interest and those affected is not 'just and equitable'. However, an inequitable balance might be justified as a necessary and proportionate means of redressing past racial

[86] 19 June 1913 is the date that the Black Land Act 1913 (c. 27) was promulgated.

discrimination. One might argue that unjust and inequitable compensation is necessary whenever the expenditure of funds is prohibitive, but since section 25 does not require market value compensation in every case it is difficult to say when just and equitable compensation would be prohibitively expensive. Moreover, the principle that the infringement of the right must be minimal suggests that it is indeed impossible or impracticable to increase the amount of compensation. One might argue that the redress of racial discrimination demands that the previous beneficiaries of racial discrimination should not receive 'just and equitable' compensation, but, once again, if this is the case it appears to be contemplated by section 25(3)(b).

Overall, section 25(3) makes the scope of the judicial inquiry quite broad. In practice, the courts may have no choice but to defer to the legislature except where only nominal compensation is paid. Nevertheless, the advantage of including the factors in paragraphs (a)–(e) is that they speak to both the courts and the legislature. The courts may be forced to defer the legislature, but they have specific points on which to base their review. The legislature must consider the factors and must be prepared for a challenge if it ignores any of them.

Other provisions on compensation

Some Commonwealth constitutions impose other requirements on the provision of compensation. In a number of countries, compensation must be 'prompt'[87] or given within a 'reasonable time'.[88] Some constitutions also state that compensation must be paid in money, and the recipient must be entitled to remit compensation.[89] Where there is no requirement to pay compensation in money, it should be possible to give it in the form of long-term bonds or debentures.[90] However, other

[87] See *e.g.* Bahamas, s. 27(1)(c)(ii); Botswana, s. 8(2) (but see s. 8(3)); Fiji, s. 9(1)(d); The Gambia, s. 22(1)(c); Ghana, s. 20(2); Grenada, s. 6(1); Kenya, s. 75(1)(c); St Christopher and Nevis, s. 8(2)(b); St Lucia, s. 6(1); St Vincent, s. 6(1); Mauritius, s. 8(1); Zimbabwe, s. 16(1)(c). Cyprus, Art. 23 and Uganda, s. 26(2)(b)(i) require payment prior to the acquisition.

[88] See *e.g.* Belize, s. 17(1)(a); Solomon Islands, s. 8(1)(c)(i).

[89] See *e.g.* Botswana, s. 8(4); Fiji, s. 9(3); Mauritius, s. 8(2); St Christopher and Nevis, s. 8(4); St Lucia, s. 6(4); St Vincent, s. 6(4).

[90] See *e.g. R. C. Cooper* v. *Union of India* [1970] 3 S.C.R. 530 at 609: compensation required under Article 31(2) of the Indian Constitution may be given in bonds, provided that the market value of the bonds is equal to the amount of compensation required. Cf. *Gujarat* v. *Shantilal Mangaldas* A.I.R. 1969 S.C. 634 at 644: since Article 31(2) does not define compensation, it need not be given in money; hence, offsetting benefits may be taken into account.

courts have resisted such attempts. In *San Jose Farmers' Co-operative Society Ltd* v. *Attorney-General*, the Court of Appeal of Belize held that giving compensation in long-term government debentures did not provide 'reasonable compensation' in a 'reasonable time', as required by the Constitution, for two reasons. First, the Court held that '[c]ompensation within a reasonable time can only mean that payment must be made in full as soon as is reasonably practicable after the amount of compensation due has been finally settled'.[91] Secondly, interest was fixed at 6 per cent per annum; this failed to satisfy the requirement for 'reasonable compensation', because 'the interest payable must be an interest at a rate applicable to give the expropriated owner a just equivalent of his loss at the time of the expropriation and not a rigid and fixed rate whatever his loss may be'.[92] On both points, the decision is quite restrictive, but reflects the belief that compensation must provide a just equivalent. The idea that compensation is part of a fair or proportionate balance between private and community interests did not play a significant part in the Court's decision.

Conclusions

Broadly speaking, there are two possible approaches to compensation standards that the courts could consider. The first is a deferential approach. It is similar to the approach most courts take in relation to public purpose requirements, as most courts would hold that the constitutional requirement of a public purpose is satisfied if the expropriating authority can show that there is a rational link between the expropriation and the public interest, however weak the link and however broad the public interest. The result is that the public purpose requirement has become a relatively unimportant element of the constitutional right to property. With respect to compensation, the courts might require that the measure of compensation reflects an identifiable standard of fairness, but goes no further than that.

Alternatively, the courts could subject compensation standards to a higher degree of scrutiny, thereby making compensation an extremely important element of the right to property. This is the approach taken by most Commonwealth courts, although it is not the approach that many constitutional framers expected them to take. As the Indian

[91] (1992) 43 W.I.R. 63 at 83 *per* Liverpool J.A.
[92] *Ibid*. at 82 *per* Liverpool J.A.

experience demonstrates, this approach raises the risk of a serious conflict, with the judiciary pitted against the executive and legislature. Ultimately, a high degree of judicial scrutiny of the other branches of government exposes the judiciary itself to a higher degree of scrutiny from those branches and the public in general. The strict, legalist reading of 'compensation', 'fair compensation' or 'adequate compensation' constricts the judiciary in cases where a flexible approach might be politically desirable.

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