

LAW AND DEVELOPMENT AND THE EXPROPRIATION LAWS OF ZAMBIA

Samuel Amoo

Introduction

The concept of law and development here is discussed within the framework of the general theory of law and social change, since development could be considered as a species of social change. The theory of the relationship between law and society, and further still, law and social change, has various dimensions which unfold from the basic premise of the inter-relatedness between law and other phenomena in the society and provides the essential background and perspective for the study of law in this dimension. The concept of law and social change has occupied the attention of not only jurists¹ in the general jurisprudential quest for the definition and nature of law but also governments in developing countries especially in Africa. This interest in this dimension of jurisprudence may have been aroused by different interests and motives or by similar motives. Friedman puts the subject-matter in these words:

A reappraisal of the role of law, and of the function of the lawyer is needed in the great majority of nations that have recently acquired political independence, because of a generally low and static economic and social level. The characteristic feature of an undeveloped country is the stark gap between its economic and social state and the minimum aspirations of a mid-twentieth century state modelled upon the value and objectives of the developed countries of the West. All these countries have an overwhelming need for rapid social and economic change. Much of this must express itself in legal change—in constitutions, statutes and administrative regulations: Law in such a state of social evolution is less and less the recorder of established social, commercial and other customs; it becomes a pioneer, the articulated expression of the new forces that seek to mould the life of the community according to new patterns.²

Much of the area of emphasis described by Friedman may come within the scope of the rationale that has generated this interest in governments of developing countries. But governments in the newly independent states of Africa have taken a strong partiality to this dimension in jurisprudence, within the scope of the general outcry against the evils of colonialism and in particular to colonial laws, on the grounds that the colonial laws, some of which are still operative in Africa, had no relevance to the African society and therefore served no purpose in the quest to achieve the social, economic and political aspirations of the African people. In short, some of the laws had no reflections on the ethos of the African society. In a speech marking the formal opening of the Accra Conference on Legal Education and of the Ghana Law School, the late Dr. Kwame Nkrumah emphasised the need for the identification of the legal system within the ethos of the society:

There is a ringing challenge to African lawyers today. African law in Africa was declared foreign law for the convenience of colonial administration, which found the administration of justice cumbersome by reason of the vast variations in local and tribal custom. African law had

to be proved in court by experts. But no law can be foreign to its own land and country, and African lawyers particularly in the independent African states, must quickly find a way to remove this judicial travesty.

The law must fight its way forward in the general reconstruction of African action and thought and help to remould the generally distorted African picture in all other fields of life. This is not an easy task, for African lawyers will have to do effective research into the basic concepts of African law, clothe such concepts with living reality and give the African a legal standard upon which African legal history in its various compartments could be hopefully built up. Law does not operate in a vacuum. Its importance must be related to the overall importance of the people, that is to say, the state.³

Within the framework of this general rationale laws have been promulgated to remould the society. However, both the jurists, in their exposition of this hypothesis and the politicians, in the process of the enactment of the social-oriented legislation, leave some issues open. The determination of these issues is vital to the development of the hypothesis, and throws open the limitations of the concept. These issues centre upon:

- (a) the identification of the elements in the society whose interests shape the law and determine the content of the law;
- (b) the determination of the sector of the society which could be regarded as the valid source of the socio-economic goals and values;
- (c) the extent to which state power can be constrained and legitimacy be accorded to these executive actions towards socio-economic development.

As already stated, most of these issues cluster around the area of legitimacy and the enforcement of the law. The theory of the functional role of the law unfolds from a premise which identified legitimacy of law with its source and purpose, and in this content the will and the value of the general populace have been regarded as the essential criteria for measuring the legitimacy of any legislation. The jural postulates have been regarded as the determining factor of legitimacy.

At independence most developing countries, especially those which have gone through the experience of colonial rule, have been faced with the problem of choice of ideologies and policies. Most of them have been confronted with this problem because it has been argued that the colonial laws and policies had been formulated to serve the interests of colonial powers. In the process of the search for alternative ideologies and economic policies which would serve the interests of the nation, the post-independence governments in the developing countries have embarked on policies which are a complete departure from those of the colonial governments. Most of them, as we have already noted, have opted for the establishment of socialist-oriented type of economies. They have taken an interventionist role in the economy and many 'reforms' have been undertaken including nationalisation of foreign firms and radical land reforms. In essence, the drive in search of new policies has been generated by the need to exercise the full powers of sovereignty which include the sovereignty over natural resources and wealth, and the desire for the exercise of the powers of self-determination in both economic and political affairs.

One of the fundamental principles of the theory of law and development as an area of law and social change is that it is the function of the law to provide the infrastructure for development. One essential element of infrastructure is land and in most developing countries land has been the subject of much legislation.⁴ Land has been the arena of a constant tug-of-war between governments which advocate and practice active-state participation in the economy and elements which go against development in the context of their economic programmes. In developing countries the sources of these problems may be varied ranging from the existence of subsistence economy with all the antecedent problems attached to customary land tenure and the concept of ownership to the inhibitions imposed by the colonial governments in the attempts to promote their own version of economic development. Most of the laws used in this context to change the law of land tenure centred around what some authors have called the right of "eminent domain".⁵

Every contemporary African government places "rapid economic development" high on its public list of national priorities. Government planning, concentrates on channeling human and material resources into infrastructure projects and productive activities conducive to economic growth. This has meant the radical reform of a land tenure system which generally operates against the productive utilisation of the land for extensive commercial purposes. These problems emanate from the recognition of private rights over land held under customary law, where traditional concepts of land holding operate.

A legal expediency employed to counteract these inherent inhibitions in the customary system of land tenure against development has been the enactment of the "eminent domain" legislation and the division of land into reserves and trusts. This expediency was used extensively by the colonial administration and later, by the post-independence African governments.

The eminent domain legislation could be described as legislation used to extinguish private ownership of land when it conflicts with group-plans for the use of the piece of land. The colonial administration passed legislation which empowered the administration to compulsorily acquire lands required for "the public service". Such legislation was passed in the Gold Coast in 1876,⁶ in India⁷ in 1894 and in East Africa in 1899.⁸

In Zambia the colonial government divided land into state-land, trusts and reserves. The law applicable to state-land was the English land law. All land in the reserves and trusts areas was held under customary land law.⁹ The division was effected by the Northern Rhodesia Order in Council of 1924. This ordinance was followed by the enactment of the Public Lands Acquisition Ordinance.¹⁰ This applied only to state lands. Under section 3 of the Ordinance the governor was empowered to acquire any lands required for any public purpose for an estate in fee simple or for a term of years as he may think proper, paying such consideration or compensation as may be agreed upon or determined under the provisions of the Ordinance. It must be emphasised that most of these statutes provided for compensation in the face of compulsory acquisition and to protect against compulsory acquisition without compensation, most constitutions had entrenched provisions to this effect. But the point to note is that the area of departure from the pattern of these statutes and the statutes enacted by most post-independence African governments on the attainment of independence is that

most of the new governments defined their economic policies in terms of active state-participation which meant amendments to these laws, which included the "public purpose" doctrine. Most of these new governments because of the socialist-oriented economies they have adopted have found that the legal framework of the old laws is inadequate in the achievement of their goals. In the new statutes the scope of "public-purpose" was tremendously expanded. As Dunning puts it:

The relationship between the state and the development process has an important bearing on the public-purpose limitation in the law of eminent domain. In the past, the public-purpose doctrine has meant that the state could only take property by eminent domain where that property was needed for "public activities". Compulsory acquisition was limited to traditional state activities such as defence, highways, and education. But the modern African government seeking rapid economic development acts in all spheres. The state either engages directly in production or takes important action to enable private persons to produce and develop. . . . When the state has as a dominant aim rapidly increased production, any production purpose becomes a public purpose.¹¹

In Zambia at the time of independence, the inadequacies were located especially in the provisions of clause 18 of the Constitution. The provisions of clause 18 provided for compensation under certain circumstances and after the satisfaction of certain conditions. The circumstances under which compulsory acquisition of property could be allowed came generally within the scope of the orthodox definition of the right of eminent domain, which were substantially identical with the circumstances given under section 3 of the Northern Rhodesia Public Lands Acquisition Ordinance, which after independence became known as the Public Lands Acquisition Act. In addition to these conditions, it was provided that the government had to pay adequate compensation immediately after expropriation and provision had to be made for the guarantee of the remittance of the money outside the country "free from any deduction, charge or tax made or levied in respect of its remission". [This clause was entrenched and could only be repealed by a referendum. In 1969 a referendum was held to amend Article 18 of the Independence Constitution]. It was argued¹² that since the then existing laws of expropriation embodied in clause 18 of the Constitution and the Public Lands Acquisition Act, hitherto referred to, were designed to serve the economic interests of the colonial government and was therefore obsolete as a result of the shift in emphasis of economic planning towards rapid development and state-participation, it had to be repealed. The government made it an objective of the new Lands Acquisition Act that the creation of a society of powerful landlords on the one hand and tenants and workers on the other hand, which was promoted by the Act, had to be eliminated. The new Act denied the right of compensation in respect of undeveloped or unutilised land except for unexhausted improvements. Even for enexhausted improvements no compensation was payable if the land was unutilised land belonging to an absentee landowner. In addition, it is also interesting to note that the power to acquire land was not restricted only to cases where it was needed for "public-purpose". In fact, "public-purpose" was eliminated from the Act. Section 3 of the Act reads thus:

Subject to the provisions of this Act, the president may, whenever he is of the opinion that it is desirable or expedient in the interests of the republic so to do, compulsorily acquire any property of any description.

For "public-purpose" it substitutes "interests of the republic" which is not defined in the Act and which is determined only at the discretion of the president.

It was echoed in that speech that Zambia was embarking on an economic policy to effect the establishment of an egalitarian society. The Act ushered in a new chapter in the land law of Zambia. In order to change the capitalist-oriented economy to a socialist-oriented economy, which included the land ownership laws, a new Act was enacted in 1975. The new Act¹³ vested all land in the Republic of Zambia in the president on behalf of the republic. The Act abolished freehold and all freehold property was converted into statutory leasehold. All transactions concerning land could be entered into only with the prior consent of the president. Certain powers of the president under the Act were delegated to the minister of lands and natural resources. The enabling Act itself does not provide what procedure is to be followed when application is being considered by the minister on behalf of the president. Section 21 of the Act gives this jurisdiction to the minister. It empowers the minister to make regulations "for the proper carrying out into effect of the provisions of this Act". Consequently, The Land (Conversion of Titles Consent) Regulations, 1975 Statutory Instrument No. 142 of 1975) was passed. These regulations, however, only provide what forms are to be used when the application is being sought. The procedure to be followed when the application is being sought is absent from the regulation.

The next regulations to be passed by the minister in exercise of the powers given under section 21 of the Land (Conversion of Titles) Act came under Statutory Instrument No. 187 of 1975, The Land (Conversion of Titles) Regulations 1975. The regulations have four schedules attached to them and under the schedules the lessor i.e. the president, the various councils, their agents or any persons authorised by the president or the councils under certain circumstances can enter on any gazetted land to carry out certain works.¹⁴ The relevance of these regulations in the expropriation laws of Zambia is that even though they do not vest direct powers of expropriation in the president, the minister, or the councils, they do so indirectly. The indirect powers of expropriation contained in these regulations, operate under the same principles and mechanism as the powers vested in the councils under the relevant provisions of the Municipal Corporations Act.¹⁵ Under these provisions,¹⁶ the various councils are empowered to enter on any land under certain circumstances to carry out certain works. These provisions are drafted in similar language as the regulations under statutory instrument 187, 1975. This Act does not *directly* empower the councils to expropriate but the power of expropriation could be exercised indirectly. It is only in this sense i.e. the exercise of indirect power of expropriation that property can be expropriated where the powers under statutory instrument 187 of 1975 are being exercised. For, in practice,¹⁷ before some of these works can be carried out some properties must be compulsorily acquired. Where compulsory acquisition is required under these circumstances the councils use the powers under both the Lands Acquisition Act and statutory instrument 187 as the basis of their authority for expropriation.

The above discussion of the law relating to the mechanism of indirect expropriation under the regulations of statutory instrument 187 applies equally to the powers under the provisions of the Municipal Corporations Act. Subsection 2 of section 4 of the Act does not give the councils direct powers of expropriation. Like the powers under the

regulations of statutory instrument 187, compulsory acquisition is possible where the powers under section 5 and 6 of the Lands Acquisition Act are invoked. For section 4 sub-section 2 of the Municipal Corporations Act only empowers the council to enter upon the land to carry out the works but not to compulsorily acquire the property. The procedural requirements before complete expropriation is exercised are also given under the Act, the Lands Acquisition Act. It should, however, be pointed out that section 3 of the Lands Acquisition Act vests the power of expropriation in the president alone. Under section 5 of the Act the powers given to the minister in terms of expropriation are only procedural; he has no direct powers of expropriation. Consequently, if the councils want to exercise these powers of expropriation under the provisions of the Lands Acquisition Act there must be express delegation from the president to the minister of lands and natural resources and then to the councils. However, direct acquisition is possible under the powers granted under the provisions of the Local Government Act.¹⁸ The power of direct acquisition is granted to the minister under section 69(1) of the Act. The section provides that:

A council may, with the approval of the minister acquire any land.

In addition to this general power, if the council fails to exercise this power vested in it by virtue of subsection (1), as a result of the inability of the parties to come to an agreement, the minister may apply to the president to acquire the property on behalf of the council if the president is of the opinion that the land in question is one to which the Land Acquisition Act applies. Again there is a further condition that this can be exercised where the compulsory acquisition could be effected under the right of eminent domain, i.e. that the president must be satisfied that the acquisition by the council is necessary or expedient in the interest of public safety, public order, public morality, public health or town and country planning, and generally for the development of the land for the good of the community. Compensation is payable by the council.

It is quite obvious from this survey of the expropriation laws of Zambia that the law provides the necessary legal framework for development and the implementation of governmental policies. The constitutional amendment was necessary for the removal of the legal constraints imposed by the entrenched provisions and for the subsequent enactments of the various statutes dealing with compulsory acquisition under the right of eminent domain. Our next area of concern is to find out the legal mechanism for the safeguard of the right of the individual in the face of legislation enacted to provide the legal basis for development. In other words, how is the rule of law maintained to balance the inherent arbitrariness embodied in this theory of instrumentalism of the law? Is the individual obliged to obey these laws by the mere invocation of development? In short, what is the validity of these laws?

Mechanical jurisprudence

To answer these questions we shall look at some of the theories on the question of the validity of law. It should also be added that one of the purposes of the application of legal theories in this exercise is to ascertain how far they provide the lawyer with the tools for analysing legal problems. The concept of law and social change and or law and development presupposes the study of law from a certain dimension and the point of

reference of this concept has been the society and the interrelatedness of law and other phenomena in the society. Law has been regarded as serving an instrumental role in society.¹⁹ The social utilitarians and the jurists of the sociological school who attempt the definition of law by looking at the instrumental function of law relate the concept of a valid and just law to the function and purpose that the law is designed to serve in the society. Since the reference point of this theory is the society, and the validity or justness of any law is measured in terms of this instrumental role the question of the determination of the values or the postulates which should be the content of the law is a crucial element which must be clearly defined. The logical inference that one would make by pushing the theory to the extreme is that since the validity or justness of any law is measured by the purpose it is designed to serve in the society, this theory would put the jurisdiction for the determination of the absolute values and the postulates in the domain of the society at large. The extent to which this is made explicit by the theorists would be the subject-matter of a part of this exercise.

For the social utilitarians²⁰ the reference point and the nucleus of this theory is the society and the criteria for determining the issue of the validity of any law are embedded in the theory of the instrumental function of law. The social utilitarians hypothesize that the purpose of any law is to secure social interests and where individual and social interests conflict, social interests must prevail. Social advantage and interests should be the underlying principles and objectives of any policy, and individual or class interest can be served by law only to the extent that they coincide with social interests or to the extent that social interests are secured by them. On the basis of this proposition Julius Stone²¹ concludes that valid and just law is one that can be measured in relation to the extent to which it serves the social interests. Alternatively, the criterion of any just law is its value content and the extent to which it promotes the absolute postulates of the society. Joseph Kohler²² in particular regarded law as the product of the civilisation of a people. The civilisation of a people consisted of a complex of physical, psychological and socio-economic conditions and interactions which were constantly in conflict with each other. These conditions are not static and are relative to every society. It is the function of law to reconcile these factors for the progress of the entire society as opposed to the individual interests, which Julius Stone terms "the jural postulates" of a civilised society that constitute the criterion for measuring the validity and justness of any law.²³ Roscoe Pound regarded Kohler's concept of "jural postulates" required to maintain and promote civilisation as "an abstract scheme of universal law"²⁴ which fell short of Pound's expectation of a purposeful law. Pound wanted "something more definite than a conception of maintaining and furthering civilisation". Having found this lacking in Kohler's theory, Pound propounded his own concept of social engineering. The core of Pound's theory of social engineering can be found from these passages from two of his works:

There is no eternal law. But there is an eternal goal the development of the powers of humanity to their highest point. We must strive to make the law of the time and place a means towards that goal in the time and place, and we do this by formulating the presuppositions of civilisation as we do as we know it. Given such jural postulates, the legislator may alter old rules and make new ones to conform to them, the judges may interpret, that is, develop by analogy and apply codes and traditional legal materials in the light of them, and jurists may organise and criticise the work of legislatures and courts thereby...²⁵

Elsewhere he writes:

A legal system attains the ends of the legal order (1) by recognizing certain interests, individual, public, and social; (2) by defining the limits with which those interests shall be recognized and given effect through legal precepts developed and applied by the judicial (and today the administrative) process according to an authoritative technique; and (3) by endeavouring to secure the interests so recognised within the defined limits.²⁶

For Pound the function of law is the adjustment of relations and interests and the ordering of social conduct by judicial process with the least waste. These interests²⁷ could be public or individual. Pound also referred to these interests as the jural postulates. Pound maintained that it was not the business of the legal order or the law in modelling these interests to create new ones. These interests were *prima facie* already in existence and Pound in some of his works made a catalogue of postulates which he considered essential to human society in the state of civilisation. However, he admits that his list of jural postulates is by no means exhaustive²⁸ and states that they are not immutable and are relative to time and space.

Friedman adds that these postulates are value-neutral and that "as soon as the interests are ranked in a specific order or given any appearance of extensiveness or permanence, they lose their character as instruments of social engineering and become a political manifesto".²⁹ If these are the characteristic features of the jural postulates, can we validly conclude that if the law creates new postulates and some postulates are given prominence over others and are subsequently made the content of the law this species of law would lose their validity?

Unlike Kohler, Pound stipulates that there is no eternal law but an eternal goal which the law must strive to achieve. The eternal goal is a perfection which is a product of the balance of interests which are dominant in the society. Any legitimate and just law is therefore one which reflects this goal and strives to achieve this goal.

The question then is to what extent do these theories help to answer these questions? What interests or absolute postulates must the law promote at a given time and who has the jurisdiction to isolate the values and goals? These questions as we stated earlier are very crucial in determining whether a particular law is just and valid within the framework of the theory of the instrumental function of law.

Kohler's approach to the problem forms part of the basic tenets of his theory which goes to the analysis of what he means by civilisation or the value content of civilisation. It was stated earlier that Kohler regarded the function of law as the maintenance and advancement of civilisation. The interests and values or the absolute postulate to be maintained "comprise the alternate ideal of civilisation or the social development of human powers towards their highest possible unfolding".³⁰ This is Kohler's definition of civilisation and what values should become the content of the law. Kohler therefore throws us back to the traditional stance of natural law which regards the universal existence of certain laws which are the ultimate ideal of human development and which are deductible by the application of man's rational faculties to his environment. For Kohler, therefore, if this is achieved it is wholly immaterial for the result who happens to be the assessor of the interests. Hence Kohler does not give any definite answer as to what interests should dominate and who must make the choice.

Relating Kohler's answer to the question we posed earlier about the maintenance of the individual's rights in situations where property can be expropriated for the development of the society, we see that Kohler does not help us much in resolving these issues. One would assume that Kohler would give the jurisdiction for ascertaining these values to the entire society. As we have seen, this is not the case. These broad and undefined areas of universal values are vulnerable to subjective determination so that the jurisdiction could be exercised as a one way projection of authority and so long as the criterion assumes this one dimensional characteristic; it cannot be an acceptable one for the maintenance of the individual's right because it is an arbitrary one.

Pound, realising the vagueness and possible dangers of Kohler's approach, attempted the solution of this problem by making a catalogue of postulates which the law must contain. These postulates are not immutable and are always in conflict and his answer to the problem lies in his theory of the mechanism for isolating these interests. In order to answer this question we must look further at the society that Pound is using as his basis. Pound says that the social engineering of the society may be achieved by the ordering of the human relations through the action of a politically organised society. His frame of reference is therefore the institutions afforded by and available in a politically organised society. Pound also hypothesises that in the attempt to resolve these conflicts the solutions provided by the other social sciences must be utilised. Put in the twentieth century perspective, this theory requires us to rely on the political mechanisms provided by political science. But the confusion arises when we recognise that Pound made it the responsibility of the courts to balance and select these interests in the society by making use of the existing legal institutions, which in accordance with the principles of political science, is not the function of the judiciary. Besides, he does not give the lawyers the criteria by which the action of the legislator can be judged. It can be seen therefore that Pound does not answer the question and apart from the fact that he does not answer the question he introduces more complications by saying that these postulates are not immutable, which implies that the absolute ones must eventually be chosen by an individual or an institution.

The expropriation laws were enacted in the avowed interests of the entire public. By applying Pound's theory to these laws, lawyers should have been involved in the process of enactment of these laws and the legal institutions should have been made use of. But in practice, lawyers have little or no role at all in the actual enactment of these laws. The enactment of these laws involved cases where new values and new laws of ownership were introduced in the society; which are functions which traditionally belong to the legislature. The role of the judiciary in the selection of the absolute values is limited by the constitutional restraint imposed by the theory of a political system which recognises the existence of the three branches of government. The role that Pound is asking the judiciary to play would infringe the constitutional functions of the legislature. The judiciary would only come in where there is an issue arising from a positive law which has already been enacted by the legislature. In the traditional sense, they administer rather than promulgate the law. Lawyers' involvement in the choice of what values and interests should be the content of the law is very limited. Apart from these constitutional restraints it is debatable how much lawyers can contribute where a choice has to be made in cases where the minimisation of waste involves areas where

the knowledge of a lawyer is quite meagre. The way the values incorporated in the laws were selected³¹ and finally the mechanism employed for the enactment of the laws throw a lot of light onto the actual realities of law and politics. So long as the social utilitarians are silent about what constitutes civilisation and whose jurisdiction it is to determine what social values should be the contents of the law, such species of law can be easily justified by invoking the public interest doctrine and the criterion for validity and protection of individual's right could be easily reduced to a one-dimensional one.

We intimated earlier on that one of the demands of the concept of law and development is that the law should be used to establish the infrastructure for the realisation of political economic and social changes in the society. We have attempted the application of the theories of the sociological school to the expropriation laws of Zambia in an attempt to ascertain how far the legal theories help to establish the validity of the rules. This has been found necessary in view of the fact that the concept of law and social change or law and development demands the enactment of legislation which goes to the basis of human existence and questions the individual's obligation to obey the new rules. The enactment of the new expropriation laws involved the introduction of new concepts of ownership of property. New values are introduced into the society and these conflict with the old values. This poses a challenge to the rule of law and in situations such as these the legal institutions would find themselves in the position where they would be called upon to search for theories and reasons justifying the individual's obligation to obey the new rules; this, in essence, is another test of the validity of rules.³²

We saw earlier that the social utilitarians and the sociological school take the functional approach to the study of law. A synthesis of the theories of the two schools in relation to their concept of the validity of any law can be determined in terms of the social utility and the mechanisms for evaluating and isolating the value contents of the law. We also noted that a very important dimension of the functional theory of law is the problem of who has the jurisdiction to determine the social and value contents of the law. It was also observed that if the validity of the law was to be determined in terms of the social utility, then the jurisdiction for determining the value contents of the law must necessarily rest within the domain of the society at large. In this sense, then, the law will be derived from the will of the society and the degree of its acceptability will be determined in the same premise—the individual's obligation to obey the law will be derived from the fact that it emanated from the will of the society. It is in this sense that the criterion can be two-dimensional. The virtue of this social theory of law which unfortunately has been overshadowed by the elaboration of the other aspects of the theory is that law enactment should be regarded as a two-dimensional exercise. However, it was also observed that since the theories were inadequate in answering some of the issues and clarifying issues involved in these extreme but logical deductions of the theories, the criterion of validity could be one-dimensional.

The exigencies and practicalities of government impose certain limitations on the concept that the society must be actively involved in the policy-making and law enactment processes. These limitations make it necessary that we consider the theories of the schools of thought who look at law in terms of the law-making institutions themselves, and the structure of law itself without much regard to the satisfaction of some external criteria, which the social utilitarians and the sociological school might term the jural

postulates, or the will of the people. This school of jurists define law not in terms of its content but of its structure; and the obligation to obey the law is determined in terms of the structure of the legal system and the existence of force.

Analytical positivism

For Austin the validity of law is to be measured in terms of its own structure. In order to achieve this purpose Austin started his analysis of law with two notions. The first is that of a command. The command is given by a sovereign who wields power and is capable of inflicting pain in case the desire is disregarded. The command is given to people who are in the habit of obedience to this sovereign who is a determinate person. Law then is defined as a set of commands set by a determinate sovereign to the members of an independent political society who are in the habit of obedience.³³

Austin's analysis of law therefore is a one way projection of authority and the validity of any law can be established if it is traced from the sovereign. The nucleus of the theory therefore lies in the definition and the determination of who the sovereign is which becomes an empirical question. The sovereign according to Austin, is a determinate and a common superior in an independent political society. The sovereign could either be a certain body or aggregate of individual persons to whom the bulk of the given society are in the habit of obedience or submission. The two notions of sovereignty and the bulk of the independent political society being in the habit of obedience to the sovereign are correlative. Austin claims that no positive law emanating from the sovereign can be legally unjust. The sovereign's legal capacity is unlimited and the only legal limitations the sovereign can impose on himself or his followers are merely "principles or maxims which they adopt as guides or which they command as guides to their successors in sovereign power".³⁴ Austin follows this reasoning to the logical conclusion that a departure from these principles or maxims does not render the law so set by the sovereign illegal or invalid.

Law enactment is generally regarded as a social issue and law as a social tool to solve social and economic problems. Within this framework, therefore, this exercise involving the search for the practical use of legal theories would necessarily involve the analysis of law not only at the micro-level but at the societal level. A legal theory which explains the individual's obligation to obey the law, i.e. the expropriation laws, must operate from a dimension which regards the interests of all parties—both the lawmaker and the subject. Viewed in this perspective, the application of Austin's theory of law to the expropriation laws of Zambia will concern itself with the extent to which law is a social issue. The first and obvious question is to establish how far the Austinian theory is helpful in the analysis of law as a social issue or as a two-dimensional exercise. One could argue that since the avowed premise of the positivists is the analysis of law in terms of rule pedigree without regard to any external criteria—i.e. to analyse law as it is and not what it ought to be—it is a futile exercise to address ourselves to this question. The answer to the argument is that even within the structural analysis of law, it could be argued that law enactment could become a social issue if it is regarded as a two-dimensional exercise involving a reciprocal duty relationship by which the performance of the parties can be evaluated.

This issue does not come within the scope of Austinian analysis of law. To Austin law enactment is primarily the function of the sovereign. The mere enactment of legislation by a sovereign who is habitually obeyed by the bulk of the society offers adequate rationale for the obedience of law by the subject. To Austin law making, therefore, is a one way projection of authority and within this concept the mere existence of the identified sovereign with an unlimited legal power enjoys habitual obedience from the bulk of the society establishes the basis for a binding legal system. Austin's analysis does not offer us very much and this might be explained by the fact that the Austinian theory concentrates too much on the face value of the law, and offers no accommodation for the rights of the individual.

As a result of the limitations of Austinian theory, it might be necessary to consider the work of another positivist, Professor H.L.A. Hart whose work³⁵ is both a critique of Austin's concept of law and an exposition of his own concept of law. Hart starts his own concept of law with the concept of primary and secondary rules, the union of which constitutes the core of a legal system. The primary rules are those which lay down standards of behaviour and are rules of obligation, that is, rules that impose duties. The secondary rules, on the other hand, are ancillary to, and concern, the primary rules in various ways—for instance they specify the ways in which the primary rules may be ascertained, introduced or varied.³⁶ Hart concludes that it is the identification of the primary rules by means of the secondary rules that state what the rule is. For our purposes, perhaps we should proceed with an exploration of Hart's analysis by trying to answer these questions:

- (a) Is the mere enactment of legislation by the law-maker enough to plant in the subject the duty to obey the law? Or, alternatively, is law enactment not such a serious exercise regulating social interests that there should be a reciprocal duty situation involving both the law-maker and the subject so that there is a basis by which the action of both might be judged?

To relate these questions to the expropriation laws of Zambia one may ask these questions:

- (b) Is the discretion given to the president and exercised by the minister and the councils not so wide that the individual be given a criterion by which he can judge that his interests are secured? Or, in the exercise of this wide discretion, is the president, the minister or the council or its agents not under any obligation moral or otherwise to respect the interests of the individual? If so, by what criteria is the individual to assess the official's observance of and compliance with these obligations?
- (c) Does the conversion³⁷ of freeholds into statutory leaseholds not amount to a retroactive deprivation of rights? By what rule is the citizen to challenge the validity of such a legal rule?

Hart's answer to these questions is to a large extent a straightforward affirmative and in order to answer these questions and explain what we mean it might be necessary for us to consider the ingredients of Hart's concept of rules. Hart correctly recognises that the law-maker's role must be guided by the secondary rules of recognition. The secondary rules of recognition serve as authoritative guides for disposing of the doubts as to the existence of a primary rule and whether a primary rule has been broken. He shows

that the rules of recognition are a very important adjunct to the analysis of the primary rules in that the bare existence of the primary rules is subject to certain inherent defects the elimination of which involves the application of the "internal point of view" of "those who not merely record and predict behaviour conforming to rules, but use the rules as standards for the appraisal of their own and other's behaviour."³⁸ And the relation between the secondary rules of recognition and the internal point of view is that the application of the internal point of view for resolution of issues concerning the primary rules would involve the use of the secondary rules of recognition. Some of the issues the resolution of which needs the application of the internal point of view and the secondary rules of recognition are issues concerning the validity and the source of the law. These can only be resolved when the primary rules have been identified by the secondary rules of recognition.

Hence, the answer to our question about the obligation to obey the law lies in the analysis of the rules of recognition themselves, for Hart relates the validity of the law to its source. If the source of the law can be identified by means of the relevant rule of recognition then the rule assumes its binding nature and its validity. One may ask how the source is located. Hart uses the concept of the ultimate rule of recognition. By this concept of the ultimate rule the source of the law is determined in terms of its hierarchical structure—which basically is one-dimensional location of law. And according to Hart when the source of the law is located and the secondary rules are obeyed by the officials, one can identify the existence of the legal system. This is basically a question of fact and when this is attained the question of the efficacy of the law or whether the law should be obeyed is immaterial.³⁹ Once this stage is reached the question about the citizens' obligation to obey the law is 'futile and pointless'. The answer to our queries lies in this factual situation—the situation where the officials obey the secondary rules of recognition and are able to identify and locate the source of the primary rule by means of the secondary rules of recognition and the application of the ultimate rule of recognition.

Hart's concept of the secondary rules of recognition, which serve as a guide for the rule maker potentially recognises the need for some control over the rule maker and for the legislator to satisfy the dictates of the secondary rules. But unfortunately, this is one-dimensional and does not give the citizen any grounds by which he can satisfy himself that the law passed is a valid one and therefore must be obeyed. Hart's answer to our first question is that once the source of the law is identified, the obligation is brought into existence—this in short amounts to saying that the mere enactment of the law without any violation of the procedural rules establishes the birth of a binding law. To quote Fuller, this theory in short:

... sees the reality of law in the fact of an established lawmaking authority, what this authority determines to be law is law. There is in this determination no question of degree; one cannot apply to it the adjectives, 'successful' or 'unsuccessful'.⁴⁰

This solution offered by the concept of law propounded by Hart to our questions would give the fiat to any law enacted by the legislator. This, however, is a dangerous proposition and the theory tends to overlook the rights of the individual and maximizes the element of arbitrariness. For example, the discretion given to the president by the provisions of the

Land Acts and exercised by the minister and the councils is so wide that the naked application of Hart's concept by the courts in Zambia would amount to a complete disregard of the interests of the citizen. One cannot avoid reaching such a conclusion because Hart fails to develop the scope of the secondary rules of recognition. Hence lawmaking becomes the exclusive domain of the legislator and leaves the citizens with no yardstick by which to judge the validity of laws so enacted. For Hart the citizens obligation to obey the law arises where a legal system is found to exist. There is no relationship of reciprocity and the legislator is not accountable to the citizen for the performance of his duty. As a result of these limitations we need to look for a theory with a broader basis. To borrow the words of John Rawls we are looking for a legal system:

... of public rules addressed to rational persons for the purpose of regulating their conduct and providing the framework for social co-operation. When these rules are just they establish a basis for legitimate expectations. They constitute grounds upon which persons can rely on the other and rightly object when their expectations are not fulfilled. If the basis of these claims are unsure, so are the boundaries of men's liberties.⁴¹

This is the approach taken by Lon Fuller:

If we assume, as I do here, that an element of commitment by the law giver is implicit in the concept of law, then it will be well to attempt to spell out briefly in what form this commitment manifests itself. In a passage headed by his translator "Interaction in the Idea of Law", Simmel suggests that underlying a legal system is a contract between lawgiver and subject. By enacting laws government says to the citizen, "these are the rules we ask you to follow. If you will obey them, you have our promise that they are the rules we will apply to your conduct". Certainly such a construction contains at least this much truth: if the citizen knew in advance that in dealing with him, government would pay no attention to its own declared rules, he would have little incentive himself to abide by them. The publication of rules plainly carries with it the "social meaning" that the rule-maker will himself abide by his own rules.⁴²

Implicit in this statement is that law-making involves the moral element of reciprocity and as Fuller points out the process of reciprocal testing involves the interaction of social issues. These are part of the fact of social life which bear upon the law, and the study of them and their interactions gives the legal system a social dimension.⁴³

What we have learnt from positivism is that much as any analysis of law cannot disregard the formal structure of law, the question of the obligation to obey the law or the validity of law cannot be answered by reference to law *per se* only. If legislation is to be conceived of as a meaningful exercise establishing a reciprocal duty situation, it cannot do without consideration of extra-legal factors. We must not analyse law only as it is but what it ought to be. We need an analysis of moral considerations and other social phenomena. We shall therefore consider theories which have attempted the analysis of law by a coalescence of the *is* and the *ought*. By looking at the question of morality we shall find out how far the theories of natural law philosophers offer us such a legal system and how far the theories of writers like Lon Fuller, who have attempted an approachment of natural law and positivism achieve that goal. Our analysis of natural law theories will concern itself with the question of the obligation to obey the law on moral grounds, or the evaluation of the validity of law by subjecting it to moral considerations.

Natural law jurists have on the whole treated the question of the moral content of law or the subjection of law to moral considerations as an integrated part of the need for human law to conform to natural law. The concept of morality has been treated as part of the order of nature or of the imperative norms of nature that God communicates to man and which the human law must conform with to obtain its validity. A binding law or a valid law is determined by its moral content so that the concept of the moral content of law has been an inherent notion of the entire natural law philosophy of justice and validity.⁴⁴ The question of the obligation to obey the law on moral grounds will be expanded to include the question of the extent to which natural law establishes the basis for legitimate expectations upon which the rule-maker and the citizen can rely on one another and pass judgment when the dictates of these expectations are broken.

The general feature of natural law is the coalescence of law and ethics and the general approach has been the identification of a legal system as the hierarchy of norms which are traced from the eternal norm. The law of the state or man-made laws must be evaluated against the higher moral claims of the unwritten and unaltering divine law for its validity. The unwritten law is supreme and that part of supreme law which is made accessible to man by the application of man's reason to nature is incorporated in human laws. In so far as human law is morally obligating, it must be rooted in God. Natural law concept, then, is derived from a hierarchy of laws with natural law at the top of the hierarchy and human law at the bottom and the validity of human laws, as pointed out already, is derived from the fact that it is rooted in eternal law. This is reminiscent of the Kelsinite approach, but the difference between the two is that natural law is not only concerned with hierarchical structure of norms but also with their content. The essence of the natural law approach is that law achieves its status and its purpose in regulating the affairs of men by imposing on the subject a moral obligation. What then is the source of this obligation? We have already seen that the force of human law is derived from the eternal law and that the power to bind the consciences of men by law belongs to God. One might ask this question: if the human legislator can also exercise this function, by what means is this to be limited? The importance of these questions is that they lead us to the intricacies of the analysis of the theories on the binding nature of law; the obligation to enact and obey laws. In question 96 Art. 4 of the *Summa Theologica*, St. Thomas Aquinas answers these questions in this way:

Laws framed by men are either just or unjust. If they be just, they have the power of binding in conscience from the eternal law whence they are derived.

The source of a binding law must be rooted in God. Human law must therefore conform to eternal law. The source of the obligation is conceived of in the same premise as the medieval hierarchical structure of the universe. The obligation is an inherent part of the nature of things and since the nature of things⁴⁵ is controlled by God, man has no control over them and hence no power to determine the basic outlines of obligation.⁴⁶ The ultimate obligation can then be found in the infinite being who determines the nature of things, which are then discovered by the human legislator by reason.⁴⁷

On the whole, therefore, Thomist concept of the obligation to law is conceived of in terms of the rule pedigree and the content of the law must conform in substance with eternal law which includes ethical considerations the determination of which dwells

in the realm of abstractions and is very subjective to individual interpretations. In applying these theories to the expropriation laws we shall attempt to determine this fundamental question: whether the criteria of justice as propounded by the philosophers of natural law establish the basis for any legitimate expectations and provide any grounds upon which the legislator and the citizen can rely on one another and rightly object when their expectations are fulfilled? Or, since there is all the evidence of the great drive for transformation of the society, does the concept of law propounded by natural law philosophers establish the basis for the rule of law to offset any possible invasion of justice? How does the natural law concept of the conformity of human law with eternal law help us in our attempt to look for moral considerations as necessary criteria in determining the citizens' obligation to law? How does this help us in resolving the controversies over the discretion given to the president in the land laws; the retroactive deprivation of rights by virtue of the conversion of freeholds to statutory leaseholds; what criteria and procedures are to apply in deciding the issues involved in compensation?

The resolution of all these issues would invariably cluster around the extent to which it could be claimed that the human law has substantially conformed with eternal law. The practical question then is by what criteria is the citizen to assess that there is any conformity? How is the citizen to conclude that the law is a direct conclusion drawn from the principle of nature? In relation to our first question; that is how far the natural law philosophy makes law enactment a relationship of reciprocity, the answer appears to lie in Question 95 Art. 2 of the *Summa Theologica*, in which Aquinas asserts that there is some relationship of reciprocity between the legislator and the citizen, but it would appear that this relationship is defined in terms of the abstract sphere of the supernatural, for it derives its premise from the same source as the source of the obligations, which is God. In practical terms this is potentially open to the subjective interpretation of the parties, and it would also appear from the answer that there is no objectively pre-defined dimensions of this relationship by which the legislator and the citizen can determine their expectations. However, Aquinas qualifies this by stating that the citizen has the obligation to obey laws which are conducive to the common good, but that in certain specific situations the citizen can legitimately disobey laws set by the legislator. These are situations where the laws imposed by the legislator are burdensome and are conducive only to his own cupidity or vain glory. In addition to this, Aquinas also states that the citizen can disobey laws which are unjust because they are opposed to the divine law, such as laws by tyrants inducing idolatry. On the whole, it would appear from the above analysis of the natural law philosophy that there is one basic answer to all the issues—the determination whether a particular human law complies with eternal law: if it does, the obligation arises, if it does not, the obligation is not firmly established. But the practical problem is that this is subject to any moral subjective interpretation ranging from philosophy, metaphysics to theology.⁴⁸ And as pointed out by Friedmann, ⁴⁹this ambiguity and ambivalence could be very volatile.

These undefined and ambiguous dimensions of the philosophy of natural law have led some natural law philosophers, like Locke, to put some definite dimensions to these undefined limits of natural law criteria of justice. These have come under the general theory of inalienable individual rights. They have argued that human law which violated natural rights would be regarded as oppressive and invalid. This theory has found favour

with some African writers like Nwabueze⁵⁰ who have argued that even if the leaders in Commonwealth Africa are justified in undertaking interventionist economic policies resulting in nationalisation and compulsory acquisition of property fundamental human rights must be respected. We have no quarrel with this theory as such. The danger with this theory is that it is also open to subjective interpretation. The *Zambian Lands Acquisition Act* provides for compensation in the event of compulsory acquisition but this is potentially subject to the determination of the legislator.⁵¹ On the whole, as pointed out by Fuller, the invocation of the concept of individual rights as a criterion of justice amounts to the whipping of a dead horse.⁵² In any case we are not provided with any criteria to settle the intricacies of compensation, neither are we provided with any procedural rules which would guide and satisfy the expectations of the parties. Compensation of injured parties might be motivated by moral considerations but the resolution of practical issues would involve the application of other economic and sociological factors. This in short would mean the consideration of both moral and procedural criteria.

The shortcomings in the theories of natural law and positivism have motivated writers like Fuller to adopt a rapprochement of the two theories. Fuller says that his approach has nothing to do with any "brooding omnipresence in the skies".⁵³ Fuller sees the need for moral considerations but he attempts to give his theory some definite dimensions and purpose. Fuller's adherence to natural law, he says, is motivated by his attraction to the "good order" and "workable arrangement" of the natural law but not by its commitment to ultimate ends.⁵⁴ This is aimed at providing the basis for the establishment of a due process of law in any given situation where the lawyer will be called upon to interpret the law and find the basis for analysing any law. Fuller observes that natural law philosophers have not concerned themselves with the definition and demands of legal morality. They have on the whole felt delving into the expansion of the demands of legal morality would amount to an indulgence in the obvious. But this failure has resulted in a big drawback in the theory of natural law because as we saw the province of legal morality has remained obscure under the general abstractions of eternal law. Fuller⁵⁵ says that philosophers of natural law have been more concerned with the demands of the substantive aims of natural law to be sought through law. However, as we pointed out, Fuller is attracted by the potential qualities of natural law as a system of "good order and workable arrangements".⁵⁶ This he sees as a potential tool for a natural law approach whose premises deals with procedural and institutional practices, the type of natural law approach which serves as the basis of the principles of natural justice. The relationship between Fuller's approach and the principles of natural justice can be best established if the fact is realised that the whole moral philosophy behind the principles of natural justice is that law enactment and the administration of law involves a relationship of reciprocity. And as we shall see later this is one of the fundamental elements of his analysis of law. Fuller then attempts a natural law of a particular kind of human undertaking and this is an attempt to escape from the indulgence in abstractions which characterized the writings of the natural law philosophers. He is concerned with procedural natural law which deals "not with the substantive aims of legal rules, but with the ways in which a system of rules for governing human conduct must be constructed and administered if it is to be efficacious, and

at the same time remain what it purports to be".⁵⁷ This is the function of legal morality, which he expands in the concept of the internal morality of law. Fuller asserts that the maintenance of a legal system depends upon the discharge of interlocking responsibilities—of government toward the citizen and of the citizen toward the government. This approach recognises the human element in the enactment of law and regards law as a social reality aimed at maintaining order in the society, and the function of legal morality, according to Fuller, is to produce order, rule of law, and legal excellence in human society.

What then constitutes legal morality? Legal morality is conceptualized as consisting of the demands of inner morality of law, which is said to have two component parts—the morality of duty and the morality of aspiration. The function of the two is basically to provide "standards by which excellence in legality may be tested".⁵⁸ The morality of aspiration exemplified the conflicting values which are the products of man's constant struggle for excellence in the history of his existence. The morality of duty lays down the basic rules necessary for the achievement of the ordered society in men's perpetual struggle for the attainment of his aspirations.

The morality of duty is not instrumental in determining man's choice; it however provides the necessary condition for the determination of the moral choice, by means of the principles of legality. Or to borrow Fuller's words, it would be relied on "for moral standards of judgement of law in order to attain the choice". And this precisely is one of the fundamental functions of legal institutions. As Fuller puts it:

... there is no way open to us by which we can compel a man to live the life of reason. We can only seek to exclude from his life the grosser and more obvious manifestations of chance and irrationality. We can create the conditions essential for a rational human existence. These are the necessary, but not the sufficient conditions for the achievement of that end.⁵⁹

This condition according to Fuller is attainable by means of the standards of legality provided by the morality of duty. This forms the heart of Fuller's concept of the proper elucidation of the rule of law.⁶⁰ Embodied in this concept of law are standards⁶¹ of legality which by and large treat the fidelity to law as a social phenomenon and a social process involving the interaction of both the law and maker and the citizen and provides the grounds, be it moral or legal, by which the performance of each party can be judged. Our next area of concern is to find out how this exposition of a legal system helps us in providing the basis for which the laws of expropriation can be explained as being within the confines of legality.

Economic Development—Expropriation and Compensation

We have seen that the concept of law and social change has an economic ramification which has been utilised by the leaders of the developing countries as the theoretical basis for the interventionist role they have taken in their economic policies. This has taken various forms and for Zambia we have particularly mentioned expropriation of property. Our concern here is to consider how legality is maintained in the implementation of such policies especially where these have been effected by means of legislation.

The expropriation law, quite apart from their historical justification, are a set of good laws but there are a few comments to be made about the procedures before ex-

propriation and compensation. We mentioned earlier that the president, and in practice, the minister or the councils, are vested with too much power and discretion by the provisions of the Acts, as they stand.

Section 3 of the *Zambian Lands Acquisition Act*, Cap 296 of the *Laws of Zambia* does not involve the public i.e. the parties who own the property in the process of deciding whether or not the expropriation of the property is desirable or expedient in the interests of the republic. In other words, the whole process is one-dimensional, and is quite susceptible to corrupt practices by whatever officials are charged with it.

The innovation of making the determination of what constitutes desirable or expedient in the interests of the republic the subjective discretion of the president *per se* does not constitute a bad law but where an individual is vested with any subjective discretion by any law, the rights of the individual are invariably secured through the procedural rules. And in most cases this is achieved only when the procedural rules are not one-dimensional. It is only in this way that the chances of arbitrariness can be cured. The decision to acquire property, as it is clearly stipulated under section 3 belongs to the subjective jurisdiction of the president, or the officials to whom it has been delegated. This procedure does not give the other parties whose interests are threatened by the compulsory acquisition any right of hearing before the acquisition. He has no *locus standi* before whatever board or whoever exercises that discretion. This procedure as it exists is purely one dimensional and is far from achieving the equilibrium in the society that is supposed to be the function of law. This procedure is a departure from the compliance with the principles of natural justice or what Fuller calls the inner morality of law.

In contrast with this procedure, the procedure in the *Municipal Corporations Act* provides some predictability and reciprocity and thereby minimizes the danger of arbitrariness and corruption in that it allows the owner of the property to make representations and requires him to be heard by the minister.⁶²

This procedure gives the individual some rights and involves him somehow in the mechanism of expropriation so that in the final analysis justice is not only done but is seen to be done. In this sense therefore, it is hereby submitted that in order to change the one-dimensional nature of the pre-expropriation procedure provided by the *Lands Acquisition Act*, the following recommendations be considered. Since, in practice the:

- (1) Discretion vested in the president is exercised by the minister and the council, a mechanism be established whereby the individual could make representations to the president regarding his objections to the compulsory acquisition. Alternatively, an independent body be set up, which could be charged with the responsibility of hearing objections by the public to compulsory acquisition. The body should make its hearings public.

Locus standi should extend to the expropriating authorities and the public. The expropriating authorities should make available for inspection any documents, including maps and plans that they intend to use at the hearing. Similarly the objectors should also present any documents etc for inspection. At the close of the hearing, the board should then submit their findings to the minister or the president, as the case may be, who would then make the final decision. This procedure would then ensure predictability, in the pre-expropriation procedure and give the individual protection.⁶³ The provisions relating to the procedure to be followed when compensation is to be paid have the same

element of one sidedness. Section 10 of the Act, the *Zambian Lands Acquisition Act*, provides that the minister shall pay compensation on behalf of the government in respect of any property compulsorily acquired by the president. Hence, *prima facie*, the decision as to how much shall be paid as compensation is that of the minister. Section 11 (2) provides that in the event of a dispute arising as to the amount of compensation, such dispute shall be referred to the national assembly. The evidence is to be heard before a select committee of the national assembly and if the national assembly resolves how much compensation is to be paid, the amount shall not be questioned in any court of law on the grounds that it is not adequate.

One could level the legitimate criticism against this procedure as impartial. The provision for the establishment of a parliamentary select committee as an adjudicating body in a dispute between the government and a private citizen amounts to the violation of the principles of natural justice. The existing provision makes the government the judge in its own case. One would have thought that an independently constituted compensation body should have been given this function to provide the assurance that a certain amount of impartiality is administered.

The procedure followed before compensation is paid under the provisions of the *Municipal Corporations Act*, in a sense, recognises the individual's interests, in the whole process so that the principles of natural justice are maintained. Subsection 9 of section 4 provides that the council shall pay compensation in respect of any damage done to any land or building. The amount or sum to be paid shall be as mutually agreed upon by the parties. In the event of a failure to reach agreement, the matter shall be referred to the minister who may fix the amount. But before making such a decision the minister shall give to all parties opportunity of making representations either in person or in writing.

Under the *Local Government Act*, the procedure to be followed when compensation is paid is not clearly laid down. One would presume that since compulsory acquisition under section 69(2) can only be effected where application has been made to the president to exercise his powers of expropriation granted under the provisions of the *Lands Acquisition Act*, the procedure to be followed when compensation is being paid would be that provided by the *Lands Acquisition Act*.

Conclusion

The exponents of the concept of law and social change ascribe a functional role to law in human society. They have argued that law should be regarded as a tool of social evolution and the fundamental framework which this concept derived its development is the hypothesis that law is a social phenomenon. From this basic premise of the inter-relatedness between law and other social phenomenon unfold the other ramifications of the theory.⁶⁴ Yehezkel Dror⁶⁵ among other exponents considers that the evolution of a society involves changes in the structures of the social institutions. Law as one of the institutions of the society undergoes such changes. The other side of the concept is that law should not always follow changes in the society but should be used to mould the society. To borrow the words of Friedman the law then becomes "the articulated expression of the new forces that seek to mould the life of the community according to new partners".⁶⁶ David M. Trubeck calls this the "core conception" of modern law.

He indicates that some salient features of this conception of law are its forcefulness and instrumentalism. With this concept, is the theory that the law should be used for the establishment of the necessary infrastructure for development. This in a nutshell represents the concept of law and social change or/and law and development.

After the attainment of independence, most African countries have introduced changes in their laws to create a legal framework responsive to their developmental needs. However, the danger is that this overzealousness for modernisation might involve the enactment of an avalanche of legislation which could pose as a threat to the rule of law and legality. This development through legal enactment and enforcement has often been equated with an increase in the state's power to use the law for the realisation of its economic and social goals. In the process, the state's bias towards the instrumental function of the law has placed a higher value on ends rather than on legal form or tradition. The state has become the source of values and goals and this has jeopardised the maintenance of the rule of law. It is essential that if law or the legal system is to constrain the state its autonomy must be maintained. Our concept of the function of a legal system is two-dimensional; the concept of law and social change shifts the emphasis from the traditional concept of the function of law as a mere tool for the maintenance of social accord. It demands more from the legal system and viewed in this perspective the law has been used to interfere in the life of the citizen. A legal system in a society where the pervasive ideology is this instrumental use of the law has the necessary dual function of providing the legal framework of the society and at the same time maintaining legality and instilling confidence in the citizen.

From our exploration of the theories of the various schools, we noted that the failure of the sociological school to answer certain questions; the analytical positivist's insistence on the rule pedigree and the natural law theorists' over-indulgence in abstractions, all reduce law enactment to a one-dimensional exercise. It is after the considerations of all this that we subscribe to Fuller's theory of law as the only theory which offers us some useful framework within which the rule of law could be assessed and which could provide the lawyer with tools for predicting the citizen's stand in relation to the law. The advantage of Fuller's approach is that law enactment and its administration is conceived of as a two-dimensional exercise involving both the citizen and the rule-maker and within the framework of this concept of law the tendencies towards arbitrariness of positive law and the dictatorship of the ruling elite are generally minimised. The introduction of new values into the society and their legitimation as valid legal rules would either be achieved through the process of penetration or participation. L. M. Friedman argues that exponents of the concept of the instrumental function of law in the society who advocates more active participation by the government in these matters are in effect advocating a higher degree of legal penetration. In this regard, he correctly argues that the concept of engineered social change is a polite way of speaking about change imposed from above. However, he also correctly adds that government is a two-way street and that values could be enforced in the society as valid legal rules through the process of participation.⁶⁷ It is not clear what the stance of the jurists of the sociological school is in this regard. There is a high degree of ambivalence and ambiguity in the camp of the sociological school as to how the new values embodied in the socio-economic policies of the government are to be introduced and interpreted

by the courts as valid legal rules. Pound, as we saw earlier, argues that the courts' role in this is that their decisions must be directed towards the implementation and achievement of the goals set by the state so that the state achieves its policy objectives. But in the first place, as we have seen, a total acceptance of this view of the role of the courts as propounded by Pound would amount to the courts giving their fiat to any governmental policy. Secondly, this proposition is vague for it does not tell the courts what criteria of validity to employ in their interpretation apart from the fact that the policy goals are in the interest of the society. Thirdly, this is a rather dangerous proposition for our purposes because as we saw earlier this notion of active state-participation and engineered social change places an over-emphasis on goals and ends set by the state more than on legal values and culture. Fourthly, this is another version of one-way projection of authority which we have said is inadequate for our purposes. But Pound is not alone in this, this is generally the role the jurists of the sociological school assert that the courts must play. However, they also advocate that engineered social change must be done under the law in order to contain arbitrariness and maintain liberty.

The role the sociological jurists assert the courts must play in giving legitimacy to policy objectives as valid rules is not only vague with respect to the elucidation of the criteria of validity and rule of law but has an element of arbitrariness as well, for it amounts to the acceptance of rules imposed from above as valid. We indicated earlier that our moral philosophy for the achievement of legality is the principle of reciprocity. The acceptance of this view then means that the introduction of new values into the society and their enforcement by the courts as valid must involve the process of participation. Hence for our purpose judicial interpretation of executive and legislative action cannot overlook this moral principle. Fuller's approach then places the moral elements of reciprocity and participation as boundary conditions and essential features of judicial interpretation. The autonomy of the law requisite for the containment of state power does not only imply the structural and institutional autonomy but also a strong emphasis on judicial interpretation as a means of maintaining the cultural autonomy of the law. It is in these perspectives that we accept Hart's notion of the task of the courts in developing a general body of law that will rest upon a coherent and intelligible fabric of principle. "Effective collaboration between legislatures and courts requires on the one hand that legislatures leave room in their enactments for the exercise by the courts of their distinctive function of reasoned elaboration of the law. It requires, on the other hand, that courts have a conception of their function which is adequate to enable them to make good use of the room which the legislatures leave them".⁶⁸ Implicit in this notion is the fact that much as the courts have a duty to collaborate with the legislature they have their own traditional functions and principles to maintain, which denies the automatic legitimization of any executive and legislative action. This can only be done within a certain framework, as made implicit in Hart's notion of the function of the courts. Viewed in connection with the whole concept of law and social change or law and development, this important remark poses a limitation on the instrumentalism of the law that this theory demands.

Notes

1. (a) Julius Stone, *Social Dimensions of Law and Justice*, Stevens, London, 1966. Yehezkel Dror, "Law and Social change", *Tulane Law Review* 33, 1959, pp. 787: Friedman, "On Legal Development", 24 *Rutgers Law Review*, 11 1969 David M. Trubeck, "Toward a Social Theory of Law; An Essay on the Study of Law and Development" Vol. 82 no. 1 1972 *Yale Law Journal*, pp. 1-50.,
2. W. Friedman, *Legal Theory*, fifth edition, Stevens, London, 1967, p. 429.
3. Kwame Nkrumah, *Journal of African Law*, 1962, Vol. 6 no. 2 p. 105.
4. H. C. Dunning; "Law and Economic Development in Africa", *The Law of Eminent Domain*, 68 *Columbia Law Review*, 1968 p. 1286.
5. Dunning, *ibid*.
6. The Public Lands Ordinance.
7. The Indian Lands Acquisition Act of 1894.
8. Dunning, *ibid*, pp. 1290-1291.
9. In the Orders, "Reserves" was defined as "Lands set apart by Article 6 of this order as from time to time amended for the sole and exclusive use of the Natives of Northern Rhodesia (Zambia)."
10. Section 2 of the Ordinance defined Land as "All lands and all interests in lands except; (i) unalienated Crown Lands (ii) Native Reserves (iii) Native Trust Land.
11. Dunning, *ibid*, p. 1298-1299.
12. In President Kaunda's address to the UNIP National Council held at Matero Hall, August, 1969.
13. Land (Conversion of Titles) Act.
14. Part 1 of the First Schedule deals with covenants and conditions of the statutory leases Relating to Land in Municipal Areas, other than Agricultural Land.
15. The Municipal Corporations Act, Cap. 470 of the Laws of Zambia.
16. Section 4 of the Municipal Corporation Act runs as follows:
(2) Subject to the provisions of this section, the council may, by its servants or agents or by contractors enter upon any land for any purpose directly connected with the placing, whether above or below ground, of any councils works into, out of or across such land. The section goes on to provide for matters of notice and service of notice. See subsections 3, 4, 5, 6, 7, 8, 9, 10.
17. *Selina Motswenyane v Lusaka City Council SCZ/7/1977-HP/1185/1976*.
18. The Local Government Act, Cap. 480 of the Laws of the Republic of Zambia
19. (a) Julius Stone, *Human Law and Human Justice*. Chapter 6, especially pages 190-192, Stevens and Sons Ltd., London, 1965. Roscoe Pound, *Interpretation of Legal History*, Chapter VII, New York, Macmillan, 1923, Roscoe Pound, *Jurisprudence*, Vol. 111 St. Paul, Minn, West Publishing Co. pp. 331, 333, 1959.
20. The term "social utilitarians" is used loosely to denote the jurists associated with historical development of this dimension in legal philosophy which started with the rise of the Historical School. The term is used broadly to include the Neo-Hegelian Schools.
21. Julius Stone, *Human Law and Human Justice*, Stevens, London, p. 189.

22. (a) Julius Stone, *ibid*, p. 189; Roscoe *Interpretation of Legal History*, *ibid*, 1923, pp. 141–145., *supra*.
23. Julius Stone, *ibid.*, page 190.
24. Roscoe Pound, *Interpretation of Legal History*, *supra*, p. 147.
25. Roscoe Pound, *Interpretation of Legal History*, *supra*, p. 149.
26. Roscoe Pound, *Jurisprudence* Vol. 111, *supra*, p. 16.
27. Pound defined these interests as “a demand or desire or expectation which human beings either individually or in groups or associations or relations seek to satisfy, of which, therefore, the adjustment of human relations and ordering of human behaviour through the force of a politically organised society must take account”.
28. Some modern jurists have further elaborated or varied Pound’s basic classification. Thus Stone in *Social Dimensions of Law and Justice*, 1966, chap. 3–5, Stevens, London, builds up on Pound’s classification except for the elimination of the category of public interest as a separate category. Paton also analyses law on the basis of interests, dividing them into social and private interests in *Textbook of Jurisprudence*, Oxford University Press, London, p. 112 2nd edition.
29. Friedmann, *Legal Theory*, Stevens, London, fifth edition, pp. 339.
30. Translated by Pound in *Interpretation of Legal History*, page 143.
31. It is difficult for an outsider not involved in the state machinery to know how certain policies are arrived at. But for certain important policies like the decision to amend the entrenched provisions in Article 18 of the 1964 Constitution to facilitate compulsory acquisition without some restraints, which was announced at the Matero Conference and the decision to convert all freehold into statutory leaseholds announced in the Watershed Speech, one would assume that these would eventually come from the highest echelon of the government and party hierarchy.
32. This is similar to the approach taken by Fuller in, “The Law in Quest of Itself”, pp. 12–16 1940.
33. Austin, the Province of Jurisprudence Determined, Lecture VI, London, Wealdnfeld & Nicolson, pp. 193 1965.
34. Austin, *ibid*, page 255.
35. H. L. A. Hart, *The Concept of Law*, 1961.
36. H. L. A. Hart, *ibid*, pp. 78–79.
37. Section 5 of the Land (Conversion of Titles) Act.
38. Hart, *The Concept of Law*, Oxford, Clarendon Press, 1961, p. 96.
39. Hart, *The Concept of Law*, *supra*, pp. 113.
40. Fuller, *The Morality of Law*, New Haven, Yale University Press, 1969 (Revised Edition).
41. John Rawls, *A Theory of Justice*, Oxford University Press, 1971, p. 235.
42. Lon Fuller, *The Morality of Law*, *supra*, pp. 216–217, 1969.
43. Lon Fuller, *ibid*, p. 193 states that the failure of positivism to give a social dimension to the theory of legal system is one of the major setbacks.
44. Julius Stone, “*Human Law and Human Justice*”, 1965, *supra*, p. 288.
45. *Summa Theologica*, Quest 95 Art. 2.
46. *Summa Theologica*, Quest 93 Art. 5 and 3.
47. *Summa Theologica*, Quest 93 Art. 4.

48. Julius Stone, *Human Law and Human Justice*, *supra*, chapter 10, Para 2 and 5.
49. Friedman, *Legal Theory*, fifth edition, *supra*, pp. 95-97.
50. Nwabueze, *Presidentialism in Commonwealth Africa*, London, C. Hurst, chapter XII "Human Rights Versus Economic Development," 1974.
51. Section 2 and 3 of the Zambia Land Acquisition Act.
52. Lon Fuller, "The Law in Quest of Itself," p. 100.
53. Lon Fuller, *The Morality of Law*, Revised Edition, 1969 *supra*, p. 96.
54. Lon Fuller, *supra*, p. 473.
55. Lon Fuller, *The Morality of Law*, Revised Edition, 1969, *supra*, pp. 98-99.
56. See footnote 54, *supra*.
57. Lon Fuller, *The Morality of Law*, Rev. Edition, p. 97.
58. Fuller *ibid.* p. 42.
59. Fuller, *ibid.* p. 9.
60. Fuller asserts that a failure in any one of the eight standards does not simply result in a bad system of law; it results in something that is not properly called a legal system at all.
61. In chapter two of The "Morality of Law" Fuller provides 8 *desiderata* by which the legality of any statute can be measured. These are also the 8 demands of the inner morality of law. These are:
 - (a) Generality of law
 - (b) Promulgation
 - (c) Laws must not be effected retroactively.
 - (d) Clarity of laws.
 - (e) The laws must be logical and consistent
 - (f) Rules should not require conduct which is beyond the powers of the affected party.
 - (g) Constomacy of the law through time.
 - (h) Consistency between official action and declared rule.
62. See Section 4 (6) of the Municipal Corporation Act, *supra*.
63. Compare, Uniform Eminent Domain Code drafted by the National Conference of Commissioners on Uniform State Laws at Kaanapali Beach, Hani, Hawaii, August, 1974.
64. Julius Stone, *Social Dimensions of Law and Justice*, 1966, *supra*, ch. 1 1.6.
65. Yehezkel Dror: "Law and Social Change," in Tulane Law Review 33 (1959), 787-99. Also in, *Law and Change in Modern America*, Juoel B. Grossman and Mary H. Grossman (eds.), Good Year Publishing Co. Inc, New York 1971, p. 36.
66. See footnote 1.
67. Kenneth L. Karst, "Law in Developing Countries", Law Library Journal Vol 60, 1967, p. 16 argues that in order that values are accorded with legitimacy the introduction and implementation must be done publicly i.e. he is also advocating the process of participation.
68. H. Hart, *Comment on Courts and Law making in Legal Institutions Today and tomorrow*, Oxford, Clarendon Press, 1959, p. 43.

