

*RECONCILING THE STATE'S DUTIES TO PROMOTE LAND
REFORM AND TO PAY JUST AND EQUITABLE' COMPENSATION
FOR EXPROPRIATION*

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INTRODUCTION

The apparent conflict between the state's duties to promote land reform (specifically equitable access to land, as provided for in s 25(5) of the Constitution, 1996) and to pay just and equitable compensation for expropriation (s 25(2) and (3) of the Constitution) has been in the news recently because of allegations that the government's commitment to the willing-seller/willing-buyer principle stood in the way of effective and speedy land reform. The government has been criticized in this respect both for its apparent hesitation to use its expropriation powers for land reform purposes and for its seeming unwillingness to speed up land reform by expropriating land against compensation at less than market value (see various critical contributions at the National Land Summit, 27–31 July 2005, available at www.land.pwv.gov.za/Land_Summit/ (last accessed on 29 September 2005)).

Underlying this discourse are the assumptions that (a) the state has to promote land reform, inter alia by acquiring large tracts of private land through expropriation, for redistribution; (b) purchasing the required amount of land (according to government policy, 30 per cent of agricultural land by 2012) at market prices or expropriating it against compensation that is dominated by market value is too expensive, considering limited state resources and the government's range of other social and economic responsibilities; (c) expropriation of the required land against compensation at a level below market value could overcome or alleviate the problem; and (d) doing so is constitutionally viable in view of s 25(3) but for some reason against current government policy. Pressure has therefore increasingly been placed on the Minister of Land Affairs and Agriculture to use her

constitutional and statutory powers of expropriation, including the possibility of expropriating land for less than market value, to promote and accelerate redistribution of (especially agricultural) land. Non-Governmental Organizations with a special interest in land reform and redistribution of land have been particularly visible in the lobbying for such a change of policy. More recently it has been reported that the government has indeed decided to start making use of expropriation to acquire agricultural land for redistribution and that a major source of the first expropriation disputes that are already on their way to the courts is the amount of compensation offered by the state, although there is no indication that the state is expropriating the land in these cases at below market value (see the articles published on 27 and 28 December 2005 in the *Citizen* newspaper (available at www.citizen.co.za)).

Expropriation of land against compensation that is lower than market value is a contentious and fairly complicated matter, regardless of whether it is approached and debated from the perspective of government policy, economic theory or legal and constitutional theory. In view of developments in Zimbabwe over the last few years, this topic is bound to attract the critical attention of landowners, farmers and agricultural associations. Although the matter has enjoyed some attention from constitutional scholars and property lawyers, the debate is clearly far from over in South African legal circles. In a recent article in this *Law Journal*, Jill Zimmerman proposed that land reform as such constitutes a ‘special constitutional priority’ that justifies a significant, across-the-board percentage reduction of compensation for redistributory expropriation of land. In addition, she argued that the current inability to make progress with expropriation-driven land reform is at least partly the result of overly cautious or even conservative constitutional interpretation characterized by ‘the pre-emption of the express language of the Constitutional text by a standardized, transnational “property rights” discourse emphasizing the centrality of market value compensation’, resulting in a ‘premature and “technicist” ossification around concern for market value’ (see Jill Zimmerman ‘Property on the line: Is an expropriation-centered land reform constitutionally permissible?’ (2005) 122 *SALJ* 378 at 383 and 418). Three forces apparently contribute to this counter-transformative tendency (and therefore share the blame for the slow rate of reform): the democratic government’s allegiance to ‘the strictures of a surprisingly conservative economic strategy’ (at 379); the ‘carelessness with which interpretive authority has been diffused through successive layers of delegation with respect to land reform’ and the conservative interpretive attitude of the lower courts (at 383, 417 and 418, referring to Duncan Kennedy *A Critique of Adjudication (Fin de Siècle)* (1997)); and comparative scholarship that ‘emphasizes the universality of a “modern” expropriations jurisprudence that links compensation, in one way or another, to market value’ (at 398), thereby entrenching a counter-transformative “habitual” legal culture which imposes extra-textual constraints on the interpretive processes of its participants’ (at 416, quoting Karl E Klare ‘Legal culture and transformative constitutionalism’ (1998) 14 *SAJHR* 146 at 168–71), particularly outside of

the Constitutional Court. Zimmerman thus draws a direct link between comparative scholarship, conservative adjudication and a legal culture that resists land reform in direct conflict with the text and spirit of s 25: '[w]here the flexible and unusual provisions of s 25 have the potential to differentiate the South African property clause from its comparative analogs, they are either ignored or attributed very cautious and conservative content' (at 417).

These are strong words and, particularly in view of the new developments that promise to raise the question of compensation for redistributive expropriation in the courts, it is worth our while to consider Zimmerman's explanation of the reasons for slow progress with land reform and her suggestions for an alternative approach.

SECTION 25 AND LAND REFORM IN SOUTH AFRICAN LEGAL DISCOURSE SINCE 1993

Apart from Zimmerman's specific arguments, some of which are again raised and debated below, what she describes as a progressive view about the relationship between s 25, land reform, expropriation, compensation and the role of market value could probably be summarized in the following points:

- (a) Section 25(5) places a positive obligation on the state to promote equitable access to land and to take the necessary legislative and other steps to promote redistribution of land. (Other land reform initiatives around restitution and tenure reform are not discussed specifically here, although they may also involve expropriation, in which case the issues are largely the same.)
- (b) Judging from government statistics, redistribution programmes cannot succeed purely on the basis of re-assigning land that is already in black hands or that is currently held by the state; some transfer of (especially agricultural) land from white to black landowners will have to take place to reach transformation goals.
- (c) In effecting this transfer the state cannot purely rely on purchasing land in the market, because sufficient quantities of the right kind of land may not be available at affordable prices.
- (d) The state has the power to expropriate land (ultimately derived from s 25(2) of the Constitution) and may presumably use that power to expropriate land for the purpose of redistribution (this separate issue is raised again below), but can probably not afford to do so at levels of compensation that are purely or even mainly informed by the market-value principle; according to economists and agrarian reform specialists expropriation of land for redistribution purposes must at some point take place at levels of compensation that are significantly below market value if reform targets are to be met in view of a limited state budget and the demands of other social and economic state responsibilities. (I do not rehearse the arguments here: see articles on the National Land Summit 2005, published at www.land.pwv.gov.za/Land_Summit from 27–31 July.)

- (e) In order to promote and facilitate effective land-reform expropriation, it is therefore necessary to undermine or weaken the grip of the market-value principle for compensation in cases where expropriation is specifically aimed at redistribution (or land reform in general).
- (f) In terms of the relevant constitutional provisions (including but extending beyond s 25), the fact that expropriation is undertaken for land reform purposes is sufficient in itself to justify a lower level of compensation in suitable cases; and the Constitution (including the property clause) clearly foresees that s 25 should facilitate rather than frustrate land reform.

The first issue I would like to discuss with reference to these points is their status in the South African literature on constitutional property since 1993. According to Zimmerman, 'where this scholarship touches on compensation at all, with limited exception it emphasizes the universality of a "modern" expropriation jurisprudence that links compensation, in one way or another, to market value' (Zimmerman *op cit* 398, citing Andra Eisenberg 'Different constitutional formulations of compensation clauses' (1993) 9 *SAJHR* 412 at 416 and 420–1). Contrary to Zimmerman's generally negative sentiment, my view is that the South African literature on compensation, while not extensive, is remarkably unanimous in accepting the general thrust of points (a)–(f) above and only raises the centrality of market value in order to highlight the openness of s 25 for deviations from market value, as and when required by land reform initiatives. By and large, I would regard South African commentaries that insist upon the centrality of market value as the exception rather than the rule.

Although it is true that s 25(3) and the level of compensation for expropriation have enjoyed less attention in academic literature than some other aspects of the property clause, certain early analyses were sufficiently incisive and lucid to inspire more or less general concurrence with the broad outline of thinking about compensation (as set out in points (a)–(f) above) and, consequently, there was less anxiety and speculation about the compensation provisions in s 25(3) than might otherwise have been expected (added to the fact that the lack of litigation and case law relegated this issue to the back burner for quite a long time). Very early analyses (like Eisenberg *op cit* and Aninka Claassens 'Compensation for expropriation: The political and economic parameters of market value compensation' (1993) 9 *SAJHR* 422) made it clear, even before the interim Constitution of 1993 was adopted, that (a) in a transformative context, where expropriation will have to be employed for land reform purposes, market value cannot be allowed to dominate the compensation issue; and (b) comparative analysis shows that market value can indeed be relegated to a subordinate role in the calculation of compensation for expropriation. These points have been picked up and echoed again and again in subsequent literature, and references in the later literature indicate wide acceptance of, and no overt disagreement with, these early arguments. Slightly later analyses (see Duard Kleyn 'The constitutional protection of property: A comparison between the

German and the South African approach' (1996) 11 *SA Public Law* 402 at 441–5; A J van der Walt *The Constitutional Property Clause: A Comparative Analysis of Section 25 of the South African Constitution of 1996* (1997) 141–8; and especially Geoff Budlender 'The constitutional protection of property rights' in Geoff Budlender, Johan Latsky & Theunis Roux (eds) *Juta's New Land Law* (Original Service 1998) at 1–56–67) explicitly followed in the footsteps of the early publications and emphasized — some admittedly in more detail than others — that s 25(3) makes it possible to expropriate land (inter alia for land reform purposes) against compensation that could be established at a level below market value; that market value is just one amongst several factors that determine what 'just and equitable' compensation is; and that expropriation in pursuit of land reform therefore should, and need not, be hampered by the market-value principle. None of these sources insist, as I read them, on the centrality of the market value principle.

A wider range of later literature not referred to by Zimmerman confirms this impression: the majority of South African authors do not argue that market value should dominate compensation and in fact accept quite explicitly that compensation is determined by a number of factors, of which market value is just one; that compensation could be lower than market value; and that land reform purposes not only justify expropriation but might also influence the level of compensation. (See Iain Currie & Johan de Waal *The Bill of Rights Handbook* 5 ed (2005) 554–7 and earlier editions to the same effect; G E Devenish *A Commentary on the South African Bill of Rights* (1999) 350–1; Theunis Roux 'Property' in M H Cheadle, D M Davis & N R L Haysom *South African Constitutional Law: The Bill of Rights* (2002) 429 at 463–5; Ziyad Motala & Cyril Ramaphosa *Constitutional Law: Analysis and Cases* (2002) 309–12; M D Southwood *The Compulsory Acquisition of Rights* (2000) 91; A Gildenhuis *Onteieningsreg* 2 ed (2001) 164, 167–8, 178. Even relatively cautious authors such as Southwood and Gildenhuis explicitly accept that compensation could be established at below market value when the land reform purpose justifies it; Gildenhuis op cit 178 even confirms Zimmerman's additional argument (at 411–16) in terms of s 25(8).) Clearly, some authors are more cautious than others and some state the relevant principle in more direct terms than others, but all accept the central point that compensation is not determined by market value alone or primarily, and that land reform aspirations can affect the level of compensation. Moreover, the literature recognizes and reflects the position taken in the Constitutional Court's judgment in the *First Certification* case (*Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) para 73) to the effect that there is no universally accepted standard of compensation with which the South African Constitution has to conform (with the implication that market value does not have to be guaranteed as the principal norm). So, where do the different interpretations come into the picture? Is Zimmerman just storming windmills, or does she have a point? How does one explain the obviously divergent readings of the South African literature on this point?

One possible (partial) explanation is that Zimmerman does shift the argument around to a certain extent — in one sense she is correct in saying that all South African commentators link compensation to market value ‘in one way or another’, but that does not mean that they insist on the central importance of market value — it means nothing more than that market value has some effect on compensation. It could be said that Zimmerman herself links compensation to market value ‘in one way or another’; it would have been remarkable not to have done so in the context of s 25, which explicitly enumerates market value as one of the factors that have to be considered. The real issue is, of course, not whether market value is somehow linked to compensation but whether market value is posited as the central or dominant factor in calculating compensation. Zimmerman’s argument fails in so far as she does not (and in my view cannot) prove that the majority of South African authors support the latter point; in as far as she does prove that they are guilty of the lesser sin her argument is meaningless.

A second explanation for the difference in opinions is that Zimmerman simply did not read the South African literature carefully enough or, having done so, overstated her case. This possibility is certainly borne out by closer scrutiny of the relevant sources, at least up to a point. On the one hand, Zimmerman fails to discuss important early literature (such as Kleyn op cit 441–5) and later literature (such as Theunis Roux ‘Property’ in Cheadle et al op cit 463–4; Theunis Roux ‘Property’ in Stuart Woolman et al *Constitutional Law of South Africa* 2 ed (2003) 46–34–6) that quite clearly adopts a position close to her own and opposed to the supposedly mainstream position that she criticizes (she does single out Eisenberg op cit 412–21 as being an exception, but does not refer to Claassens op cit 422–7). On the other hand, when Zimmerman does refer to authors who clearly share her own views, she either fails to give them credit for their ‘progressive’ views (like Budlender op cit 56–67 — a source that has assumed the role of locus classicus on the compensation provisions in the South African literature, being cited with approval by even cautious authors such as Gildenhuis and Southwood) or she simply misreads and misquotes them. (For two telling examples, see the clearly contradictory references to my own views in Zimmerman op cit ff 170, 182 and 196.). At the very least Zimmerman spoils her argument by overstating it and by failing to give an accurate reflection and assessment of the South African literature on compensation.

The above criticism does not mean that Zimmerman is completely off the mark and that South African authors have been shining beacons of progressive thinking on compensation; on the contrary. Zimmerman’s criticism would have been closer to the heart of the matter if she had argued (which she did not) that, while all South African authors adopted the (a)–(f) line of argument above in general, they did not do so with equal enthusiasm, or (even more nuanced) that they have not embraced the transformative potential of more radical reformist interpretations of s 25(3) with any measure of clarity or creativity. This is certainly a point worth making, especially now that we seem to be moving towards actual litigation on

compensation for land reform expropriations. To mention just one rather obvious example that does resonate with Zimmerman's argument: from recent case law and literature it appears that many South African interpreters believe that the purpose of s 25(3) is served adequately if compensation is calculated by first determining market value (as a kind of benchmark) and then looking at the other (often less easily quantifiable) factors to see whether and how the market value should be adjusted in the direction of 'just and equitable' compensation. (See to this effect the court decisions in *Khumalo v Potgieter* [2000] 2 All SA 456 (LCC); *Du Toit v Minister of Transport* 2003 (1) SA 586 (C) paras 23–52.) On the surface, this looks like a reasonable and practicable approach and South African authors have not offered incisive criticism of it as yet (see Roux 'Property' in Cheadle et al op cit 465; I adopt a similar view in my most recent book, A J van der Walt *Constitutional Property Law* (2005) 281–3). However, perhaps we have to reconsider it. In *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) para 35 (hereafter, '*Du Toit* (CC)') the majority of the Constitutional Court followed a slightly different but comparable approach in deciding whether a particular compensation award was constitutionally justifiable: first establish what compensation would be according to the 'standard' approach and then check whether it is in line with the constitutional demands. However, the minority sounded a significant warning against this approach: to treat the requirements of s 25 as 'a second level "review" test' would continue to privilege market value at the expense of other considerations as enumerated in s 25(3) (*Du Toit* (CC) (supra) para 84). In this respect it looks as if Zimmerman does have a point: we should be aware of the possibility that seemingly innocuous 'easy' or 'practicable' approaches and solutions to compensation issues could in fact entrench reform-resistant modes of thinking that in fact privilege market value.

It therefore appears much more useful and credible to argue that, while all South African authors accepted (more or less explicitly) that compensation could be lower than market value when expropriation was undertaken for land reform purposes, only a small handful of them have explained with any measure of clarity or detail when and how this reduction might have worked in view of s 25(3), and so far none has explored the reformist possibilities of a radical interpretation of s 25(3). Of course this argument would have supported Zimmerman's central point to a certain extent, even if she had made it, but it would also have required further qualifications and explanations taking account of (for instance) the initial lack of clarity about the nature and range of land reform expropriations that might be required and possible under the relevant land reform laws and programmes (many of which are of much more recent vintage than the publications referred to) and the initial lack of litigation and case law that usually serve as inspiration for more detailed and explicit analyses of such a compensation provision. In view of the expected land reform expropriations and the litigation around it we can perhaps expect the kind of analysis now that we lacked before.

SECTION 25, COMPENSATION AND LEGAL CULTURE

Zimmerman's indictment that South African lawyers and courts were entrenching a counter-transformative or reform-resistant "habitual" legal culture which imposes extra-textual constraints on the interpretive processes of its participants' (op cit 416) cannot be taken lightly. In his influential article on transformation in the new democratic order, Karl Klare argued convincingly that South African lawyers were more open than their American counterparts to the seductive influence of formalist thinking, inter alia because of the almost negligible influence of American legal realist thinking in South Africa (see Klare op cit 170n51). Klare related legal culture to 'professional sensibilities, habits of mind, and intellectual reflexes' (at 166) and, like Zimmerman, he pointed out that 'searching and critical examination of the legal culture and its multifaceted and diffuse influences on interpretive practices would seem to be a constitutional duty in the new dispensation' (at 168). The almost complete absence of critical realist thinking means, in Robert Gordon's terminology, that South African lawyers are more likely to be complacent about the legitimizing and hegemonic influence of liberal-democratic capitalism on our legal system and less likely to 'imagine that life could be different and better' (Robert Gordon 'Some critical theories of law and their critics' in David Kairys (ed) *The Politics of Law: A Progressive Critique* 3 ed (1998) 641). It is, therefore, indisputably true that traditional rhetorical style and existing practices of argumentation have a decisive influence on legal culture, and that legal culture can be entrenched so deeply through uncritical and complacent modes of thinking that transformation becomes practically impossible (see further Joseph W Singer 'Property and coercion in federal Indian law: The conflict between critical and complacent pragmatism' (1990) 63 *S California LR* 1821-41).

However, Klare argued that recurring rhetorical and argumentative moves tend to entrench the status quo and frustrate transformation *in the absence of critical self-reflection and/or transformative experience* (see Klare op cit 167). The question is whether Zimmerman makes a convincing argument to the effect that South African literature on compensation in terms of s 25(3) reflects an example of such uncritical, unreflective, hegemonic thinking about property. In my view she did not, for several related reasons. First, as was pointed out in the previous section, she does not provide a very accurate reflection or analysis of the existing literature. Secondly, Zimmerman fails to reflect the relevant context within which the literature on compensation was written. This context, if properly investigated and analyzed, would no doubt cast interesting and valuable light upon any assessment of the literature. To mention just broad outlines: much of the early literature on s 25 (from about 1991 until 1996) must be seen as beginner efforts, in which South African legal academics started for the first time to reflect on and deal with constitutional theory, a justiciable Bill of Rights and, above all, a constitutional property clause that also made explicit provision for land reform. All of

these were new to the legal community, which had to find its way into the material, develop new skills, acquire new knowledge and at the same time develop ways of dealing with the new situation. It is completely understandable if literature from this period is more or less general and focuses on general topics or on specific issues such as the meaning of notions such as 'property', 'deprivation' and 'expropriation', without necessarily going into great depth on any given topic. The fact that many of the new laws that had to give effect to and flesh out some of the changes were only promulgated much later also meant that critical analysis of at least some aspects of the new dispensation could only be developed over time. Similar considerations apply to the slow pace at which litigation and case law dealing with the property clause and land reform emerged, at least initially. Thirdly, Zimmerman fails to distinguish between authors and courts that do reflect critically upon the traditional modes of thinking, argument and rhetoric and those that do not — such a distinction can indeed be made and would perhaps have provided a starting point for making a better case along the lines of Zimmerman's argument. Seen in its context, an initial lack of extensive or in-depth analysis of the compensation provision in s 25(3) does not mean, as she seems to suggest, that the relevant authors were adopting or entrenching a traditional, reform-resistant attitude towards compensation and land reform. On the contrary, the early literature — limited as it admittedly is — and the tone of that literature, indicates an early (albeit sometimes inarticulate, superficial or general) willingness to accept that expropriation for land reform is necessary and justified and that compensation for such expropriation could well be lower than market value.

A further consideration militating against Zimmerman's critical assessment is her failure to reflect the 'influence profile' of the literature: most if not all authors during the period 1993–1996 at least refer to the Eisenberg and Claassens's articles (see Eisenberg *op cit*; Claassens *op cit*); while many of the later authors also refer to Kleyn *op cit*) and all refer to Budlender *op cit*). In my view it would be fair to say that Eisenberg, Claassens, Kleyn and Budlender are the early sources most widely accepted and cited by South African authors on s 25(3); that these sources accept the constitutional necessity of and justification for expropriation for land reform purposes reasonably clearly and explicitly; and that they also at least accept (or even argue in favour of the point) that compensation for such expropriation could (and in some cases should) be below market value. Given the contextual explanation above for the apparent scarcity of more extensive early analyses of the compensation issues, this observation contradicts Zimmerman's assessment of South African literature.

One could also fault Zimmerman's assessment of the South African literature more generally in that she fails to identify and assess the extent to which South African sources are explicitly conscious of legal culture and of the need to critically reflect upon the necessity to imagine and develop alternative ways of reading, interpreting and thinking about property, property rights and the constitutional protection of property in view of the

constitutional obligation to promote land reform. It is true that most of the critical and reflective literature to date dealt with other aspects of the property clause and of land reform such as eviction and access to land and housing and not with compensation for expropriation, but again this tendency can be explained in view of the context and the specific outlines of the emerging case law and literature on property and land reform. It certainly does not mean that there is a complete lack of awareness of the hegemony of legal culture or that there is no indication of critical self-reflection on property and land reform issues (something that could perhaps still have been at least partially true at the time when Klare wrote his article in 1997). In fact, in view of Zimmerman's extensive (and very instructive and insightful) analysis of the developments around socio-economic rights and the *Grootboom* decision (*Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC)), and their importance for the interpretation of s 25, one might perhaps have expected greater awareness of the relatively lively debates that have emerged over the last few years in which South African authors have demonstrated a commendable critical self-reflection concerning the nature, structure and purpose of the property clause and its effect on legal culture. More particularly, Zimmerman fails to recognize the development of a very explicit interpretation strategy according to which s 25 has to be interpreted as a finely balanced tension between the protection of individual rights and the promotion of land reform, despite the fact that this strategy has been cited with approval and applied by the Constitutional Court. (See Van der Walt *The Constitutional Property Clause* op cit 16, 20, 149 and 161–3; A J van der Walt 'Tradition on trial: A critical analysis of the civil-law tradition in South African property law' (1995) 11 *SAJHR* 169–206; A J van der Walt 'Property rights and hierarchies of power: An evaluation of land reform policy in South Africa' 1999 *Koers* 259–94; A J van der Walt 'The constitutional property clause: Striking a balance between guarantee and limitation' in J MacLean (ed) *Property and the Constitution* (1999) 109; A J van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 345–8; A J van der Walt 'Dancing with codes: Protecting, developing, limiting and deconstructing property rights in the constitutional state' (2001) 118 *SALJ* 258–311; A J van der Walt 'Resisting orthodoxy — again: Thoughts on the development of post-apartheid South African law' (2002) 17 *SA Public Law* 258; A J van der Walt 'Exclusivity of ownership, security of tenure, and eviction orders: A model to evaluate South African land-reform legislation' 2002 *TSAR* 254; A J van der Walt 'Exclusivity of ownership, security of tenure, and eviction orders: A critical evaluation of the recent case law' (2002) 18 *SAJHR* 371; A J van der Walt 'Striving for the better interpretation: A critical reflection on the Constitutional Court's *Harksen* and *FNB* decisions on the property clause' (2004) 121 *SALJ* 854; A J van der Walt 'Ownership and eviction: Constitutional rights in private law' (2005) 9 *Edinburgh LR* 32; Raylene Keightley 'The impact of the Extension of Security of Tenure Act on an owner's right to vindicate immovable property' (1999) 15 *SAJHR* 277; Theunis Roux 'Pro-poor court, anti-poor

outcomes: Explaining the performance of the South African Land Claims Court' (2004) 20 *SAJHR* 511; Theunis Roux 'Continuity and change in a transforming legal order: The impact of section 26(3) of the Constitution on South African law' (2004) 121 *SALJ* 466; as well as various articles to the same effect by authors such as Pierre de Vos, Sandra Liebenberg and others. For judicial recognition of this development see *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) paras 8–23, especially para 14; compare further (not explicitly with reference to s 25) *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC); *Zondi v Member of the Executive Council for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC) paras 38–42.)

Failure to recognize and discuss these (albeit imperfect and largely preliminary) efforts to construe a self-reflective and critical interpretation of the Constitution (including s 25 and its relationship to land reform) detracts from the credibility and impact of Zimmerman's assessment of the South African literature. Although it is undoubtedly true that the hegemonic effect of legal culture will and does restrict imaginative efforts to construe a transformative jurisprudence that gives due weight to the reformist impulse and ambition in the Constitution, it is necessary to balance a largely negative assessment of the counter-transformative "habitual" legal culture which imposes extra-textual constraints on the interpretive processes of its participants' (Zimmerman op cit 416) with some regard for the reflective, critical impulses that do exist, even though they do not necessarily focus on the compensation issue.

THE COMPARATIVE APPROACH AND A GLOBALIZED, 'TRANSNATIONAL' APPROACH TO COMPENSATION AND MARKET VALUE

In her negative assessment of South African literature on compensation, Zimmerman criticizes South African academics for the fact that their work 'emphasizes the universality of a "modern" expropriations jurisprudence that links compensation, in one way or another, to market value' (Zimmerman op cit 398). It has been pointed out earlier that the problem cannot be that compensation is, in one way or another, linked to market value — in view of the explicit requirements it is not only necessary but inevitable to do so and in fact Zimmerman does so herself. The true object of her criticism is probably the view that market value features too centrally and has too much influence on the existing analyses of compensation; an error that she blames on the comparative perspective adopted by so many South Africans in the early period of constitutional analysis. In her view, comparative analysis is probably not only unsuitable but even inappropriate, specifically with regard to s 25 (at 398n120). This criticism elicits several observations.

First, once again one has to refer to the context. It has been said often enough that the relative novelty of the 1996 South African Constitution, with its Bill of Rights (including a property clause), forced South African

scholars to become comparativists, even if only to find out what constitutionalism and constitutional jurisprudence (in various fields, including property) was all about. Section 39(1)(c) of the Constitution (s 35(1) of the 1993 text) not only allows reference to foreign law; it is an intellectual and analytical necessity in view of the fact that South African scholars simply did not have the background with which to engage in proper constitutional analysis, and therefore needed some prompting and examples from foreign law to alert them to the issues, the problems, the possible approaches and solutions and the traps and errors to be avoided. To expect that South African constitutional lawyers should avoid comparative research altogether or in general, purely on the basis of the assumption that foreign constitutional law might lead them astray, is unrealistic. In the new, successor edition to my 1997 book on s 25 (A J van der Walt *Constitutional Property Law* (2005)) I argue that studying foreign constitutional law does not force South African lawyers or courts to follow any specific foreign example, and the decision not to follow a particular example should be an informed one, resulting from thorough comparative research rather than precluding it ab initio. Despite her critical assessment of the influence that comparative work has had on South African property jurisprudence, Zimmerman's own analysis demonstrates the usefulness of comparative work in that she singles out for praise one South African article that was specifically and particularly comparative in nature (Eisenberg op cit) and herself refers to the case law of the European Court of Human Rights (a source that is referred to almost without exception by South African comparativists). Strictly speaking the ECHR case law is not foreign law but international law, but in this context (South Africa not being a member) it is used much like foreign law, and there are interesting and informative links and lines of influence between the ECHR case law and case law in member countries such as Germany and Ireland.

A second observation concerns the assumption (shared by a few South African academics and judges, some of whom are cited by Zimmerman) that the South African context is unique and that comparative work is therefore inappropriate and potentially misleading. Again, I would counter that comparison does not force us to follow any given example and that the decision not to follow foreign law should be based on comparative research rather than an a priori decision to preclude reference to foreign law. In addition, I question the validity of the assumption that uniqueness excludes comparative analysis and the assumption that comparative analysis would almost automatically result in the wrong attitude or approach. If uniqueness excluded comparative analysis there would have been no such thing as comparative research (admittedly this is indeed what sometimes seems to be the attitude in certain foreign courts), but the argument is false. The uniqueness of the South African situation should not be a general and vague assumption to be departed from, but rather the result of careful and reflective comparison; if not in comparison with other contexts, how can we claim that it is unique? Of course (in the end) the South African situation is different from the US or German or Canadian situation, but that makes

comparison possible, useful and instructive, not impossible. Intelligent and careful comparison means that one takes due cognizance of similarities and differences. Furthermore, I also question the assumption that all comparative analysis is dangerous and potentially misleading — certainly that is a rather insulting assumption about the intelligence and capabilities of the academics and courts indulging in comparative work. Of course there are bad examples that should be avoided on any given point; but once again that decision should result from, rather than preclude, comparison.

For the same reasons it is simply wrong to assume that comparative analysis is unhelpful or inappropriate in the context of compensation for land reform expropriations in the South African situation. It is also wrong to conclude that the existing comparative analyses on this point simply emphasize the ‘transnational’ duty to compensate against market value. From Eisenberg’s 1993 article through Kleyn’s 1996 article to my own writings of 1997 and 1999 (and others, such as Budlender and Gildenhuys) that is not the result that I find in the literature. In foreign case law the tendency is indeed to accept that there is a general duty to pay compensation for expropriation (see Thomas Allen *The Right to Property in Commonwealth Constitutions* (2000) 224). The classic authority for this proposition, as far as Commonwealth jurisdictions are concerned, is the decision in *Attorney-General v De Keyser’s Royal Hotel, Ltd* [1920] AC 508 (HL), where the House of Lords confirmed that there is a general, common-law right to receive compensation for expropriation, even in a war situation and even if the property is only used for a limited period of time and not acquired permanently. (See Gildenhuys *op cit* 143.) Compensation is also required for expropriation in most constitutional property clauses in foreign law, and the duty to compensate is even confirmed by the case law of the European Court of Human Rights, despite the fact that Article 1 of the First Protocol to the European Convention on Human Rights, 1950 does not specify compensation as a requirement for expropriation (in fact, expropriation as a specific category of limitation of property is read into the so-called second rule of the property clause in the European Convention and not mentioned explicitly). Since the 1980s the ECHR developed jurisprudence in terms of which compensation is required for expropriation on the basis of the proportionality principle (see *James v United Kingdom* [1986] 8 EHRR 123), although the Court left the possibility open that compensation might in exceptional circumstances not be required. In other jurisdictions (eg Austria, Ireland), where the property clause does not explicitly require compensation, such a duty has been read into the relevant provisions through jurisprudence, often under the influence of the ECHR jurisprudence (see Van der Walt *Constitutional Property Clauses* *op cit* 81, 240; and Van der Walt *Constitutional Property Law* *op cit* 269–83).

The tenor of these decisions is that the duty to compensate for expropriation has to be taken seriously, especially in South Africa, where s 25(2)(b) requires compensation explicitly. In business-as-usual cases (eg expropriation for road building), the upshot probably is that a complete

absence of compensation could be problematic: either the legislation that provides for such expropriation without any compensation, or the interpretation of the authorizing legislation that results in it, might well be in conflict with s 25(2) and (3). However, and this is the crucial point, that is just the beginning of the story and not the end; it is the statement of a more or less general truism that needs to be qualified and contextualized before one can draw any conclusions about its reform potential. Moreover, the relevant qualifications and contextualizations are not unique to the South African situation; they occur in just about every comparative example studied and explained by the various authors already referred to. As has been pointed out by South African authors, the general validity of the compensation duty in s 25(3) does not mean that compensation must always occur at market value: the considerations in s 25(3) have the practical result that the amount of compensation can be reduced (even to nil) when such a result is justified by the complexity of factors and considerations that makes up each individual case. Generally, I would venture to say that comparative analysis had exactly the opposite effect of what Zimmerman ascribes to it: foreign jurisdictions indicate that expropriation for land reform purposes is justifiable and that compensation may be established below market value in suitable circumstances, and South African authors who studied these foreign jurisdictions (Eisenberg, Kleyn, Budlender, Gildenhuis and myself) recognized this result from their comparative work. Far from relying on comparative analysis to justify their emphasis on the 'transnational' duty to compensate against market value, these scholars concluded from their study of foreign law that expropriation for land reform purposes was possible and that market value was not the dominant factor in establishing compensation.

A final point on comparative analysis concerns the interesting fact that the title of Zimmerman's article is misleading ('Is an expropriation-centered land reform constitutionally permissible?'). Whether expropriation-centred land reform is constitutionally permissible is of course an interesting and important issue, but by and large the article concerns itself with the question whether it would be permissible to compensate expropriation for land-reform purposes at a rate lower than market value or without compensation, which is an equally interesting but nevertheless quite separate issue. The article's focus is firmly on the compensation provision in s 25(3), but the permissibility of expropriation for land-reform purposes is at least just as much concerned with the public purposes requirement in s 25(2); an issue that is not dealt with in the article, perhaps because of a particular approach that characterizes US law. In this regard it is worth mentioning that comparative research reveals that US law is particularly unhelpful in this regard; in the recent case of *Kelo v City of New London* 125 S Ct 2655 (2005) the US Supreme Court confirmed, in line with the extreme deference on this issue developed in earlier cases such as *Berman v Parker* 348 US 26 (1954) and *Hawaii Housing Authority v Midkiff* 467 US 229 (1984), that it would generally not question legislative decisions regarding the public purpose of expropriations. By comparison, in decisions like *Dürkheimer Gondelbahn*

BVerfGE 56, 249 and *Boxberg* BVerfGE 74, 274, the German Federal Constitutional Court has developed a much more useful and more nuanced approach that controls exercises of the state's power to expropriate more carefully, without thereby necessarily frustrating legitimate expropriations (see Van der Walt *Constitutional Property Law* op cit 254–61). The apparent difference between the title of Zimmerman's article (suggesting that the public purpose issue would be discussed) and the content (which ignores the public purpose issue and focuses on compensation) is probably a result of this specific trait of US expropriation jurisprudence; a fact that is quite interesting for a South African audience and that can only be revealed through meticulous comparative analysis, without thereby necessarily forcing South African courts to follow the US or the German approach.

ZIMMERMAN'S ALTERNATIVE PROPOSAL

Arguably the most interesting aspect of Zimmerman's article is her proposed approach to the compensation issue that would openly favour land reform by allowing a general or across-the-board discount on the market-value-related compensation standard. Zimmerman's argument is that 'land reform is not only a legitimate basis for expropriation, it must also factor into the calculation of compensation' and consequently the 'compensation "balance" is in this manner weighted toward the public interest in land reform from the start' (Zimmerman op cit 407). Accordingly, 'land reform is Constitutionally "special" when it comes to the calculation of compensation' and 'land reform legislation may factor in a series of standardized compensation "discounts"' based on the categorization of expropriated land (such as underutilized land, the current use of the property, the history of acquisition and use of the land and so on) (at 407–8). These categorical discounts should then 'function cumulatively to provide for an across-the-board discount' called the "basic land reform discount" that applies to all property expropriated in the interests of rectifying the legacy of historical injustice (at 408).

This proposal by Zimmerman is no doubt interesting and worthy of careful consideration. Assessing it is a task that deserves more time and attention than I can afford here, and will therefore have to wait for another day, but a few preliminary observations are possible. First, it should be said that no one will find fault with the general proposition that land reform is constitutionally special — given the history of land and the social, economic and political function and significance of land this is almost a truism that is confirmed quite clearly by the Constitution itself. In fact, the structure of s 25, with its careful juxtaposition of provisions that protect private property and provisions that promote land reform, is exactly what renders the South African property clause unique (and which prompts some authors and courts to be sceptical about comparative analysis), and uniquely interesting and challenging. However, the fact that land reform is constitutionally special does not necessarily justify the conclusion that the constitutional balance is

thereby weighted towards the public interest or towards land reform from the start — this conclusion begs the question whether the special character of land reform is not already embodied (or ‘factored’) in the careful balance that s 25 so clearly and repeatedly strikes between private interests and the public interest. In other words, an alternative interpretation would be that land reform is indeed special and that it is therefore balanced against private interests very carefully, with the outcome of each conflict between these interests to be decided contextually in each individual case by way of a careful weighing process.

Zimmerman wants to avoid such a weighing process in the courts; her proposal is intended to ‘limit judicial discretion with respect to the overall expense of land reform without losing sight of individual circumstances’ (at 408). The idea is clearly that the basic land reform discount should, through legislation and adjudication, favour the public interest in land reform ‘from the start’ (at 407), by way of a ‘redline’ process that bypasses judicial discretion.

This argument relates back to the question whether the mere fact that an expropriation is undertaken for purposes of land reform will justify the complete absence or general reduction of compensation in terms of s 25(3)(e). In the context of s 25 as a whole the answer that most South African authors arrived at (judging from the literature already referred to) was that one factor, such as the purpose of the expropriation, should not be sufficient on its own to justify the amount or the absence of compensation, just as one factor (like the market value of the property; s 25(3)(c)) should not be sufficient on its own to determine the necessity or amount of compensation. Instead, all the relevant circumstances (including the ones mentioned in s 25(3)(a)–(e) but not restricted to them) should be considered together in deciding whether it would be just and equitable to pay no compensation (or extremely low compensation, compared to market value) in a specific case. This interpretation of s 25 (if my analysis of the literature is accurate) is not necessarily based on foreign law; if anything it is derived from the unique structure and characteristics of s 25 itself. It nevertheless is probably the foundation of Zimmerman’s critical assessment of South African literature — she wants the weighing process to be pre-determined in favour of land reform.

In the absence of a court judgment that settles the matter clearly, I would venture to say that the following approach is currently accepted by the majority of South African scholars working in the field of land reform and constitutional property law, and also that it is the approach most likely to be followed by the Constitutional Court, judging from their other decisions on land-reform related issues such as eviction and housing:

- (a) Section 25(2) requires compensation for expropriation and s 25(3) stipulates that compensation should be just and equitable and that it should reflect an equitable balance between the public interest and the interests of those affected by the expropriation. Striking this balance involves a careful weighing of interests that should reflect a just and equitable outcome in view of all the circumstances of each individual case.

- (b) Like every other provision of the Constitution, s 25 in general and s 25(3) in particular have to be read within the larger context of the Bill of Rights and the Constitution and applied so as to promote the values and purposes of the Constitution; they also have to be interpreted and applied with due regard for the historical context of injustice in contradistinction to which the new democratic order was established (see *Port Elizabeth Municipality* (supra) and *Zondi* (supra) for particularly good examples). (Zimmerman op cit 389–400 undertakes a very interesting analysis of the background to the constitutional text, including the foundational values of the Constitution, the purposive mode of interpretation, other provisions such as those providing for socio-economic rights, and of the Constitutional Court case law surrounding housing and social rights.)
- (c) In calculating compensation, market value is one amongst a number of factors, and as such it is neither determinative nor the most important factor in principle. In practice, market value still plays a large role because of the determinacy and quantification considerations. This is especially clear from the practice to first establish market value and then determine whether it should be reduced in view of the other factors in s 25(3). (See in this regard *Khumalo* (supra) at 26–31; followed in *Du Toit* (CC) (supra) para 28.) In view of the minority decision in *Du Toit* this practice may need to be reconsidered. What is clear is that the current practice should not imply that or result in a situation where market value is in fact the predominant or determinative factor in calculating compensation; s 25(3) clearly makes provision for compensation at a lower rate than market value where consideration of the factors enumerated there (and other relevant factors) indicates that such a lower rate is just and equitable and that it reflects an equitable balance between the public interest and the interests of those affected by the expropriation.

This is not to say that Zimmerman's proposal is completely misguided or that it could be dismissed out of hand. The question is first whether legislation could, in view of s 25(3), pin down a (or various) land reform discount(s) for compensation in land reform expropriations; secondly whether the courts could be prevented from reviewing such legislation with reference to s 25(3); and thirdly whether a court could adjudicate or determine compensation in land reform expropriations on the basis that the balance in s 25 is 'weighted in favour of land reform from the start'. These are complex questions that deserve further attention and more detailed analysis; my initial and preliminary reaction would be as follows:

- (a) It would probably be quite legitimate for the legislature to set down a general land reform discount for compensation in land reform expropriations if such a discount is based on the considerations in s 25(3) (especially for underutilized land), provided the legislation leaves room for adjustments based on individual circumstances. In principle I would agree with Zimmerman that such legislation is not

only feasible but also desirable as a mechanism to speed up and facilitate land reform.

- (b) The courts' discretion in reviewing such legislation could probably not be excluded, nor should it be.
- (c) I do not agree that s 25 is 'weighted in favour of land reform from the start'; in my view the section contains a very delicate and carefully calibrated balance that leaves open the possibility that the scales will be tipped in favour of either set of interests in any given case. The courts therefore have to consider all circumstances carefully in every individual case and then decide how compensation should be determined, rather than working on the assumption that the section favours land reform and that a blanket discount is therefore in order.
- (d) Having said that, I would again emphasize that market value should not be the principal or determinative factor; that the current practice of starting with market value and then discounting according to other factors may have to be reconsidered; and that general discounts of some kind may very well emerge from expropriation cases through the application of the factors set out in s 25(3) (ie discounts based on state involvement in acquiring the land, on underutilization and so on).