13 Children's Environmental Rights and Environmental Governance in Zimbabwe: A Constitutional Approach

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1 Introduction

Recent studies have shown that despite dramatic improvements in other human rights aspects such as survival, nutrition and education, children face an uncertain future due to climate change and environmental degradation.[1] Children are more susceptible to the effects of environmental harm than adults due to their "physical size, immature organs, metabolic rate, behaviour, natural curiosity and lack of knowledge".[2] Children suffer more from the impacts of environmental degradation and (air and water) pollution than adults. It is estimated that approximately 43 per cent of the total burden of disease caused by environmental risks fall on children under five years of age, globally.[3] In many cases, child-related health conditions, such as asthma and other respiratory tract infections are caused by atmospheric pollution and extreme climatic events.[4] This is the case in many developing countries. Zimbabwe is not an exception.

In 2013, Zimbabwe adopted the Constitution Amendment (No. 20) Act (hereinafter 'Constitution') with a justiciable environmental right entrenched in the Declaration of Rights. As it is often referred to, the right to a healthy environment is a constitutional right that all government institutions are obliged to respect, promote and fulfil. Simultaneously, the Constitution explicitly entrenches children's rights as part of the constitutional package within the Declaration of Rights. Children's rights are by nature, indivisible and interdependent. Thus, the protection and promotion of the right to a healthy environment is a prerequisite for the enjoyment of all other rights for children. As some scholars argue, without environmental protection, it is

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[1] H. Clark *et al.,* 'A Future for the World's Children? A WHO–UNICEF–Lancet Commission', 395 *Lancet* (2020) p. 605.
[2] *See* UNEP, UNICEF and WHO, 'Children in the New Millennium: Environmental Impact on Health', *UNEP, UNICEF and WHO* (2002) p. 7. *See also* P. Mitchell and C. Borchard, 'Mainstreaming Children's Vulnerabilities and Capacities into Community-Based Adaptation to Enhance Impact', 6:4 *Climate and Development* (2014) pp. 372–381.
[3] K. R. Smith *et al.*, 'How Much Global ill Health is Attributable to Environmental Factors?', 10 *Epidemiology* (1999) pp. 573–582.
[4] M. Franchini and P. M. Mannucci, 'Impact on Human Health of Climate Changes', 26:1 *European Journal of Internal Medicine* (2015) pp. 1–5.

impossible to safeguard the rights to life, health, water or play.[5] While there is a scholarly discourse on the constitutional protection of the environmental right in general, including the role of the judiciary in environmental protection,[6] there exists a gap in relation to children's environmental rights and environmental governance. The gap is evident mostly in developing countries, particularly in Africa. This chapter bridges the gap, using Zimbabwe as a context setting.

The central aim of this chapter is to examine the extent to which 'environmental governance'[7] in Zimbabwe complies with the constitutional imperative to respect, promote and protect the environmental rights of children as a specifically vulnerable group. The chapter begins by a critical reflection of environmental governance and the environmental rights of children, giving an international and regional perspective. Thereafter, the chapter explores the terrain of environmental governance in Zimbabwe, using the law and policy as instruments of governance, and specifically focus on the protection of children from environmental harm or degradation. Also, the section explores the procedural rights of children in the context of environmental governance. This part is analysed from two lenses: a constitutional approach and the measures taken at the legislative and policy level. The last part is the conclusion.

2 Environmental Governance and the Environmental Rights of Children

The United Nations Environmental Programme (UNEP) defines environmental governance as the constituent of "the rules, practices, policies and institutions that shape how humans interact with the environment".[8] According to Kotzé, environmental governance entails the regulatory functions of environmental governing bodies in an endeavour to regulate the behaviour of people by means of setting rules, standards and principles through legislation, administrative and executive measures.[9] For Challies and Newig, environmental governance is:

> the totality of interactions among societal actors aimed at coordinating, steering and regulating human access to, use of, and impacts on the environment, through collectively binding decisions. Environmental governance arrangements may be directed towards a range of causes – including conservation and environmental protection, spatial and land use planning,

[5] *See* T. Kaime, 'Children Rights and the Environment', in U. Kilkelly and T. Liefaard (eds.), *International Human Rights of Children* (Springer, Singapore, 2019) pp. 564–583.
[6] *See, for instance*, B. C. Soyapi, 'The Judiciary and Environmental Protection in Zimbabwe', in M. Addaney and A. O. Jegede (ed.), *Human Rights and the Environment under African Union Law* (Springer, Singapore, 2020) pp. 349–379; T. Madebwe, 'A Rights-Based Approach to Environmental Protection: The Zimbabwean Experience', 15 *African Human Rights Law Journal* (2015) pp. 110–128.
[7] *See* part 2 below for the definition of environmental governance and the scope and delimitation of this chapter.
[8] United Nations Environmental Programme (UNEP), 'Environmental Governance', 2009 <wedocs.unep.org/bitstream/handle/20.500.11822/7935/Environmental_Governance.pdf?sequence=5&isAllowed=y> visited on 29 November 2020.
[9] L. J. Kotzé, *A Legal Framework for Integrated Environmental Governance in South Africa and the North West Province* (LLD-dissertation, North-West University, Potchefstroom Campus 2005) p. 52. *See also* L. J. Kotzé, Global Environmental Governance: Law and Regulation for the 21st Century (2012) pp. 294–304.

(sustainable) management of natural resources, and the protection of human health – and operate across scales to address local and global environmental problems.[10]

From the above, one could view environmental governance as the vehicle through which the environmental right is realised at different spheres of governance – at "global, continental, national, (provincial) and local levels".[11] One of the prominent aims of environmental law and policy is to protect the health or 'well-being' of present and future generations of human beings.[12] This part explores the elements of environmental governance from the angle of law and policy, and what that entails in the context of the environmental rights of children. While the term 'governance' is broad and used to encompass governing institutions, the focus of the chapter is limited to the regulatory frameworks.

As Knox and Pejan note, it is now clear that under international and African regional law, issues of environmental protection and human rights are profoundly interdependent.[13] Critical legal scholarship around the substantive right to a healthy environment shows that the right is part of international environmental law and a justiciable right entrenched in many modern constitutions.[14] With this in mind, we argue that the Convention on the Rights of the Child, 1989 (CRC) and the African Charter on the Rights and Welfare of the Child, 1990 (African Children's Charter) must be interpreted to ensure the environmental protection of children in the context of environmental governance. For instance, Article 24(2)(c) of the CRC recognises the special vulnerability of children to environmental harm, indicating that environmental pollution poses dangers and risks to the "attainment of a highest standard of health". The vulnerability of children from environmental harm requires the adoption of multi-dimensional approaches and governance strategies that are sensitive to the needs and interests of children. Such an approach of being child-sensitive is in-tandem with the clarion call that in 'all matters concerning the child' – which include environmental issues – 'the best interests of the child' shall be considered as paramount.[15] Also, Article 29(1)(e) of the CRC obliges states parties to ensure, *inter alia*, that the education of children is directed to the development of and respect for the natural environment. This entails that states must include

[10] E. Challies and J. Newig, *What is 'Environmental Governance'? A Working Definition* (Research Group on Governance, Participation and Sustainability, Leuphana University, 2019).
[11] A. A. Du Plessis, 'Local Environmental Governance and the Role of Local Government in Realising Section 24 of the South African Constitution', 21 *Stellenbosch Law Review* (2010) pp. 265–266; A. Du Plessis, *Fulfilment of South Africa's Constitutional Environmental Right in the Local Government Sphere* (2008) p. 110.
[12] On the meaning of 'well-being' in the environmental right, in general, *See* A. Du Plessis, 'The Promise of "Well-being" in Section 24 of the Constitution of South Africa', 34 *South African Journal on Human Rights* (2018) pp. 191-198.
[13] J. H. Knox and R. Pejan, 'Introduction', in J. H. Knox and R. Pejan, *The Human Right to a Healthy Environment* (Cambridge University Press, Cambridge, 2018) p. 1.
[14] *See* C. Soyapi, *The Role of the Judiciary in Advancing the Right to a Healthy Environment: Eastern and Southern African Perspectives* (LLD degree, North-West University, 2018) pp. 1–7, 36–44. *See also* J. H. Knox, 'The United Nations Mandate on Human Rights and the Environment', in J. R. May and E. Daly, *Human Rights and the Environment: Legality, Indivisibility, Dignity and Geography* (Edward Elgar, 2019) pp. 34–48.
[15] *See* Article 3 of the CRC and Article 4 of the African Children's Charter.

environmental and climate change education into the school curriculum. Integrating the education dimension ensures the recognition of children as actors and participants in environmental protection and in the "respect, promotion, protection and fulfilment"[16] of their rights in the context of environmental governance processes. Also, the participation of children in decision-making (as discussed below) constitutes a fundamental factor that facilitates and promote the healthy development of children as well as the realisation of the substantive environmental right.[17]

Generally, the realisation of the substantive environmental right depends on the fulfilment of three essential procedural elements: participation, access to information and access to justice.[18] Thus, it is critical to ascertain, albeit briefly, what these procedural elements mean to and/or for children and how they can be applied to ensure the respect, protection, promotion and fulfilment of the right to a healthy environment for children. First, the child's right to participate, be heard and taken seriously, is entrenched in international and African regional children's rights. Article 12 of the CRC, and Articles 4 and 7 of the African Children's Charter, provides for a justiciable right of children to be heard in all matters concerning them both in public and private spaces. Child participation is a fundamental right and a foundational pillar of children's rights law.[19] The centrality of child participation is emphasised by the CRC Committee on the Rights of the Child (CRC Committee), in its General Comment No. 20, wherein it underscores the obligation to engage and involve children in the formulation, development, implementation and monitoring of all relevant legislation, policies, services and programmes affecting their lives, at all levels including international, regional, national and local.[20] Giving children the opportunity to participate has the potential to enhance the quality of solutions,[21] particularly in the context of environmental governance.

There is a common belief that children are incompetent and lack the necessary experiences to engage and respond to environmental issues because "children, as is the environment, are regarded as objects of protection".[22] Apparently, this

[16] The concept to implies: (a) respect means duty-bearers must refrain from actions that violates rights or should not directly or indirectly interfere with the enjoyment of, or aid and abet any infringement of, children's rights, and that the state must not engage in, support or condone abuses of children's rights; (b) protect means duty-bearers must take all necessary, appropriate and reasonable measures to prevent third parties from interfering, causing, contributing or violating the rights of children; (c) promote means that duty-bearers must take practical and proactive measures to ensure the advancement of the rights of children; and (d) fulfil means taking positive measures or action to facilitate, promote, provide for and ensure the full realisation of the rights of children. *See* D. J. Karp, 'What is the Responsibility to Respect Human Rights? Reconsidering the "Respect, Protect and Fulfill" Framework', *International Theory* (2019) pp. 83–108.

[17] CRC Committee General Comment No. 20 on the Implementation of the Rights of the Child during Adolescence (2016) CRC/C/GC/20 para. 17.

[18] C. Glinski, 'Environmental Justice in South African Law and Policy', *Law and Politics in Africa, Asia and Latin America* (2003) pp. 64–74.

[19] *See, for instance*, CRC Committee General Comment No.12 on the *Right of the Child to be Heard* (2009) CRC/C/GC/12.

[20] CRC General Comment No.20, para. 23.

[21] CRC General Comment No.12, para. 27.

[22] *Ibid.,* para. 20.

misguided view significantly undermines and limits the weight and seriousness given to children's views in environmental decision making.[23] For instance, in its Day of General Discussion (DGD) on children's rights and the environment, the CRC Committee noted that the right of children to participate in decision making in local environmental governance, is still underdeveloped and decision-makers often disregard the views of children.[24] In many cases, there are formal, institutional and legal requirements that restrict the participation of children in environmental decision making at all levels. As the CRC Committee notes, current institutional frameworks of environmental governance are complex, technical and expert-based, [25] thereby marginalising children from actively taking part in environmental decision or policymaking. Platforms for children's engagement in environmental governance are generally limited, particularly because the legal and policy frameworks were not designed and adopted with children in mind.

Second, children have the right to access to environmental information. Broadly, the right is entrenched under international and African regional environmental agreements. For instance, Principle 10 of the Rio Declaration on Environment and Development (1992) declares that:

> At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness … by making information widely available.

Also, the Stockholm Convention on Persistent Organic Pollutants (2001), one of three multilateral environmental agreements regulating hazardous chemicals and wastes, expressly recognises the rights to access to (environmental) information, which extends to children. The right of children to environmental information, at an international, regional, national and local level, has not received enough attention in environmental legal and policy frameworks. If there is available data (and, in some instances, it may be accessible) either through mass media or other platforms, the information is not simplified to enable children to comprehend the essence of the message and drive usefulness to mitigate environmental harm on their lives or health.[26] One of the concerns expressed by the CRC Committee is the dire lack of comprehensive data on the impact of environmental harm on children:

> [and also the] lack of longitudinal data that relates to environmental harm and children's health and development in different life stages; lack of disaggregated data on children most at risk; lack of information about adverse impacts resulting from loss of biodiversity, resource depletion and degradation of ecosystems; and the lack of integration of environmental, health, and social data.[27]

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[23] *Ibid*.
[24] CRC Committee Day of General Discussion: Children's Rights and the Environment (2016) p. 20.
[25] *Ibid*., pp. 20 and 34.
[26] *Ibid*., p. 17.
[27] *Ibid.*, p. 16.

States parties to international and African regional law are responsible for ensuring and making environmental information public and accessible to children. This right could generally be interpreted and enforced through the fundamental right to access information entrenched as a constitutional right in many modern constitutions. In the environmental context, access to environmental information, basically, is essential to the protection and promotion of children's substantive rights such as the right to life, clean water and health. It entails "informing children in a child-friendly, understandable, and age-appropriate manner what the right to the environment is, the impacts of environmental degradation, and what needs to be done to preserve the environment for the benefit of the present and future generations".[28] One could argue that access to information in general and environmental information specifically is the gateway to meaningful participation of children (of different age groups) individually and collectively. The CRC Committee observed that given enough, adequate pedagogical, scientific, and logistical support, children are strategically positioned, grounded in an understanding of local contexts, to identify, interrogate and investigate local environmental challenges affecting their communities from a bottom-up approach.[29] The responsibility to disseminate environmental information is primarily upon the state. However, non-state actors such as transnational, national and local businesses are also equally responsible for ensuring that dissemination of environmental information, especially those whose activities affect communities. The United Nations (UN) Guidelines on Business and Human Rights underscores that businesses have a responsibility, as part of their child-rights due diligence, to compile, access, generate and disseminate environmental information in a child and age-appropriate manner.[30]

Third, access to justice in general remains a major challenge in many developing countries. More so, it is complex when reference is made to children and access to environmental justice. In many jurisdictions, children are procedurally without the legal standing *locus standi* to approach any judicial or administrative forum to seek redress against actual or perceived violation of their right to a healthy environment. While children are directly affected or may suffer or have substantial interests in the matter, in many jurisdictions, one has to be an adult to get access or audience before judicial and administrative bodies. As a result, this requirement potentially creates a barrier for children in accessing courts (access to justice). Some of the challenges that children find themselves facing, apart from the lack of legal standing, relates to the burden of proof, limitation (or prescription) periods upon which seek redress, and the lack of financial resources to pursue legal pathways.[31] Regarding the burden of proof, the cardinal rule is that he who alleges must prove. Environmental litigation places the onus upon the litigants, in this case, children, to establish a strong and sound case, supported by expert evidence and complex environmental impact assessment and data against the government or business giants. In some cases, the lack of environmental justice may be exacerbated by the lack of specialised

[28] *Ibid*., pp. 15 and 32–33.
[29] *Ibid*., p. 16.
[30] Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (A/HRC/17/31).
[31] CRC General Comment, *Supra* note 21, pp. 21–22.

environmental lawyers to undertake thorough environmental strategic litigation with a specific focus on the protection of the rights and interests of children.[32]

Furthermore, court procedures and time limits could also be a barrier for children. Childhood is a time-bound passage, and children can only claim and enforce their rights while below the age of 18 years. Subsequently, the realisation of children's rights and access to remedies must be immediately available to them. Strategic litigation is time-intensive and children could become adults before the litigation is finalised, thereby depriving them of access to justice during their childhood. Also, strategic litigation is expensive and requires adequate financial resources. In some instances, litigants are deterred from pursuing strategic environmental litigation for fear of incurring considerable costs if they lose the case, or the court rules against them.[33] Legal aid systems in many developing countries are government-funded, thereby making it difficult to challenge the government's failure to fulfil its governance responsibilities in the protection of children from environmental harm. Even after obtaining a court order against government institutions that are responsible for environmental governance, compliance and enforcement of remedial action may remain a challenge for children since compliance and enforcement are subject to political will. In addition, access to justice in general, and for children in particular, is hindered by the lack of specialised environmental (law) courts to facilitate better access to justice in relation to the violation of the right to a healthy environment.

Access to environmental justice means that the State has the responsibility to ensure that children have access to meaningful, effective remedies to redress violations,[34] for instance in the context of environmental degradation caused by the business sector. Access to justice entails the availability of remedies and reparation for the violation of children's environmental rights. The CRC Committee recommended that the forms of reparation should:

> take into account that children can be more vulnerable to the effects of [the violation] of their [environmental] rights than adults and that the effects can be irreversible and result in lifelong damage. [States] should also take into account the evolving nature of children's development and capacities and reparation should be timely to limit ongoing and future damage to the child or children affected; for example, if children are identified as victims of environmental pollution, immediate steps should be taken by all relevant parties to prevent further damage to the health and development of children and repair any damage done. States should provide medical … assistance, legal support and measures of rehabilitation to children who are victims of [environmental degradation] caused or contributed to by business actors. They should also

[32] For a critical analysis of this point, using Uganda's case of *Mbabazi & Others v. The Attorney General and National Environmental Management Authority* Civil Suit No 283 of 2012 (High Court of Uganda, Kampala) as an example, *see* L. J. Kotzé and A. A. Du Plessis, 'Putting Africa on the Stand: A Bird's Eye View of Climate Change Litigation on the Continent', 1 *Journal of Environmental Law and Litigation* (2020) pp. 1–28.

[33] Reference can be made to the 'Costs Protection for Litigants in Environmental Judicial Review Claims: Outline proposals for a costs capping scheme for cases which fall within the Aarhus Convention', pp. 1–15.

[34] CRC Committee General Comment No.5 on General Measures of Implementation of the Convention on the Rights of the Child (2003).

guarantee non-recurrence of [violation] through, for example, reform of relevant law and policy and their application, including prosecution and sanction of the business actors concerned.[35]

The three procedural elements of environmental governance, namely, participation, access to information, and access to justice, are critical to the realisation of children's substantive rights to a healthy environment. The following part examines how the environmental legal and policy framework in Zimbabwe respects, promotes, protects and facilitates the fulfilment of children's environmental rights and interests.

3 Environmental Legal and Policy Framework in Zimbabwe

3.1 *The Constitutional Framework: Environmental Right and Children*

Section 73 of the Constitution entrenches the environmental right:

> (1) Every person has the right—
> (a) to an environment that is not harmful to their health or well-being; and
> (b) to have the environment protected for the benefit of present and future generations, through reasonable legislative and other measures that—
> i) prevent pollution and ecological degradation;
> ii) promote conservation; and
> iii) secure ecologically sustainable development and use of natural resources while promoting economic and social development.
> (2) The State must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realisation of the rights set out in this section.

The environmental right applies to and protects everyone, including children. In the context of children, section 81 of the Constitution elaborates on the rights of children to non-discrimination and equal protection of the law inclusive of the right to be heard, protection from economic exploitation, and to have their best interests considered as paramount in all matters concerning them. Accordingly, the constitutionalisation of the environmental right, on the one hand, and the constitutionalisation of children's rights on the other hand,[36] provides a strong legal basis to advance the protection of the rights of children in the context of environmental governance. This has to be viewed in light of the fact that a constitution is a document of distinctive and supreme status that stands at the helm of the normative legal pyramid in almost all legal systems.[37] Importantly, the

[35] CRC Committee General Comment No.16 on State Obligations Regarding the Impact of the Business Sector on Children's Rights (2013) para. 31.

[36] On the constitutional implications of including a children's clause in the Zimbabwean Constitution in general, *see* A. Moyo, 'The Legal Status of Children's Rights in Zimbabwe', in A. Moyo (ed.), *Selected Aspects of the 2013 Zimbabwean Constitution and the Declaration of Rights* (Raoul Wallenberg Institute, Sweden, 2019) pp. 126–162; I. Magaya and R. Fambasayi, 'Giant Leaps or Baby Steps? A Preliminary Assessment of the Development of Children's Rights Jurisprudence in Zimbabwe', *De Jure Law Journal* (2021).

[37] On this point, and how it applies in the Zimbabwean context, *see* R. Fambasayi and A. Moyo, 'The Best Interests of the Child Offender in the Context of Detention as a Measure of Last Resort: A Comparative Analysis of Legal Developments in South Africa, Kenya and Zimbabwe', *South African Journal on Human Rights* (2020) p. 32.

Constitution reigns supreme such that any law, practice, custom or conduct inconsistent with it is considered invalid.[38] Thus, the entrenchment of the environmental right in the Constitution is a fundamental strategy towards achieving environmental protection,[39] particularly for the benefit of the present generation and future generations, children included.

The duty to provide for and facilitate the right to an environment that is not harmful to the health or well-being of every person rests upon the state as the primary duty-bearer. Also, non-state actors have a duty towards the implementation and fulfilment of the right, as clearly provided for in terms of section 44, read with sections 45 and 73 of the Constitution. First, section 44 of the Constitution proclaims that the duty to respect, protect, promote and fulfil the rights and freedoms contained in the Declaration of Rights rest upon the state and other non-state actors. Second, section 45 (1)-(2) of the Constitution underscores that the Declaration of Rights binds the State and all executive, legislative and judicial institutions and agencies of government at every level. This entails that non-state actors and all levels of government at the national, provincial and local levels have a constitutional duty to uphold and fulfil all the rights in Chapter 4, in particular the environmental right and children's rights.

The obligation in terms of section 73 is further explained and expanded by other sections of the Constitution, such as the national objectives, in particular national development.[40] The purpose of national objectives, broadly, as set out in Chapter 2 of the Constitution,[41] is articulated by the Supreme Court in *Zimbabwe Homeless People's Federation v. Minister of Local Government and National Housing*:[42]

> … these provisions [national objectives] are essentially hortatory in nature ... In this sense, they cannot be said to be strictly justiciable and enforceable in themselves. Nevertheless, they are not to be regarded as being entirely superfluous and otiose and therefore devoid of any legal significance whatsoever. They remain interpretively relevant for the purpose of informing and shaping the specific contours of the substantive rights enshrined elsewhere in the Constitution.

In principle, the interpretation and implementation of the right to a healthy environment within the scheme of environmental governance entails adherence to constitutional values and principles of transparency, accountability, public participation in decision-making, freedom of associations and the best interest of the child principle.[43] These values are indispensable in implementing and enforcing the

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[38] Section 2(1) of the Constitution.

[39] *See generally* T. Murombo, 'The Utility of Environmental Rights to Sustainable Development in Zimbabwe: A Contribution to Constitutional Reform Debate', *African Human Rights Law Journal* (2011) p. 121.

[40] Section 13(1) and (4) of the Constitution provides for 'national development' as a national objective, and in particular emphasise the need for balanced development in rural and urban areas as well as ensuring that local communities [where the children live] benefit from the (natural) recourses in their areas.

[41] *See* Moyo, *supra* note 36, pp. 41–46.

[42] SC-94-20.

[43] L. A. Feris, 'The Role of Good Environmental Governance in the Sustainable Development of South Africa', *Potchefstroom Electronic Law Journal* (2010) p. 1.

substantive right to a healthy environment for the benefit of children. Also, these principles ensure that children are aware, informed and involved in the environmental management processes and have the ability to advocate for environmental protection effectively. In light of the above, the following discussion examines key features and the content of section 73 of the Constitution, which could either hinder or promote the realisation of children's environmental right. Therefore, it is trite to look at each of these norms and interrogate the extent to which they allow for the respect, protection and promotion of children's rights in environmental governance.

Section 73(1)(b) of the Constitution underscores that every person has the right to have the environment protected for the benefit of present and future generations, through reasonable legislative and other measures. Two important aspects emanate from this provision. Firstly, the protection of the environment is for the present generation – children included. Secondly, a similar duty is placed for the protection of the environment for the benefit of future generations. The right, constitutionally entrenched, suggests that there is explicit constitutional protection of present children's environmental rights and the environmental interests of unborn children. The need to protect the environment for current and generations to come was captured by the High Court in *Augar Investments OU v. Min of Environment & Another*.[44] The Court aptly stated that "it is hoped that the citizens of Zimbabwe will vigorously pursue and enforce their rights as provided in terms of the Environmental Management Act, lest we be judged and found wanting, by future generations, for failing to play our part in preserving and protecting the environment"[45.] This is a clarion call that the present generation must, in terms of the law, pursue the protection of the environment for their own benefit and also for the benefit of future generations.

Further, the adoption of reasonable legislative and other measures, as articulated in section 73(1)(b), must be aimed at ensuring the prevention of pollution and ecological degradation.[46] The prevention of pollution in all its forms (air, land and water) is a critical issue that has the potential to cause irreversible consequences for children. Take air pollution and climate change, for instance, and consider how that will potentially impact children's lives in Zimbabwe. More to it, air pollution is a national concern. In a recent 2019 State of the Environment Report, the Environmental Management Agency (EMA) observed that the increasing amounts of toxic air pollutants from different sources in Zimbabwe is significantly affecting children with acute respiratory infections, contributing to the causes of a high mortality rate for those under the age of 5 years.[47]

The peculiar vulnerabilities of children should be taken into account in standard setting in the context of pollution and ecological conservation. Also, it also entails

[44] HH-278-15.
[45] *Ibid.*
[46] Section 73(1)(b)(i) of the Constitution.
[47] Zimbabwe Environment Outlook 2: A Clean, safe and healthy environment. Zimbabwe's Fourth State of the Environment Report December 2019 <https://www.ema.co.zw/agency/state-of-the-environment-report> visited on 7 December 2020.

that in sanctioning violation, children's rights and needs should be particularly considered. A review of case law relating to water pollution, in particular, suggest that the best interests of the child principle is not taken into account. For instance, in *Zimbabwe Environmental Law Association (ZELA) & Others v. Anjin Inv (Pvt) Ltd & Others*,[48] an application was brought against a group of mining companies involved in diamond exploration and mining. It was alleged that the companies were discharging untreated waste material and effluent, including human waste, into the Odzi river, Singwizi river and Save river. These discharges heavily polluted the rivers causing dirty and water contaminated with chemicals and metal deposits including iron, chromium and nickel. While no reference was made to children's rights in the judgment, particularly the right to life, the right to play and access to clean drinking water, it is pertinent to note that children in the affected communities were potentially, and if not, irreversibly affected by the pollutants. More so, it has been found that, 27 per cent of children in Zimbabwe do not have access to safe drinking water, particularly in rural areas, to which the majority of children live.[49]

Another pressing issue in the prevention of ecological damage is associated with spatial developments taking place in wetlands. Wetlands are fragile ecosystems rich in biodiversity and are of great ecological, economic, cultural and recreational value.[50] The benefits of wetlands include flood attenuation, water purification through the removal of pollutants and other toxic substances, groundwater recharge, carbon dioxide assimilation, habitat for wildlife, sustaining unique biodiversity and serving important recreational and cultural functions.[51] Environmental governance in this area has been uncoordinated and political. State actors, particularly local authorities, appear to act in silos, and they also exclude affected communities. Children from the affected communities are excluded and do not participate in decision-making processes around development plans in wetlands. Yet, such issues affect their lives. The failure to protect the ecological integrity of wetlands has negative impacts on children's rights, taking into account the importance and uses of wetlands. Although no case law relating to wetlands directly mention children, the courts' interpretation in such cases is commendable as it allows and enables the protection of the rights and interests of children. For instance, in *Hillside Park Association v. Glorious All Time Function (Private) Limited & Others*[52] the High Court declared, the development of a wetland without going through the Environmental Impact Assessment (EIA) process violated section 73 of the Constitution as well as section 77 which guarantees the right to food and portable water. It should be noted that EIA provides

[48] HH 523/15, [2015] ZWHHC 523 (16 June 2015) (unreported).
[49] Zimbabwe Environment outlook 2, *supra* note 47, p. 15.
[50] V. Madebwe and C. Madebwe, 'An Exploratory Analysis of the Social, Economic and Environmental Impacts on Wetlands: The case of Shurugwi District, Midlands Province, Zimbabwe', *Journal of Applied Sciences Research* (2005) pp. 228–233.
[51] H. N. Chabwela, 'The Ecology and Conservation Status of the Save-Runde Floodplain', in T. Matiza and S. A. Crafter (eds.), *Wetlands Ecology and Priorities for Conservation in Zimbabwe: Proceedings of a Seminar on Wetlands of Zimbabwe* (International Union for Conservation of Nature and Natural Resources, Harare, 1994) pp. 43–46.
[52] HH-349-19. *See also Harare Wetlands Trust & Another v. Life Covenant Church & Others* HH-819-19; *The Cosmo Trust & Others v. City of Harare & Others* AC 3/19.

the opportunity to consider children's interests and rights in environmental governance.

Judicial and administrative bodies have always, in many instances, demanded scientific evidence to support policy and administrative decision-making processes. In *Cosmo Trust & Others v. City of Harare & Others*,[53] the Administrative Court was faced with such a challenge. No scientific proof was submitted before the court to establish why the Monavale Wetland attracts different kinds of bird species, for instance, some come from as far as Cameroon and Kenya. Again, the court felt that the scientific evidence presented before it was not enough to conclude that the massive construction work proposed on the wetland will not cause massive destruction and cause irreparable destruction of the bird habitat as well as disruption of the natural process of water cleansing. In coming up with the decision, the court relied on the precautionary principle of environmental law which prescribes that where there are serious threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason to act.[54] In *Mustai & Others v. City of Harare and Others*[55] the court came to the same conclusion wherein it held that:

> In the absence of any scientific certainty that the holding bay is not being constructed on a wetland… It is prudent to err on the side of caution by granting the provisional order.

The above-mentioned cases relating to wetlands management present an opportunity for the protection of child right in environmental governance in that policy and decision-makers are not excused from taking action if there is a slight possibility that activity, product or project can potentially violate the rights of children. However, there is a need for the principle to be applied at state institutions rather than wait for the court to determine at all times.

Secondly, measures have to be taken to promote conservation and secure, while promoting, sustainable development.[56] The concept of sustainable development is closely intertwined with (intragenerational and) intergenerational equity. As introduced and defined by the Brundtland Report, sustainable development is "development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs".[57] Although the Brundtland Report has no legal force, the definition it sets has been globally accepted, including in Zimbabwe, and shapes how to view and interpret the concept of sustainable development. Sustainable development demands the need to strike a balance between the need for economic development and environmental protection and conservation. Sustainable development is thus based on three pillars: economy,

[53] AC 3/19.
[54] *See Nyakaana v. National Environment Management Authority & Others* CA 5-11, a case from Uganda.
[55] HH 535-17.
[56] Section 73(1)(b)(ii)-(iii) of the Constitution.
[57] Report to the World Commission on Environment and Development: Our Common Future, 1987 <https://www.britannica.com/topic/Brundtland-Report/> visited on 4 December 2020.

social and environment.[58] Thus, the concept is cognisant of the fact that the realisation of socio-economic rights and the betterment of people's welfare needs financing. It has been further described as "a conceptual framework for achieving economic development that is socially equitable and protective of the natural resource base on which human activity depends". [59]

A review of case law in Zimbabwe shows that while there are cases wherein the concept has been mentioned broadly, its full meaning and scope as it relates to children remains unexplored. For instance, in *Harare Wetlands Trust & Another v. Life Covenant Church & Others*,[60] the Harare High Court held that there is need to strike a proper balance between development and sustainable environmental management. Citing with approval the decision in *Calvert Cliff's Co-ordinating Committee v. Atomic Energy Commission*,[61] the Court held:

> In each individual case the particular economic benefits of planned action must be assessed and weighed against the environmental cost; alternatives must be considered which would affect the balance of values.

In South Africa, the concept of sustainable development was judicially interpreted in the case of *Fuel Retailers Association of South Africa v. Director-General Environmental Management, Department of Agriculture, Conservation and Environment*,[62] where the Court held:

> Pure economic principles will no longer determine, in an unbridled fashion, whether a development is acceptable. Development, which may be regarded as economically and financially sound, will, in future, be balanced by its environmental impact, taking coherent cognisance the principles of intergenerational equity and sustainable use of resources in order to arrive at an integrated management of the environment, sustainable development and socio-economic concerns. By elevating the environment to a fundamental justiciable human right, South Africa has irreversibly embarked on a road, which will lead to the goal of attaining a protected environment by an integrated approach, which takes into consideration, inter alia, socio-economic concerns and principles.

In environmental management generally and in the case of the management of wetlands in particular, the EIA process is a tool that can be utilised to achieve sustainable development as it provides an opportunity to integrate development planning and decision-making process with ecological considerations.[63] However, the current developing framework in Zimbabwe seem to be neglecting the importance, use and value of EIAs. This failure is not only in the case of wetlands,

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[58] D. Hallowes and M. Butler, 'The Ground Work Report. The Balance of Rights – Constitutional Promises and Struggle for Environmental Justice', 2004, <https://www.groundwork.org.za/reports/gWReport2004.pdf> visited 4 December 2020.
[59] J. C. Dernbach, 'Sustainable Development as a Framework for National Governance', *Case Western Reserve Law* (1998) p. 3.
[60] HH-819-19.
[61] 449F 2d (DC Cir 1971).
[62] 2007 (6) SA 4 (CC).
[63] J. Kurian *et al.*, 'Environmental Impact Assessment as a Tool for Sustainable Development', <https://www.researchgate.net/publication/329355638_Environmental_Impact_Assessment_as_a_Tool_for_Sustainable> Visited on 9 December 2020.

but extends to all aspects including in the mining sector. In a 2020 study conducted by ZELA titled, "The state of children and youths' right to a healthy and sustainable environment in Zimbabwe: Assessment of the impacts of mining on children and youth living in mining communities",[64] it was established that often mining companies start operating without going through the EIA process. In some instances, where the EIA is in place, companies ignore or neglect to take measures to safeguard the environment. Thereby, the interests and rights of children are bluntly overlooked and marginalised. The Provincial Mining Directors and other officials in the Ministry of Mines and Mining Development even award mining licences without the EIA process being carried out which practice does not take into account the principle of sustainable development[65] and the best interests of children.

Thirdly, section 73(2) provides that the realisation of the right is progressively realised within the limits of the resources available to the state. In essence, progressive realisation demands that states must promote and protects rights over time "to the fullest extent possible within their available resources".[66] What this entails is that states are required to "move as expeditiously and effectively"[67] as possible, and they must take "deliberate, concrete and targeted"[68] measures towards achieving the full scope and content of the rights of children in question.[69] Borrowing from the South African Constitutional Court, progressive realisation of a constitutional right entails that the state has:

> the obligation to take the requisite measures is that the obligation does not require the state to do more than its available resources permit. This means that both the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources. [It] does not expect more of the state than is achievable within its available resources … There is a balance between goal and means. The measures must be calculated to attain the goal expeditiously and effectively but the availability of resources is an important factor in determining what is reasonable.[70]

The provision is problematic in many respects, it may result in the state not fulfilling its obligation to provide for the right to healthy claiming lack of resources to meet its obligations.[71] In discharging their mandate on environmental governance that

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[64] Available on <http://www.zela.org/download/research-on-the-impact-of-mining-on-children-youthsright-to-a-healthy-sustainable-environment-in-zimbabwe/> visited on 4 December 2020.

[65] *See Debshan (Private) Limited v. The Provincial Mining Director*, Matebeleland South Province & Others HH-11-17.

[66] B. T. C. Warwick, 'A Hierarchy of Comfort? The CESCR's Approach to the 2008 Crisis', in G. MacNaughton and D. Frey, *Economic and Social Rights in a Neoliberal World* (Cambridge University Press, Cambridge, 2018) p. 133.

[67] UN Committee on Economic, Social and Cultural Rights (CESC) General Comment No. 3 on the Nature of States Parties' Obligations (Article 2, para. 1) (1990) para. 9.

[68] *Ibid*., para. 2.

[69] R. O'Connell *et al*., *Applying an International Human Rights Framework to State Budget Allocations* (Taylor and Francis, 2014) p. 67.

[70] *Government of the Republic of South Africa v. Grootboom* 2001 (1) SA 46 (CC) para. 46.

[71] For a detailed discussion on the challenges with the concept of progressive realisation, *see* S. Byrne, 'Reclaiming Progressive Realisation: A Children's Rights Analysis', *International Journal of Children's Rights* (2020) pp. 748–777.

encompass the rights of children, state institutions can only do so within the parameters of the available resources.

3.2 *Environmental Legislation and Policy Framework*

The framework environmental legislation in Zimbabwe is the Environmental Management Act [Chapter 20:27], which is the primary legislative instrument that provides for environmental management and governance. According to Nel and Du Plessis, "framework (environmental) legislation aims to define overarching and generic principles in terms of which sectoral-specific legislation is embedded, as well as to enhance co-operative environmental governance amongst fragmented line ministries[72]". Framework environmental legislation, such as the Environmental Management Act, provides general basic norms that may be used to introduce new environmental legislation or to amend or maintain existing legislation. Although enacted earlier, the Environmental Management Act reflects the spirit and letter of section 73 of the Constitution, in particular, section 4(1) of the Act enshrines the right to a clean environment that is not harmful to health, and the right to protection of the environment for the benefit of present and future generations.[73] It also provides for every citizen's right to participate in the implementation of the promulgation of reasonable legislative policy and other measures that prevent pollution and environmental degradation; and secure ecologically sustainable management.[74] While the Act needs to be aligned with the constitutional principles discussed above, it should be noted that the Act has been and remains instrumental in environmental governance (management) in Zimbabwe. In *Augar Investments OU v. Minister of Environment & Another*,[75] the High Court emphasised the importance of the Act:

> The purpose of [Act] is to define environmental rights and to set out the principles of environmental management, as well as to provide an enforcement mechanism against recalcitrant offenders. Section 4 of EMA declares that 'every person in Zimbabwe shall have a right to a clean environment that is not harmful to health, access to environmental information, protect the environment for the benefit of present and future generations and to participate in the implementation of reasonable legislative policy and other measures that prevent pollution and environmental degradation, and secure ecologically sustainable management and use of natural resources while promoting justifiable economic and social development.

Section 4 of the Environmental Management Act specifically provides for the rights and principles of environmental management and governance. Some of the environmental governance principles include that environmental management must place people and their needs at the forefront of its concern.[76] The term 'people' includes children, and the placing of their needs at the forefront could be interpreted in light of section 81 of the Constitution which declares that the best interests of children are paramount. In addition, section 4(2)(c) underscores the significance of

[72] J. Nel and W. Du Plessis, 'An Evaluation of NEMA Based on a Generic Framework for Environmental Framework Legislation', *South African Journal of Environmental Law and Policy* (2001) pp. 1–2.
[73] Section 4(1)(a) of the Environmental Management Act.
[74] Section 4(1)(c) of the Environmental Management Act.
[75] HH-278-15.
[76] Section 4(2)(b) of the Environmental Management Act.

the participation of all interested and affected parties in environmental governance. It states that the participation of citizens must be promoted and that opportunities must be created for them to develop the understanding, skills and capacity necessary for achieving equitable, meaningful and effective participation. Children as citizens have the entitlement to enjoy this right too. Thus, it is critical to include the participation of children and young people in environmental governance as a pivotal component.

Further, section 136 of the Act seeks to promote citizen's participation in environmental governance. This also includes children, as citizens. The provision generally states that, "in the exercise of any function as prescribed, officials (the Minister, the Secretary, the Agency, the Director-General) and any other person or authority shall ensure that the rules commonly known as the rules of natural justice are duly observed and, in particular, shall take all reasonable steps to ensure that every person whose interests are likely to be affected by the exercise of the function is given an adequate opportunity to make representations in the matter". While this provision could be utilised to benefit children as one of the affected persons, in practice, the provision is adult-centred. There are no mechanisms to ensure children's participation as interested and affected persons.

In addition, section 4(1)(b) of the Environmental Management Act provides that every person has the right to access to environmental information. As a matter of principle, section 4(2)(d) provides that environmental education, environmental awareness and the sharing of knowledge must be promoted so as to increase the capacity of communities, including children, to address environmental issues, attitudes, skills and behaviour consistent with environmental management. Accordingly, this principle could be construed to extend the right of children to environmental education and knowledge. For instance, the Environmental Management Agency,[77] the authority responsible for environmental management in carrying out its mandate, has made efforts to engage children through environmental clubs in schools, which aim to provide environmental education, campaigns and other awareness-raising initiatives.[78] However, the engagement is discriminatory as it targets children mainly in schools, at the exclusion of non-school attendees. One of the challenges with access to environmental information and participation is that EIA reports are often issued in environmental jargon, making it difficult for children to comprehend and understand, thereby violating the rights of children to access to environmental information.

[77] Established in terms of section 9 of the Environmental Management Act, the functions of EMA as laid out in section 10 includes the formulation of quality standards on air, water, soil, noise, vibration, radiation and waste management; to assist and participate in any matter pertaining to the management of the environment; and in particular (i) to develop guidelines for the preparation of the National Plan, environmental management plans and local environmental action plans; (ii) to regulate and monitor the collection, disposal, treatment and recycling of waste; (iii) to regulate and monitor the discharge or emission of any pollutant or hazardous substance into the environment; (vi) to regulate, monitor, review, and approve environmental impact assessments; amongst others.

[78] Environmental Clubs in Schools, <https://www.herald.co.zw/environmental-education-in-schools/> visited on 29 November 2020.

Another environmental issue that is critical to the rights and interests of children is climate change. It is an emerging and present threat, if not the greatest threat, to children rights. Studies have shown that climate change presents critical challenges to the rights and interests of children in the present and in the future. Responding to this challenge, the National Climate Change Response Strategy (2015) was adopted to guide national (and local) responses and measures to addressing the impacts of climate change. The National Climate Change Response Strategy acknowledges the need to be cognisant of children's special and vulnerable position in society during climate-change decision-making processes. Under the heading 'capacity building', it acknowledges that children may potentially face other growing difficulties such as lapses in education and insecurity caused by climate-induced behavioural changes and livelihood choices of parents and other family members, which may result in displacement, conflict, neglect and abandonment. Children may have to cope with higher levels of pressures which keep them out of school and force them into work too soon. The strategy acknowledges the vital need to ensure the inclusion of children and youth in the policy formulation process for climate change, and in adaptation and mitigation activities. In addition, the National Climate Policy (2017) accentuates on the impacts of climate change on children and notes that education on climate change has to be gender and child-sensitive.[79] While the provision for inclusion of children in governance is commendable, there is a need to ensure practical and meaningful participation in practice. This will also uphold the realisation of the constitutionally entrenched right not to be discriminated, the right to be heard and to have the child's best interests considered as paramount.

4 Conclusion

The constitutionalisation of children's rights in Zimbabwe was a remarkable momentous occasion that gives children a voice and legal (constitutional) claims that cannot be denied. In this chapter, we established that the children are rights holders of the right to a healthy environment and they have the right to be heard and participate in governance, right to access to information and the right access to justice in the contexts of rights violation. We have argued that section 73 – the environmental right – as read with section 81 – the children's rights clause – should be interpreted together to ensure that all environmental management decisions, measures and responses are in the child's best interests and respect the rights of children. Further, we contend that doing so will drive a constitutional approach to environmental governance, and ensure that all environmental legislation, policies and strategies are geared towards the protection of the interests and rights of children. A look at some of the existing legislation and environmental jurisprudence in Zimbabwe shows the great potential that exists in achieving a child rights based approach to environmental governance. However, more work needs to be done in terms of institutional capacity building. Future research should be devoted towards analysing how governance institutions, including traditional leadership structures, could adopt a child rights based approach to environmental governance.

[79] National Climate Policy, para. 4.1.

14 Foreign Investment, Indigenous Communities and the Constitutional Protection of Property Rights in Zimbabwe

James Tsabora* and Mutuso Dhliwayo**

1 Introduction

The 2013 Constitution – which is post-independent Zimbabwe's first ever autochthonous Constitution – contains interesting perspectives in relation to the protection of property rights. Certainly, the rights framework created has important implications on the security of rights of both domestic and foreign investors interested in conducting business in the country. Similarly, the constitutional regime also impacts on the security of the land rights of indigenous communities held under customary law systems of tenure in Zimbabwe, particularly in view of the manner such rights are usually suppressed in favour of other investment projects. From a contemporary economic perspective, the legal protection of property and business interests has been hailed as a critical component in attracting investment and instilling business confidence in a country's economic system. Indeed, the prominence of transnational business investment in the global economy means that the legal regulation of property rights is not only vital for the vibrancy and performance of the private sector but also essential in a globalised world characterised by private commercial transactions of a multinational character.

Yet in the dust created by the rush to attract foreign investment, most African governments deliberately ignore the security of land tenure of indigenous communities that host such investments. Large investment projects in sectors such as mining, road and dam construction and other infrastructure developmental projects have huge impacts on the land rights and interests of indigenous communities. Investment projects are therefore known to bring not only social, economic, cultural and environmental cost to host communities but also introduce land tenure insecurity in such areas. Inescapably one of the greatest issues generated by the presence of foreign investment projects in host communities directly relates to the insecurity of land rights of indigenous community groups. Ordinarily customary based tenure systems provide holders with a very weak level of protection of land rights and interests. In contrast, the investment licenses and special grants held by mostly foreign investment are strongly backed by legislative provisions that trump, in most instances, rights granted under customary law.

African governments have struggled to strike the requisite, albeit delicate, equilibrium between rights of indigenous communities hosting foreign investment projects and the rights of foreign investors. It is therefore relevant to explore whether the constitutional framework reconciles the conflicting land rights and interests of foreign investment and indigenous communities. The Zimbabwean social, economic and political system is not spared the depredations that have come with the foreign

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direct investment mantra in Africa. Since 2000 Zimbabwe has experienced political, economic and social developments that have left a huge imprint on the face of its economic and political system. In this vein, examples of policies that have brought grave and unintended consequences to the national economic system include the controversial policies of the land reform programme and the economic indigenisation policy. These were started under the Mugabe administration and have been continued under the Mnangagwa administration. A more recent, very haphazard and incomprehensible policy direction known as 'consolidation of diamond companies' also deserves particular mention, owing to its deeply problematic implications to foreign investment. The core character of these controversial policy directions was the forcible acquisition, distribution, redistribution and transfer of private property rights in favour of government interests or under the guise of the public interest. Inevitably, the picture created by these economic policies is one without respect for private property rights, especially the property and investments of non-indigenous enterprises. Equally, the manner in which the foreign investment drive has been pursued was in total disregard of the land rights and interests of indigenous communities that hosted such investment.

This chapter is a critical analysis of the constitutional and legislative protection of foreign investment within the context of the 2013 Constitution of Zimbabwe. Importantly, it asks, and seeks to answer, the question of whether the 2013 constitutional setup provides a reasonable shield to foreign investors against government policies that can potentially erode and impinge on their right to property. In addition to conceding the inevitable conflict between the interests of large scale investment and the land rights and interests of indigenous communities, this research also highlights the positivity brought about by the constitutional property clause through recognition of indigenous communities' rights and interests to land. Finally, in order to illustrate the practical context of this research, this chapter examines the diamond consolidation process, and its implications to the right to property. Consequently, the chapter lays out in the open the variance between law and practice in Zimbabwe, and the possibilities that are likely to take place in cases where government's economic interests are not pursued through the formal legal process but are pushed through predatory actions that defy the very law that was formulated to prevent them.

2 The Constitutional Setup

The right to property creates important socio-legal relations of both a horizontal and vertical nature in general, and of a private-public character in particular. The fundamental rights in the 2013 Constitution echo this position. Without doubt, the constitutional regulation of property rights is necessarily critical in the resolution of disputes and conflicts that arise and emerge in the context of these relationships. Indeed, the expectation is that the consequent regulatory fiat can optimally address the often-conflicting legal relationships inherent in the property rights framework.

The post-Mugabe administration has stressed the importance of respect for property rights throughout its national budgetary and economic policy blueprints. It must be

admitted that these policy pronouncements are matched by constitutional provisions that entrench respect for 'vested' rights and the rule of law. Section 71, which is the constitutional property clause, is aimed at this objective. It opens by defining property as "property of any description and any *right or interest* in property".[1]

Clearly, this definition does not add clarity at all into what really can be regarded as property. At best it is an open invitation to the courts to flesh out what is meant by the definition.

In the case of case of *Hewlett v. Minister of Finance*,[2] the Supreme Court appeared unperturbed by this phrasing and decided that the definition "seems to embrace the widest possible range of property". The observations by the Court find support from another angle. Under general common law, property generally refers to 'things' or valuable, corporeal objects of economic value, external to humans, which enjoy a separate legal existence and which can be subjected to juristic control. The objects of value that can be envisaged by this definition are various. It can thus be strongly asserted that the Constitution recognises wide range of objects as property, and this is a positive aspect in the protection of property rights in general. Both ordinary citizens and foreign investors become anxious in cases where the Constitution recognises a narrower definition of property than where such definition is as wide as it is currently envisaged.

It is also important to note that the constitutional definition identifies both 'rights' and 'interests' in property as constituting property as well. Essentially, this means that a person with any right in another person's property is also protected by the right to property. Further, any person without such right but with an 'interest' in a property is protected. Of course the interest has to be legally recognisable. There seems to exist a blurred line between a land 'right' and a land 'interest' that is actionable and subject of protection under section 71.

Apart from defining property, section 71 recognises the individual right of every person "to acquire, hold, occupy, use, transfer, hypothecate, lease or dispose of all forms of property, either individually or in association with others".

This section means every person can be right-holders in as far as property rights are concerned. Indeed, this right is contrasted to other rights in the Constitution that are limited to Zimbabwean citizens only. Importantly, this means that the right to property exists for both indigenous and foreign persons, juristic or natural. There is no discrimination, and this is welcome.

Further, section 71 provides that "no person may be compulsorily deprived of their property" except upon compliance with certain procedures and requirements in the section. By making reference to 'no person', section 71 prohibits the state and all forms of state authority from proceeding with deprivation until or unless certain terms and conditions set therein are met. Again, reference to 'no person' in the section deliberately addresses both citizens and non-citizens and thus guarantees protection

[1] Emphasis added.
[2] 1982 (1) SA 490, at p. 497.

of property to both citizens and non-citizens. This is very important in view of the legal phenomenon of foreign investment and foreign owned property not only in Zimbabwe but across the world.

Having presented these general features of the constitutional property clause, it becomes critical to interrogate the essence and substance of the clause in relation to property rights of foreign investment and the rights of indigenous communities.

3 Indigenous Communities and Land Interests

The significance of recognition of 'interests' as property in section 71 becomes critical in relation to land rights and interests of indigenous communities in areas that usually host large scale investment projects. The majority of these indigenous community groups enjoy land rights on the basis of customary law.[3] Apart from that a host of other laws recognise the interests in rural land of these indigenous communal groups that host foreign investment. However, such recognition does not extend to providing land title or freehold title to rural communities over the land they occupy, use or live on. In general, these laws allow and permit various forms of occupation, use and alienation of the pieces of rural land within the context of each community's cultural and customary backgrounds. Important laws include the Communal Lands Act[4] (CLA). This Act grants communities right of occupation on communal land for residential or agricultural purposes. The Act does not create or recognise individual title to land but gives specific guidelines on occupation and use of communal land by rural communities. Another piece of legislation is the Traditional Leaders Act[5] which addresses land related duties and responsibilities of traditional chiefs in relation to communal land in the interests of communities. Finally, the Rural District Councils Act[6] is another pertinent law which gives the legal basis for rural councils as the responsible authorities that administer communal land in the interest of their subjects.

Scholars have argued that although they do not amount to the right of land ownership, the constitutional recognition of these interests in land created by both customary law and legislation is necessary in a society that seeks to free itself from

[3] *See* the report of the Economic Commission for Africa, *Relevance of African Traditional Institutions of Governance*, p. 24. The land distribution and redistribution of traditional customary authorities exist since pre-colonial times. However, following colonial occupation of Zimbabwe by white settlers, the new government system carved out land for exclusive use by the indigenous population and this land became known as the Tribal Trust Lands (TTL). The various colonial laws gave local chiefs a measure of control in land distribution and redistribution, but they remained under the ultimate authority of colonial administrators. *See* S. Chakaipa, 'Local Government Institutions and Elections', in J. De Visser, N. Steytler and N. Machingauta (eds.), *Local Government Reform in Zimbabwe – A Policy Dialogue* (University of Western Cape, Community Law Centre, 2010).

[4] Chapter 20:04.

[5] Chapter 29:17.

[6] Chapter 29:13.

the rather abstract character of rights under the common law.[7] Van der Walt, for instance, puts this succinctly as follows:

> In terms of the traditional ownership paradigm it is assumed that ownership is not only the most comprehensive but also the most natural and the most desirable land right, and all other land rights are regarded with a certain measure of disdain: they are temporary, limited and less valuable. However, realities regarding the availability of a limited resource such as land for an ever increasing population, coupled with people's need for access to secure land rights, dictate that greater importance should be accorded to land rights, and that they should not be evaluated purely negatively simply because they amount to less than full ownership.[8]

In essence, what these scholars call for is for these interests in land to be recognised to the same level as is the right of land ownership. Yet other scholars even call for the registration of these land rights, albeit not as ownership, but as fragmented land use rights.[9] A question may be asked whether the 2013 Constitution recognises other rights, apart from the right of private land ownership. The answer is in the affirmative, and two grounds justify such answer.

Firstly, section 71 of the 2013 Constitution recognises the right of every person "to acquire, hold, occupy, use, transfer, hypothecate, lease or dispose of all forms of property, either individually or in association with others".[10] In essence, this means that the section recognises four important rights: namely, (i) the right of private ownership (*dominium*), (ii) the right of possession (*possessio*), (iv) the right of use (*usus*) and (iv) the right of occupation (*occupatio*). What this means is that the mere use, occupation and possession of property is protected under section 71. Accordingly, the occupation, use or possession of land by indigenous communities in rural areas for residential, subsistent agriculture, pasture, small scale farming, among other purposes, creates land rights and interests in their favour, and such rights are protected by section 71.

The second ground why the 2013 Constitution appears to have accepted the direction of fragmented land rights is on the basis of Chapter 16, which, however, relates to agricultural land only.[11] Under Chapter 16, the state has power to alienate land to persons, through four mechanisms, namely: (i) transfer of ownership, (ii) a grant of lease, (ii) grant of occupation rights and (iv) grant of use rights.[12] Again, this means that the state can dispose its interests or rights in land through four avenues, namely: (i) granting *dominium*, (ii) granting *possession*, (iii) granting *usus* and (iv) granting *occupatio*. The rights created by recognition in section 293 are similar to

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[7] *See* C. Cross and R. Haines, *Towards Freehold? Options for Land and Development inSouth Africa's Black Rural Areas* (Juta, Cape Town, 1988); A. J. van der Walt, 'The Fragmentation of Land Rights', 8 *South African Journal on Human Rights* (1992) p. 431.

[8] *Ibid.*

[9] G. Pienaar, 'The Registration of Fragmented Use-Rights as a Development Tool in Rural Areas', paper presented to the conference on "Constitution and Law IV: Developments in the Contemporary Constitutional State", Potchestroom University, South Africa, 2–3 November 2000.

[10] Section 71(2).

[11] Section 71 is a constitutional property clause, but does not apply to agricultural land. Section 72 applies to agricultural land, and is phrased in such a way that section 71, the property clause, is 'subject' to section 72.

[12] Section 293.

those created by recognition in section 71 of the Constitution. A critical observation that can be made is that these fragmented land rights are recognised and protected in both agricultural and in relation to all other property envisaged in section 71.

Accordingly, it can be strongly contended that the 2013 Constitution creates a comprehensive and protectionist regime that recognises the rights and interests of indigenous communities who make a living out of the land, through residence, subsistence, peasantry livelihoods and other informal means of livelihoods. The importance of this position is that all the rights that are enjoyed by indigenous communities under customary law and certain legislation amount to constitutionally recognised interests and rights to land and cannot anymore be regarded as weak, inferior or subordinate to the right of ownership.[13] Thus licensing authorities, administrative bodies, government agencies and, pertinently, large scale investment projects that seek to establish their operations in areas inhabited by indigenous communities have to contend with this position. However, to what extent does this rights fiat benefit large scale investments, particularly in relation to the protection of their investments in Zimbabwe?

4 Foreign Investment and Land Rights

As argued above, the mere use, possession or occupation of land without freehold title to such land can grant the user, possessor or occupant a legally recognisable and enforceable right or interest in land. Large scale investments occupy and make use of huge tracts of land to set up physical and technological infrastructure for operational purposes. A clear example in Zimbabwe is Zimbabwe Platinum Mine (Pvt) Ltd (Zimplats), which holds in excess of 80,000 hectares of land.[14] Another example is the Zimbabwe Mining Development Corporation that holds land measuring a total area of 63,548 hectares under special grant, but was reduced to 59,817 hectares after the cession of part of such land to a private company, Anjin Investments Pvt Ltd, in February 2010.[15] By setting this infrastructure on the land, they become users, occupiers or possessors of the land onto or under which the infrastructure is built or established. Ordinarily, however, due to the nature of mining as a land intensive industry, large tracts of land are left for further and future exploration.

It is important to note that, in the mining sector, the three rights (*usus*, *occupatio,* and *possessio*) are not created or granted in favour of mining companies through application of land or land related legislation. These rights are created by relevant

[13] The socio-political and legal importance of this to society is clear, *see* A. van der Walt, 'Property Rights and Hierarchies of Power: A Critical Evaluation of Land Reform Policy in South Africa', 64 *Koers* (1999) pp. 261–264.

[14] Zimplats is successor to BHP Minerals Zimbabwe, and was granted the 25 year long lease in 1994. *See* 'Mugabe Forges Ahead with Zimplats Land Grab', *Dailynews Live*, 6 January 2017, available at: <https://www.dailynews.co.zw/articles/2017/01/06/mugabe-forges-ahead-with-zimplats-land-grab>, (accessed 1 August 2017)>; 'President Sues Zimplats over 28000ha Idle Land', *The Herald*, <http://www.herald.co.zw/president-sues-zimplats-over-28-000ha-idle-land/> (accessed 1 August 2017).

[15] *See Anjin Investments Pvt Ltd v. Minister of Mines & Ors*, HH228/2016.

and applicable mining legislation. Under the Mines and Minerals Act (MMA),[16] for instance, various mining rights are recognised and protected, and such rights have a direct impact on land ownership or the occupation, use or possession of land where such rights are exercised.

Mining rights are created, held, exercised, distributed and redistributed in a manner that grants to the holder of such rights interests and rights to land. For instance, under the Mines and Minerals Act, a miner can be granted a 'special mining lease',[17] a 'special grant'[18] or a 'prospecting license'. The Mine and Minerals Amendment Bill (MMAB) also recognises a number of mining rights. It defines 'mining title' to mean (a) an exclusive prospecting licence, or (b) an exclusive exploration licence or (c) special grant for exploration.[19] It further defines 'mining right' to mean (a) a certificate of registration of a block of precious metal claims, or (b) a certificate of registration of a block of precious stones claims, or (c) a certificate of registration of a block of base mineral claims, or (d) a certificate of registration of a site mentioned in section 47, or (e) special mining lease, or (f) mining lease or (g) special grants for mining. Without doubt, these mining rights, licenses and grants create land-use impacting rights which necessarily flow from the nature of the different mining rights in question.[20] Further, they inevitably create a legally recognisable and protected interest in land that is not owned by the mining companies in question. For instance, a prospecting licence grants a prospecting mining company the right to search for minerals, through various means, including pegging of the land.[21] Further, the prospecting company also has surface land rights over that land, including fetching water and making use of firewood.[22] The argument is therefore that despite mining legislation providing a framework for the acquisition of mining rights, various provisions in mines laws create interests and rights in land in favour of the mining companies. Indeed, the exercise of the mining rights created is impossible without the added recognition and protection of the rights of mining companies to the land upon which their investments are established and/or intend to be operationalised.[23] Perhaps this analysis will be incomplete if it omits discussion of yet another important provision in the Mines and Minerals Act. Section 2 of the Mines and Minerals Act provides as follows:

> The dominium in and the right of searching and mining for and disposing of all minerals, mineral oils and natural gases, notwithstanding the dominium or right which any person may possess in and to the soil on or under which such minerals, mineral oils and natural gases are found or situated, is vested in the President, subject to this Act.

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[16] Chapter 21:05.
[17] *See* Part VIII of the MMA.
[18] Section 291 of the MMA.
[19] Section 14 thereof. The MMAB recognises and confirms the nature of these rights as property rights. A newly inserted section 2A provides that: "A prospecting, exploration or mining right granted in terms of this Act is a limited right which is subject to the provisions of this Act."
[20] Section 135 and 158 of the MMA (also the whole of Parts VIII & IX of the Act).
[21] Section 27 of the MMA.
[22] Section 27 of the MMA. *See also* section 178 of the MMA that recognises surface rights of miners.
[23] Naturally, the expiry or termination of the mining rights directly leads to the expiry or termination of whatever rights of possession, occupation or use to land that the mining company had. *See Grandwell Holdings Pvt Ltd v. Minister of Mines & Ors*, HH193-2016.

This provision needs clarification. Ordinarily, mineral resources are state property, and the state divests its ownership by parcelling out mining rights and mining title to third parties. In contrast, however, the fact that the Act creates a trusteeship of resources in the president is made clear. In essence, this section entails that third parties only hold mining rights at the pleasure of the president. Most importantly, however, this ownership of mineral resources by the president extends only to minerals in the ground, still to be extracted, exploited, processed or refined. It does not extend to minerals lawfully extracted by private companies and in their possession. The section is aimed at guarding against landowners who claim that their ownership of the land extends to their ownership of everything in the soil, under it and above it including mineral resources.

Accordingly, mining rights and title are well encompassed within the context of the constitutional property clause. Mining investors have the right to acquire, hold, occupy, use and transfer mining rights, but in accordance with relevant and applicable laws. Importantly, however, the Constitution explicitly guarantees, protects and entrenches private property rights such as mining rights.

5 Compensation for Deprivations and Acquisitions of Property

An important feature of the property rights clause is that compulsory deprivation can only proceed in terms of a law of general application, and such deprivation must be necessary in the public interest (i.e. in the interests of defence, public safety, public order, public morality, public health, town and country planning or in the development or use of that property or another for a purpose that benefits the community). The fact that property is subject to deprivation and compulsory acquisition by the state means that the compensation regime for such acquisitions is critical. Generally, in the context of foreign investment, there is no doubting the fact that whilst a strong government that can enforce and protect property rights is necessary, danger always lurk as the same government can also abrogate or take away such rights without due and adequate compensation.

Under the Zimbabwean Constitution, the acquisition or deprivation of property is subject to compensation. In terms of section 71(3), in cases of compulsory acquisition or deprivation, the acquiring authority is required to give reasonable notice to all persons likely to be affected of the intention to acquire property before the acquisition can proceed. Implicitly, this means that an affected property owner can challenge the reasonableness of the notice period. Most importantly, the acquiring authority is required to pay fair and adequate compensation for the acquisition before acquiring the property, or within a reasonable time after the acquisition.

It is important to note that the 2013 Constitution seems to depart from previous constitutions in relation to compensation regimes. Previously only compulsory acquisition of property required compensation.[24] Deprivations, understood to refer to

[24] *Hewlett v. Minister of Finance and Another*, 1982 (1) SA 490 (ZS) (1981 ZLR 571); *Davies v. Minister of Lands, Agriculture and Water Development*, 1994 (2) ZLR 294 (H) and 1997 (1) SA 228 (ZS).

restrictions on the use of property, were uncompensated. The 2013 Constitution interchangeably uses the terms 'acquisitions' and 'deprivations' in section 71. Accordingly, it has become almost impossible not to conclude that this means that both acquisitions and deprivations are now subject to compensation.[25]

It is hereby submitted that in practice the government is likely to compensate only those deprivations that are of such nature as to equate to acquisitions. The rationale is that ordinarily governments find it impossible to compensate for every kind of deprivation, large and small, for instance, those deprivations necessary in town and country planning, environmental conservation, telecommunications development, public health promotion or for any other public purpose. These restrictions are necessary to society and critical in the enjoyment of not only property rights but other rights as well.

6 Compulsory Acquisition under the Mines and Minerals Act

In terms of section 398, the president has the right to "acquire either the whole or any portion of a mining location, or limit the rights enjoyed by the owner thereof" under the Mines and Mineral Act.[26] A mining location is defined in the MMA to mean "a defined area of ground in respect to which mining rights, or rights in connection with mining, have been acquired under this Act". Substantively, this is the actual land or ground upon or under which mining activities are conducted. Such land can be compulsorily acquired by the president for a public purpose. The meaning of *public purpose* is not clear, but it is submitted that it may mean any use that is beneficial to society or that is meant to benefit a wider section of the public. For instance, in attempts to acquire parts of land given to Zimplats, the president claimed that:

> The land to be acquired will allow for the immediate entry of new players into the platinum sector. This will bring immediate benefit to the public through employment creation and an enlarged revenue base for the government of Zimbabwe (that is more companies paying royalties, corporate tax and Pay As You Earn). The Government will also receive dividends as it will be a shareholder in the new companies to be brought on board, as will the local community in the area through the company share ownership scheme.[27]

Further, the MMA makes it clear that the Land Acquisition Act applies in the compulsory acquisition of the mining location. Most importantly, compensation is payable for such acquisition. In order to attend to compensation, the Minister of Mines "may direct any person employed in his Ministry to conduct an investigation into the nature and extent of any mining operations that have been or are being conducted on the mining location that has been or is to be acquired". It is not clear whether the compensation has to be fair, adequate or at market value, as there is no criteria or mechanism to assess the amount. However, it is submitted that the

[25] *See* A. Magaisa, 'Property Rights in the Draft Constitution', available at <archive.kubatana.net/docs/demgg/crisis_zimbabwe_briefing_issue_86_120808.pdf> (accessed on 10 July 2017).
[26] Section 398(1).
[27] *See President of The Republic of Zimbabwe v. Zimbabwe Platinum Mines Pvt Ltd*, LA13/16.

provision might be read to mean compensation that is fair in terms of market value of the acquired rights.[28]

Another intriguing question is whether exploited or extracted mineral resources can be subjected to compulsory acquisition or deprivation under section 71. This question arises in view of the claim that extracted or exploited mineral resources are owned by the person or company that has lawfully extracted them, not the president or the state. Further, this question arises for purposes of business confidence – a foreign multinational company undertaking mineral resource exploitation in Zimbabwe needs to be sure that its exploited minerals are not subject to arbitrary seizure by the government on the basis that they belong to the state or the president.

7 Protection of Mining Investments from Seizure by the State

7.1 *Case Study: Diamond Consolidation*

The final question to be addressed is whether the state can seize or compulsorily acquire mining investments, such as a private company's mines in terms of section 71, justifying this on the public interest. This brings us to one of the most controversial policies by the government of Zimbabwe, namely consolidation of diamond companies.

There is no formal, published policy document known as consolidation policy; neither was there a green paper or white paper document floated for discussions purposes prior to the adoption of this government position. Indeed, the consolidation is a government approach or position, not a policy framework. The consolidation of diamond companies was announced through the press and government media.

In order to understand critical aspects of the consolidation 'policy', it is helpful to start from a governmental interpretation. On 6 April 2017, the Parliamentary Portfolio Committee on Mines and Energy presented to Parliament a *Report on the Consolidation of Diamond Companies.*[29] The Report does not define or attempt to describe the true nature of consolidation. It states that by the end of 2015, government position shifted "with the thrust of centralising all diamond mining activities through Zimbabwe Consolidated Diamond Company (ZCDC)".[30] At best, this is the nearest that the Report comes to definition of consolidation – centralising of diamond mining through a government diamond mining company, the ZCDC.

On paper, the Report implies that the purpose for the consolidation was in the public interest – it included the need "to stimulate growth and productivity of the diamond

[28] This would be in line with the common law basis of Zimbabwe's property law; *see* F. Mann, 'Outline of a History of Expropriation', 75 *LQR* (1959) p. 188; *Estate Marks v. Pretoria City Council*, 1969 3 SA 227 A 244; *Bestuursraad van Sebokeng v. M & K Trust &Finansiele Maatskappy (Edms) Bpk*, 1973 SA 376 A 385.

[29] *First Report of the Portfolio Committee of Mines and Energy on the Consolidation of Diamond Companies*, S.C. 9 – 2017, 6 April 2017, available at <http://www.veritaszim.net/sites/veritas_d/files/Portfolio%20Committee%20on%20Mines%20and%20Energy

[30] *See* section 2 of the Report.

industry, as well as promote transparency and accountability in the entire diamond value chain, with the ultimate result of improved revenues inflows to Treasury".[31] In practice, however, the real and practical implications of the policy on the property rights of private mining companies, foreign or domestic and on the rule of law were swept under the carpet. Most importantly, the Report describes the corporate structure formed from consolidation as follows:

> ZCDC's shareholding would comprise of all the mining companies that were operating in Marange with government retaining a 50% shareholding. ZCDC was to appoint five of the ten board members and the rest would be selected from among the former joint venture partners. Each joint venture partner would get shares based on the net value of assets and liabilities.[32]

There was no operational or financial incentive for private diamond companies to enter into consolidation at all. Government was fully aware of this, and expected the stiff resistance from targeted companies. The Report states that the consolidation was initiated in the context of section 291 of the Mines and Minerals Act which gave the Minister of Mines power to refuse renewing licenses of mining companies. This means that the government used a carrot and stick approach to private diamond companies; take the consolidation carrot dangled or face non-renewal of licenses and definite expulsion. Indeed, the consolidation policy was carefully timed to coincide with the expiry of mining licenses of various mining companies. Unsurprisingly, most diamond companies were conducting mining activities on the basis of expired mining licences and the government was well aware of this fact. Thus in addition to failing to renew expiring licences, the government just reminded companies that they were operating illegally as their licences had expired, with some licenses having expired more than five years prior. Clearly, the carrot and stick approach was perfect, at least on paper. Despite this context, mining companies continued to resist consolidation, and the government did not hesitate to refuse to renew their licences, move in and take control of their mining locations, sites, operations and activities on the ground. Meanwhile, in the face of this resistance, the government consequently resolved to "expand its shareholding to 100 percent in ZCDC".[33]

Upon the controversial take-over of diamond mining investments, the government was faced with various challenges. The Report states that in addition to exploration problems, the outgoing companies had inadequately invested in diamond mining and had consequently failed to meet mining obligations.[34] Further, most of the joint venture companies were not fully fulfilling their investment agreements. The most damning finding by the Portfolio Committee was, however, that at the time of the take-over all the companies were insolvent.[35]

This meant that these companies were highly exposed to litigation with creditors claiming large sums of money, attaching important mining equipment and auctioning

[31] *See* section 4.1 of the Report
[32] *See* section 4.2.2 of the Report.
[33] *Ibid.*
[34] Section 4.3 of the Report.
[35] *Ibid.*

them at very low prices.[36] Pertinently, the real danger this created was that one of the buyers of auctioned machinery would be the government,[37] which was in real need of cheaper mining equipment to operationalise seized mining locations. Thus, this vicious cycle stood to benefit the government and collapse private mining investment altogether.

The nature of the forcible takeover was aptly described by the High Court in the *Grandwell* case.[38] In essence, the case involved resistance by private diamond mining companies from acquiescing in the 'consolidation' call by the government. The judge observed as follows:

> Apart from its marriage with Grandwell, it (government) had entered into several others with other foreign investors. But the government felt its partners were being unfaithful. It felt it was getting little or no remittances. To remedy this, it crafted a policy to merge all the diamond mining companies at Chiadzwa into one single entity. … All the disparate companies would take up 50% of the equity in it. The government reserved the remaining 50% to itself. …

Apparently government felt there was little or no progress towards the consolidation. On that date it wrote to Mbada advising, among other things, that it had discovered that the Special Grants had expired, and that, with no title, Mbada had to cease all mining activities with immediate effect and vacate the mining site. Mbada was given 90 days to remove all its equipment and other valuables. Any further access to the mining site would be upon request.

The Minister called a press conference to announce the new development. On the same day of the letter, Mbada's operations were forcibly stopped through armed police. Processing plants were shut down. Mbada's security team was disbanded and expelled from site. Other employees were forcibly evicted both from the workstations and from their site residences. Security systems were paralysed.[39]

In the briefest of terms, the takeover by government created chaos in the diamond mining industry and led to the erosion of investor confidence, the flight of foreign investment and adverse productivity patterns in the diamond mining sector. The government eventually opted to expel the diamond mining companies and invade their mining sites to take over mining operations, using equipment seized from the outgoing, expelled companies. All in all, the consolidation exercise, though

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[36] Some of the cases involved joint venture agreements between a Zimbabwean state company (ZMDC or ZCDC) and a foreign state company mining vehicle in Zimbabwe, with the partnerships arising from bilateral international agreements between governments. *See for instance Sakunda Trading Pvt Ltd v. DTZ OZ-GEO Pvt Ltd*, 3102/17, where the foreign mining company approached the courts to compel the government to assume the debts and liabilities accrued by it in its mining operations prior to consolidation.

[37] Apart from the fact that the government is a shareholder in some of the creditors, such as Sakunda Pvt Ltd, the government was directly and indirectly a creditor since the common creditors included revenue authorities, customs and excise authorities, local authorities, rural district councils, traditional leadership authorities, mining authorities at district, provincial and national levels, and other agencies of government.

[38] HH193/16.

[39] *Ibid.*

eventually not operationalised and implemented to the full, was the height of insecurity of mining investments in the diamond sector in Zimbabwe.

7.2 *'Consolidation' and Compulsory Acquisition*

There is very little doubt that both the consolidation and the take-over of diamond companies amounts to compulsory acquisition or deprivation with far reaching implications on private companies' right to property as envisaged by section 71 of the Constitution. The existing mining laws do not provide for such forcible consolidation; neither do they make provision for the *modus operandi* to be adopted in operationalising the huge consolidated company.

In a research report entitled *Consolidation of Diamond Mines in Zimbabwe: Implications, Comments and Options*, Mtisi describes the consolidation from a legalistic perspective. In this vein, Mtisi explores the consolidation policy in the context of the Companies Act, and observes that:

> the proposal to consolidate diamond mining companies is (in fact) an amalgamation of companies to form a new company that will take over the assets of the mining companies. This also means that the existing diamond mining companies will face dissolution. *This is what is contemplated in Section 193 (of the Companies Act)*. It means government wants to amalgamate companies although the government officials are using the word consolidation.[40]

Generally, even by stretching the provisions of various laws, it remains difficult to reach a conclusion that the government has power to compel consolidation, or amalgamation of private mining companies. Mtisi shares this view, illustrating that:

> there is no law which empowers Government to force companies to merge or amalgamate, unless if it (Government) is making the proposal as a shareholder in the diamond mining companies through ZMDC or Marange Resources. Government may have to negotiate with the companies and convince them to amalgamate. Government has leverage in the negotiations in that it grants mining licences in terms of the Mines and Minerals Act. It may also withdraw such licences. However, the possible negative implications of threatening investors with withdrawal of mining rights may work negatively against investments if not handled properly.[41]

From a constitutional perspective, it is prudent to start from the public interest perspective. Section 71 permits government to compulsorily acquire private property if it is in the public interest. In the above-mentioned report, Mtisi lists a number of reasons for the government's move to consolidate diamond mining. First was that "consolidation is aimed at rescuing the industry since the diamond mining companies have been struggling to operate after allegedly exhausting alluvial diamonds in all resource areas they were allocated".[42] Thus, government needed "to find ways of triggering investment in exploration hence the proposal to form a consolidated

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[40] S. Mtisi, *Consolidation of Diamond Mines in Zimbabwe: Implications, Comments and Options, Zimbabwe Environmental Law Association*, 2015.
[41] *Ibid.*
[42] *Ibid.*

company that can ride on economies of scale and invest in exploration projects".[43] Other reasons, according to Mtisi:

> range from the need to promote transparency and accountability in the production, transportation, marketing and export of diamonds. Diamond mining companies have been fleecing the country. Some have reportedly not been paying taxes and dividends. Further, Government also views the proposed consolidation as an opportunity to streamline administration and monitoring across the whole value chain of diamond mining (production to marketing) to improve transparency and accountability. The belief is that consolidation will assist in plugging diamond leakages worsened by vulnerabilities associated with having too many operators in the field.[44]

Clearly, the consolidation can be understood as a policy crafted in the public interest. However, this is not adequate to meet the requirements of section 71.

In terms of section 71, the right to property therein is limited. Thus compulsory deprivation is permissible in circumstances where:

> (a) the deprivation is in terms of a law of general application;
> (b) the deprivation is necessary for any of the following reasons –
> (i) in the interests of defence, public safety, public order, public morality, public health or town and country planning; or
> (ii) in order to develop or use that or any other property for a purpose beneficial to the community;[45]

The consolidation was announced through the press, and not through the government gazette. It was a cabinet decision not carried through the legislature to be formally implemented through general law, or an Act of Parliament. In practice, this is what is meant by a law of general application. It is that there should be a law that sanctions the limitation of the right in question (in this case, the right to property), and that lays down the conditions which would have to be satisfied prior to the right being limited.[46] Such a law has to be rational, and there must be a rational link between the law and the attainment or achievement of a legitimate societal objective. Further, the law sanctioning the limitation must be of general application and not directed at specific individuals or group, and it must be reasonably certain.[47] People must know with a reasonable degree of certainty the conduct that is proscribed and the conduct that is permitted.[48] There was no such law; the mining law drafted in 1961 has no such provisions.

The need for a general law that provides concrete backing for government policy that limits fundamental rights is echoed in the general limitation clause in section 86 of the Constitution. Section 86 is a clause that formulates principles and draws the parameters within which laws that limit fundamental rights must fall. This limitation

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[43] *Ibid*.
[44] *Ibid.*
[45] Section 71(3) of the 2013 Constitution.
[46] *See for instance* the limitations in the Land Acquisition Act, Chapter 20:10.
[47] A. J. van der Walt, *Property and the Constitution* (PULP, University of Pretoria, 2012) p. 28.
[48] S. Woolman and H. Botha, 'Limitations', in S. Woolman *et al.* (eds.), *Constitutional Law of South Africa*, volume 2, 2nd edition (2006) pp. 48–49.

clause calls for the prior need of "a law of general application".[49] In addition, such a law can only permit limitation of fundamental rights "to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom". Some of the factors to be taken into account before limiting a right include consideration of the nature of the right in question, the purpose of the limitation, the nature and extent of the limitation, the need to respect and not prejudice rights of others.[50]

In addition, there were no legal formalities that the government followed in seeking to pursue consolidation. Section 71 calls for some procedural steps to be followed by acquiring authorities prior to acquisition or deprivation. The government did not give any form of notice to private mining firms of the impending policy of diamond consolidation. However, the government had raised various warnings and alarm with the manner in which diamond mining was being conducted by mining companies.[51] Such threats did not constitute notice in any manner.

Finally, there was no compensation extended to private mining firms for loss of property in one or another. These companies were compelled to close shop, their licences cancelled despite government guarantees and they lost huge income through government's vindictive behaviour. They lost huge investments that were protected by both domestic law and international bilateral investment agreements.

Clearly, consolidation constituted a systematic attack on the property rights of foreign investors in the diamond sector. It sent the message of conflict between a government and private investors who possessed mining licences and had followed the law. It further illustrated the government's attitude towards mineral resources, and this is fully discussed below.

7.3 *Government Permanent Interest in Mineral Ownership*

The government's attitude in relation to mineral resources that commonly attract foreign investment has changed over the years. However, it has been clear that the government seeks to secure certain minerals resources and tightly control their exploitation for several reasons. The biggest testimony to this is the proposal to identify certain mineral resources as 'strategic minerals' in the draft Mines and Minerals Amendment Bill (hereinafter 'the MMAB') yet to be signed into law.

The Mines and Minerals Amendment Bill (H.B 19 of 2015) introduces the designation of strategic minerals. The Bill defines strategic minerals as minerals that "are declared or designated as strategic in terms of this section on account of their importance to the economic, social, industrial and security development of the country". A more conventional definition of strategic of critical minerals is "minerals for which the risk of disruption in supply is relatively high and for which supply disruptions will be associated with large economic disruptions". The MMAB

[49] Section 86(2).
[50] Section 86(2)(a)–(f).
[51] *See* for instance Ministry of Finance 2014 Mid-Term Fiscal Review. 2015 National Budget Statement, paras. 578–571.

designates coking coal, natural gas or coal bed methane, iron ore, manganese, antimony, tungsten, rare earth elements, lithium, tantalite, uranium, iron ore and natural graphite as critical minerals, to name just but a few. The designation of minerals as strategic minerals is not unique to Zimbabwe. This is a global trend as countries strive to retain a competitive edge over their rivals economically, militarily and technologically. The United States of America, for example, has the National Strategic and Critical Minerals Production Act of 2015. The designation of strategic minerals by developing countries is also increasingly becoming a feature as these play a critical role as feed stocks into other sectors of the economy that includes manufacturing, agriculture, infrastructure and the generation of power.

While the designation of strategic minerals is good, the problem is that the MMAB goes further to state that special and unique conditions will apply to their exploration, ownership, exploitation and beneficiation, marketing and development. The special and unique conditions are not spelt out. In line with international best practices of transparency and accountability, especially when one takes into account the fact that these are the country's most important minerals, these 'unique and special conditions' must be spelt out or provided for under the MMAB. The MMAB should set up clear and transparent guidelines on how strategic minerals are designated. The failure to do so may inhibit Foreign Direct Investment (FDI) due to the lack of clarity on the special conditions and their implications. These must be known upfront before an investor makes a commitment. Again, there is a clear intention of tighter control of mining of these minerals, albeit in a manner that does not seem to garner too much confidence to foreign investors in the mining sector.

Another recent example relates to shifting policy positions on indigenization of mineral resource extraction in Zimbabwe. In 2018, the government passed the Finance Amendment Act whose effect was to scrap the requirement of the 51/49 per centum shareholding between indigenous Zimbabweans and foreign investors in mineral resource business. Under the 2018 amendment, the requirement was now that the 51/49 per centum shareholding requirement would be only limited to two mineral resources namely diamonds and platinum. This meant that all other mineral resources were exempted – there was no requirement for mining investors to shed shareholding to reflect the 51/49 per centum except for diamond and platinum mining. The objective was to woe FDI under the Zimbabwe's economic policy of opening up the country to foreign investment.

The policy position introduced by the 2018 amendment has been reversed by yet another law. In December 2020, the government passed the Finance Act (No. 2 of 2020) which contained several amendments to other existing legislation. A key amendment related to indigenization of extractive businesses as regulated by the Indigenization and Economic Empowerment Act Chapter 14:33. Section 36 of the 2020 Finance Act (No. 2 of 2020) amends section 3 of the Indigenisation and Economic Empowerment Act. It states that "section 3 of the Indigenization and Economic Empowerment Act is amended":

a) by the insertion after “extraction of” such minerals as maybe prescribed by the Minister in consultation with the Minister responsible for Mines and the Minister responsible for Finance
b) by the repeal of paragraphs (a) and (b)

This means that section 3 (1) of the Indigenization and Economic Empowerment Act now reads as follows:

> The State shall , by the Act or through regulations under the Act or any other law, secure at least fifty one per centum of the shares or other ownership interest of every designated extractive business , that is to say a company, entity or business involved in the extraction of such minerals as maybe prescribed by the Minister in consultation with the Minister responsible for Mines and the Minister responsible for Finance , shall be owned through an appropriate designated entity (with or without the participation of a community share ownership scheme or employee share ownership scheme or trust or both.)

In essence, the Act gives the government power to declare which mineral resources can be subjected to the 51/49 per centum shareholding requirement. The initial requirement for this kind of shareholding only to two mineral resources has thus been expanded. There has been a lot concern regarding Zimbabwe’s lack of policy and regulatory consistency and coherence in the mining sector, and the Finance Act amendment of 2020 confirms this. This amendment erodes the protection of foreign investors’ property rights in the mining sector in Zimbabwe. The mining sector requires stable, predictable and transparent legislative and regulatory framework and this amendment does not provide for this.

What this means is that government’s attitude on the control of mineral resources leans on tight control. The laws passed by government to ensure this however do not instil investor confidence – they cause investor flight and scare of interested investors.

Apart from the implications to foreign direct investments, the rights of indigenous communities to benefit from locally existing mineral resources are also diminished. Under section 14 of the Constitution, the state is required to ensure that local communities benefit from the resources in their areas including mineral resources. Community Share Ownership Schemes and Trusts are provided for under section 14 B (1) of the Indigenisation and Economic Empowerment (General) (Amendment) Regulations as one of the ways through which communities have property rights in mining activities in their areas. In essence, this accords the local community a share in mining resources exploited by mining companies. Surprisingly, the Finance (No. 2) Act of 2020 diminishes this right of communities. In terms of this new Act, the government has power to prescribe that the community may not participate in resource exploitation or distribution through a community share ownership scheme or trust. This means that, whilst it seemed that the participation of communities was guaranteed, the new law clearly whittles that right and gives the government power to prescribe where CSOTs can claim participation or are excluded totally. The involvement or participation of communities is now discretionary, and this affects their property rights and their claims to resource exploitation in their communities.

8 Overview

A number of points stand out from the analysis of the constitutional protection of property rights of foreign investors in the mining sector, as well as the impact of foreign investment on the land rights of indigenous communities. The conclusions to be drawn are as follows:

> Firstly, there is no doubt that the 2013 Constitution recognises and protects the right to property. Thus the scope of protection encompasses the protection not only of the rights of foreign property owners and investors, but also guarantees fair and adequate compensation in cases of acquisition or deprivation by the government. Mining rights are property rights well envisaged by the constitutional property clause, and consequently enjoy the full protection accorded by this clause.

Secondly, the 2013 Constitution definition of property encompasses the rights and interests in land possessed by indigenous communities in terms of both customary law and legislation. Thus despite these communities lacking title to land, or freehold tenure, they cannot be easily removed, relocated or displaced from such land as the constitution protects their rights and interests on the land they reside upon, or use. Further, their occupation, use, possession and utilisation of communal land grants them use or occupational rights that are protected by the constitutional framework, despite these rights not equating to private ownership or dominium.

Thirdly, the mining laws that creates a rights framework for mining investors further recognises and protects the land rights of mining companies to the use, occupation and utilisation of the land upon which they conduct mining activities. Consequently, the special grants, general leases and other mining rights and licences are given under the mines law for dual purposes, namely the right to conduct mining activities, and also the corollary right to the occupation, use and/or possession of the land where such activities are done. This chapter has demonstrated that whilst the acquisition and redistribution of mining rights is usually done in terms of mining law, the acquisition of land rights may be done in terms of both mining law and land rights law.

The fourth point is that government policies that result in the compulsory acquisition and deprivation of the property rights of foreign investors fall outside the ambit of the constitutional protection clause, albeit to the extent such policies are not implemented through general law, or fail to compensate for the loss of rights. Accordingly, policies such as consolidation fell outside the precincts of the law. What government needed to do was to pass legislation that would create a justifiable framework for consolidation. The post-Mugabe administration has showed that it is interested in tight ownership and control of mineral resource exploitation, and will continue to pass laws to limit the freedom of foreign investors in this sector. These laws, however, reduce clarity, stability and certainty to foreign direct investment as they do not provide concrete protection or security of mining rights.

Finally, the mining law, particularly the framework Mines and Minerals Act, is outdated and out of sync with contemporary mining methods and practises. The Act needs to be amended as a matter of urgency, and despite positive efforts in this

regard,[52] government is not moving fast enough. As it is, the Act does not adequately complement the constitutional property clause; nor does it make it easy for government to manoeuvre in its attempts to balance the public interest and the expectations of foreign investors in the mining sector.

9 Conclusion

There is little doubt that the 2013 Constitution goes a long way in the recognition, protection and promotion of the right to property. Indeed, this research has illustrated that the manner in which the constitutional property clause is phrased extends a respectful level of recognition and protection to property rights of both foreign investors and indigenous communities. This set up provides an important value system that should guide and determine the content of legislation promulgated to give effect to and/or limit the right to property. And therein lies the problem. Existing legislation is still some way towards milking the gains of a Constitution that post-dates various statutes, and the mining law is just one example of such legislation.

In this chapter, it has also been illustrated that as far as rights discourse is concerned, the Zimbabwean government struggles to balance the conflicting rights and interests of indigenous communities and foreign investors, particularly in the mining sector. Further, and more worryingly, the government has found it difficult to follow the requirements set out in the constitutional property clause prior to interfering with the right to property of foreign investors. This research clearly highlighted the variance between the content of constitutional rights and the content of government policy, and the implications this has had on the right to property are grossly adverse, in the least. Consequently, the consolidation policy, briefly sketched in this chapter, was not crafted, implemented and applied in terms of a law of general application; neither did it ensure compensation for infringed rights. It was a policy that created chaotic developments echoed in various court decisions that eventuated as a result of the consolidation policy.

In conclusion, therefore, at least in relation to the right to property, constitutional theory has not matched or shaped government actions, manifested through government policies. Constitutional theory must match governmental practice in order for fundamental rights to be adequately recognised and protected in Zimbabwe. Constitutional practice must shape the actions and policies of government, and eventually promote the rule of law since it means the government is acting in terms of the Constitution. The larger the gap between constitutional theory and government practice, the lesser the right to property is guaranteed and protected. For Zimbabwe, the consolidation policy explains the gap that exists

[52] This 2015 Mines and Minerals Amendment Bill was the third such meant to amend the Mines and Minerals Act, a piece of law that has stayed in the statute books since 1961. The government drafted the first amendment to the Mines and Minerals Act in 2007. This amendment did not see the light of day. The second amendment to the mines law was drafted in 2010. Again, this effort did not materialise into concrete legislation. In 2013, Zimbabwe adopted a new Constitution, the 2013 Constitution, and this necessitated various changes in all laws in general. Inevitably, the 2015 MMAB version could be seen as directly responding to the framework created by the 2013 Constitution, and incorporates, to some extent, positions suggested in the 2007 and 2010 draft mining law amendments.

between governmental practice and constitutional theory, and the state of the rule of law in the area of property rights.