

Compulsory acquisition and deprivation of property rights under Zimbabwe's 2013 Constitution: Dissecting the interpretive problems

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1.1 Introduction

The acquisition and deprivation of property rights within a state mirrors the respect and value accorded to private property rights in a particular state. Such respect and value is usually echoed in constitutional documents, or the basic law of the state, and given effect to in ordinary legislation. Section 71 of the 2013 Constitution of Zimbabwe² establishes a framework not only for the recognition, protection and regulation of property rights in the legal system, but also for the compulsory acquisition and deprivation of same rights by the state. Ordinarily, this constitutional property clause reflects the tensions and conflicts inherent in a constitutional property rights system shaped by colonial legacies and common law principles.³ Indeed, that the constitutional provisions on compulsory acquisition and deprivation of property rights arouse debates and controversy owes much to this context.

Since 1980, the jurisprudence of constitutional property law has significantly developed, consequently leaving very few grey areas. This development has led to a largely settled position, thanks to judicial interpretation, regarding the meaning, application and scope of the terms compulsory acquisition and deprivation.⁴ Indeed, both the legislature and the executive have largely followed the interpretation of the courts regarding the meaning of these terms. Quite unsurprisingly, the legislature and the executive have practically enacted and implemented legislation whose application gave effect to the meaning extended to acquisition and deprivation by the courts.

However, the 2013 Constitution clearly introduces a very different position in relation to compulsory acquisition and deprivation of property rights. The property rights regime that is entrenched in section 71 resurrects debates long interred. This contribution examines the

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² Published as Constitution of Zimbabwe Amendment Act No. 20 of 2013.

³ See J Tsabora 'Reflections on the constitutional regulation of property and land rights under the 2013 Zimbabwean Constitution' 2016 *Journal of African Law* 1.

⁴ See *Hewlett v Minister of Finance*, *Nyambirai v NSSA*, *ZIMTA v Ministry of Public Service, Labour and Social Welfare*, *Davies v Minister of Lands, Water and Agriculture*

general interpretive problems and controversies introduced by the clause, and the implications of the various interpretive approaches to the property rights regime entrenched in section 71 of the 2013 Constitution.

1.2 Distinction: Deprivation and Acquisition

Zimbabwe's constitutional property law has largely observed and maintained a distinction in definition, scope and meaning between the terms 'deprivation' and 'acquisition'. A number of decisions from the superior courts⁵ seem to have clearly delineated the meaning, scope and interpretation of these two terms. Resultantly, the 1980 Lancaster House constitutional framework had buried any jurisprudential debates around these terms, thanks to the interpretive role of the judiciary. To buttress this, a descriptive analysis of the 1980 constitutional framework is apposite.

The constitutional property rights regime established by the 1980 Constitution was clear and uncontroversial. The 1980 Constitution contained section 16 which was entitled 'Protection from deprivation of property'. Apart from this heading, there was nowhere else under section 16 where the word 'deprivation' was adopted, defined or used; indeed the section was exclusively dedicated to the compulsory acquisition of property.⁶ This notwithstanding, it is significant to note that in the interpretation of section 16, the courts did not ignore the existence of 'deprivations' in the jurisprudence of constitutional property

⁵ For instance, *Hewlett v Minister of Finance and Another* 1982 (1) SA 490 (ZS) (1981ZLR 571; *Davies v Minister of Lands, Agriculture and Water Development* 1994 (2) ZLR 294 (H) and 1997 (1) SA 228 (ZS).

⁶ At the time of the *Flewlett* case in 1982, the constitutional property clause of the Lancaster House Constitution, 1980 provided that property may not be compulsorily acquired except under the authority of a law that:

- '(a) requires the acquiring authority to give reasonable notice of the intention to acquire the property, interest or right to any person owning the property or having any other interest or right therein that would be affected by such acquisition;
- (b) requires that the acquisition is reasonably in the interests of defence, public safety, public order, public morality, public health, town and country planning, the utilisation of that or any other property for a purpose beneficial to the public generally or to any section thereof or, in the case of land that is under-utilised, the settlement of land for agricultural purposes;
- (c) requires the acquiring authority to pay promptly adequate compensation for the acquisition;
- (d) requires the acquiring authority, if the acquisition is contested, to apply to the General Division or some other court before, or not later than 30 days after, the acquisition for an order confirming the acquisition; and
- (e) enables any claimant for compensation to apply to the General Division or some other court for the prompt return of the property if the court does not confirm the acquisition and for the determination of any question relating to compensation, and to appeal to the Appellate Division.¹

law⁷. Three important decisions of the superior courts illustrated this, and should be discussed here.

The Hewlett⁸ case revolved around legislation that took away the right of persons to claim compensation for loss of property. The contention was that such right to compensation is a right to property and if the state needed to take away such right, it had to comply with section 16 of the Constitution that required compensation for all acquisitions. In his judgment, Fieldsend CJ declared that;

"This is clear recognition that there is a distinction between deprivation and acquisition, and also an indication that not every deprivation of property must carry compensation with it."

The Davies decisions, in both the High Court and Supreme Court, provided very clear interpretation of the meaning and place of the terms deprivation and compulsory acquisition in Zimbabwe's constitutional property law. In the High Court, the main argument was that designation of commercial farms under the Land Acquisition Act amounted to uncompensated compulsory acquisition of property, hence was unconstitutional. Of course this was in light of section 16 of the Lancaster House Constitution demanding that all compulsory acquisitions of property be compensated. After an examination of pertinent cases, Chidyausiku J (as he then was) made the following important conclusions;

- (i) In terms of Roman -Dutch law, which is the common law of Zimbabwe, the State is vested with 'dominium eminens' over the property of its subjects and this power entitles it to compulsorily acquire private property in the public interest, albeit subject to the Constitution.
- (ii) Under the same common law, the State is vested with police powers or the power to control the use of private property in the public interest.
- (iii) Compulsory acquisition requires the payment of compensation whereas the exercise of police or control powers does not necessarily demand compensation.

⁷ Supra.

⁸ 1982 (1) SA 490 (ZS) (1981 ZLR 571.

When the matter was taken to the Supreme Court, the main question remained whether the act of designation under the Land Acquisition Act amounted to uncompensated compulsory acquisition of property, hence unconstitutional since the constitution required payment of compensation for all acquisitions. The major findings of the Supreme Court were as follows;

- (i) The act of compulsory acquisition was different from an act of deprivation in common law. Compulsory acquisitions transferred rights to the acquiring authority and the State can do so under its power of 'eminent domain' which it always enjoyed.
- (ii) To the contrary, deprivation does not transfer rights to the State. In essence, a compulsory deprivation is more of an attenuation or negative restriction of some rights that come with private ownership. Compulsory acquisition thus leads to the extinguishing of property rights altogether, unlike compulsory deprivation which is uncompensated, and results in negative restrictions.

These cases demonstrate that despite the absence of the term 'deprivation' in section 16, the courts did not ignore its existence and significance in constitutional property law. Equating deprivations with 'loss or restrictions arising from the exercise of police or control powers'⁹ by the state, Chidyausiku J,¹⁰ noted that;

"In Zimbabwe, the Constitution provides for compensation for the acquisition of property or interest or right in a property. The Constitution does not provide specifically for loss or restrictions arising from the exercise of control powers by the state."

The High Court further hinted that the absence of a constitutional regulatory framework for compulsory deprivations suggested that they could only be carried out in terms of ordinary legislation.¹¹

⁹ It should be observed that in the Davies case, Chidyausiku J did not use, adopt or employ the term 'deprivation' anywhere. The learned judge preferred to stick to the description of restrictions passed due to the State's exercise of 'police' or 'control powers'. However, it is clear that this is the actual definition of deprivations, and indeed, Gubbay CJ refers to such restrictions as 'deprivations'.

¹⁰ Davies, *supra* at 301.

¹¹ For instance Chidyausiku J (as he then was) makes the following point in the Davies case: "For instance, there are numerous enactments in our statute books that provide for control, but do not provide for compensation for any loss or restriction arising from those measures of control. This, to some extent, gives a

In the Supreme Court, Gubbay CJ reasoned that section 16 of the Lancaster House Constitution essentially protected property by establishing procedures and requirements to be complied with in cases of compulsory acquisition of property.¹² Most importantly, the learned Chief Justice observed, in relation to the acquisition of property, that there was...

"... no additional protection (of property) to that expressed in s 16(1). In particular, it (section 16) does not afford protection against deprivation of property by the State where the act of deprivation falls short of compulsory acquisition or expropriation. No compensation is thus required for such deprivation of rights in property."

Essentially, the legal position derived from judicial interpretation is that under the 1980 constitutional framework, property rights were subject to both compulsory acquisition and compulsory deprivation. However, the State had to comply with requirements of section 16 only in cases where it desired to compulsorily acquire the property. Compulsory deprivations, though known, were not to be protected or regulated under the constitutional property clause, and were thus, for instance, uncompensated.

2. The 2013 Constitutional Framework

2.1 Section 71 of the Constitution

Section 71 opens by a definition of property, as "property of any description and any right or interest in property." This rather abstract definition implies that property encompasses and encapsulates a very broad range of things, and the definition is difficult to circumscribe.¹³ The courts have seemed neither particularly willing to further develop this understanding of

clear indication that by and large measures of control can be enacted without provision for compensation. The following are examples of statutory provisions providing for control without compensation. Section 40 of the Regional Country and Town Planning Act 27 of 1976 prohibits the subdivision of property without the permission of the Minister. There is no provision for compensation for the diminution of the right of ownership to all land owners who are affected by this provision. The same section also prohibits the leasing of a portion of any undivided land for a period in excess of 10 years without permission. It is interesting to note that the restrictions imposed on land owners by s 40 of the Regional, Country and Town Planning Act are very similar to the restrictions imposed on owners of designated land by Part IV of the Act under consideration"

¹² *Supra*, at 232.

¹³ See *Hewlett v Minister of Finance supra*, at 497- 499. The learned Chief Justice observed (at 497) that the definition of property "seems to embrace the widest possible range of property and to include at least any money debt due including such a debt due by the State. It would require very strong indications, particularly having regard to the principles of interpretation which have to be applied to a provision of this nature, to limit these very wide words."

property, nor to comprehensively flesh the definition so that the content and scope of constitutional property is clear.¹⁴

In addition, section 71 (2) recognises and affirms 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."¹⁵ Clearly, these explicit entitlements derive from a common law definition of ownership;¹⁶ hence it can be observed that the constitutional property clause develops from a common law foundation. Further, it is also significant to note that section 71 (2) is phrased in positive terms. The positive formulation explicitly guarantees private property rights in the constitutional system, meaning that such rights are entrenched, and cannot be taken away without constitutionally permissible process.

2.2 Deprivation and Acquisition in the 2013 Constitution

The Constitution makes provision for the compulsory 'deprivation' of property rights in section 71 (3). The section is phrased in a rather curious manner, particularly in relation to the use and timing of the use of the terms 'deprivation' and 'acquisition'. Section 71 (3) provides thus;

3. Subject to this section and to section 72, no person may be compulsorily deprived of their property except where the following conditions are satisfied—

(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

¹⁴ Compare with South African jurisprudence on their property clause in section 25. In the FNB/Wesbank case (p44), Ackermann J stated that "At this stage of our constitutional jurisprudence it is, for the reasons given above, practically impossible to furnish - and judicially unwise to attempt - a comprehensive definition of property"

¹⁵ Section 71(2).

¹⁶ These entitlements include includes the entitlement to use the thing (*ius utendi*), to possess the thing (*ius possidendi*), to enjoy the fruits or income from the thing (*ius fruendi*), to dispose the thing (*ius disponendi*), to resist unlawful invasion (*ius negandi*), to destroy the thing (*ius abutendi*) and to claim the thing from an unlawful possessor (*ius vindicandi*). See Badenhorst P et al, Silberberg and Schoeman's *The Law of Property*, 4th ed, Lexis Nexis Butterworths, 94.

(ii) in order to develop or use that or any other property for a purpose beneficial to the community;

(c) the law requires the acquiring authority—

(i) to give reasonable notice of the intention to acquire the property to everyone

whose interest or right in the property would be affected by the acquisition

(ii) to pay fair and adequate compensation for the acquisition before acquiring the property or within a reasonable time after the acquisition; and

(iii) if the acquisition is contested, to apply to a competent court before acquiring the property, or not later than thirty days after the acquisition, for an order confirming the acquisition:

(d) the law entitles any person whose property has been acquired to apply to a competent court for the prompt return of the property if the court does not confirm the acquisition; and

(e) the law entitles any claimant for compensation to apply to a competent court for the determination of —

(i) the existence, nature and value of their interest in the property concerned;

(ii) the legality of the deprivation; and

(iii) the amount of compensation to which they are entitled; and to apply to the court for an order directing the prompt payment of any compensation.

A number of observations can be made in an analysis of section 71. Firstly, it is easy to overlook that section 71 (3) is essentially a prohibition against compulsory deprivation of property. This directly suggests that it is wholly and exclusively concerned with compulsory deprivation, not compulsory acquisition. Quite strangely however, the section proceeds to interchangeably use and refer to both compulsory acquisition and compulsory deprivation in a sense that appears to suggest these two concepts bear the same meaning. Hence, section 71 (3) (a) broadly refers to compulsory deprivation, sections 71 (3) (c) and (d) make reference to compulsory acquisition, and finally section 71 (3) (e) reverts to compulsory deprivation.

Indeed, there appears an intention to destroy the traditional distinction between deprivations and acquisitions; these two words are used interchangeably, and both processes are accompanied by compensation. Secondly, it is very clear that unlike in the 1980 Constitution, both deprivations and acquisitions are now constitutional processes, and

constitutionally regulated. Indeed, 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).

In practise, the understanding of 'law of general application' is that there should be a law that sanctions the limitation, and that lays down the conditions which would have to be satisfied, prior to the right being limited.¹⁷ 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.¹⁸ People must know with a reasonable degree of certainty the conduct that is proscribed and the conduct that is permitted.¹⁹

What then to make of the interchangeable use of two terms that have borne a very different meaning in Zimbabwe's constitutional history? A number of questions remain to be answered. For instance, has the Constitution, it may be asked, now done away with the age-old common law distinction between these terms, and the dual regimes of acquisition and deprivation, recognized and respected by Zimbabwe's superior courts? If it can be argued that this is now the case, it means, for instance, that compensation has to be paid for both acquisitions and deprivations. This line of reasoning is preferred by Professor Magaisa, and, because his views are pertinent, they are presented *verbatim*.²⁰ His reasoning is as follows:

"Nevertheless, the way in which Clause 4.28 (section 71 (3)) is worded seems to blur this distinction (between deprivation and acquisition). The clause refers to both "compulsory deprivation" and the "acquiring authority" as if deprivation and acquisition refer to the same legal concept. Indeed, it refers to "compulsory deprivation", a term hitherto unused in the

¹⁷ See for instance limitations in the Land Acquisition Act, Chapter 20:10

¹⁸ AJ van der Walt Property and the Constitution PULP, University of Pretoria (2012) 28.

¹⁹ S Woolman and H Botha 'Limitations' in S Woolman et al (eds) Constitutional law of South Africa vol 2 (2nd ed OS 2006) 48 - 49.

²⁰ A Magaisa 'Property Rights in the draft Constitution' available at archive.kubatana.net/docs/demgg/crisis_zimbabwe_briefingjssue_86_120808.pdf accessed on 11 March 2017.

constitution. Significantly, the way the conditions for "compulsory deprivation" are stated suggests that deprivation attracts compensation and the traditional distinction between deprivation and acquisition will be consigned to the archives. As far as the rights of persons are concerned, this is not a bad thing as it safeguards the rights against deprivation in the same way as rights against acquisition. The need to develop a doctrine of constructive acquisition, through so-called deprivation will no longer be necessary. Whether a person is deprived of his or her property or that property is acquired, he or she will be entitled to "reasonable notice", "fair and adequate" compensation and more importantly, to challenge the deprivation/acquisition in a court of law."

The interpretation and conclusions by Professor Magaisa are based on a literal or grammatical reading of the text, and consequently produce a very safe result. For instance, his analysis does not 'dare' imagine the implications of the state having to compensate for even the smallest kind of deprivations such as servitude. Certainly, however, his reasoning is difficult to fault. The problems lies not with the clear, literal and grammatical meaning of the words, but with the absurdity that seems to accompany the grammatical approach. For instance, if there now exists a single regime for deprivations and acquisitions, as Professor Magaisa claims, does it mean that all deprivations are now compensable under the Constitution, a position in stark contrast to the hitherto jurisprudence of Zimbabwe's constitutional property law? Further, is there authority in the jurisprudence of constitutional law and interpretation that the use of two terms in a single clause interchangeably means that such words bear the same meaning? Finally, if the framers of the Constitution desired to abolish the traditional distinction, would they have done so in this less than explicit manner? In essence, there is no escaping the fact that section 71(3) is incapable of one interpretation, and the interpretation proffered by Professor Magaisa is merely one of the various interpretations of the clause.

2.3 An alternative interpretation of section 71

A different reading of section 71 is however possible, with the consequent interpretation of the clause suggesting that whilst the Constitution now regulates both acquisitions and deprivations, the regime for these protections still differs. The basis for this argument is derived from a practical understanding of the term 'deprivations' and 'acquisitions' from

domestic and comparative constitutional property law jurisprudence, and also a careful reading of section 71. Both these grounds have to be explored.

The first ground for supporting an interpretation that favours two distinct regimes derives from a practical understanding of 'deprivations' from Zimbabwe's constitutional history. Having said this, it becomes inevitable to examine the property rights clauses of constitutional documents that are part of in Zimbabwe's constitutional history since 1980. In this vein, as demonstrated above, there was nowhere in the Lancaster House Constitution, 1980, where the word 'deprivation' was adopted or used. The constitutional property clause was exclusively dedicated to the compulsory acquisition of property, and made no mention of deprivations.

Another reference point is the constitutional property clause of the rejected constitutional draft of 2000. Section 56 embodied the constitutional property clause, and it was as clear as it was direct, providing that;

"(t)he State or an authority authorised by an Act of Parliament may acquire property compulsorily for public purposes or in the public interest".

Throughout the clause, there is no mention of deprivation, meaning that the clause would have to be interpreted in the same manner as section 16 of the Lancaster House Constitution, 1980. Another interesting constitutional document was the Kariba Draft Constitution, whose (coincidentally) section 56 makes no mention of deprivation.²¹

Yet another constitutional draft document is the one presented for discussion by the National Constitutional Assembly ('NCA'), under the leadership of Professor Madhuku, a constitutional law scholar. The pertinent provisions read as follows:

2. No person may be compulsorily deprived of property or any interest in or rights over property except that:

(a) ...

²¹ There are however a number of instances where property could be limited in the public interest but where such limitations do not effectively amount to a compulsory acquisition. It can be argued that the Kariba Draft Constitution intended to recognize deprivations as regulatory controls that should be permissible, but that should not be regarded as acquisitions since they were merely regulatory' in nature. For this, see the reasoning of Chidyausiku J in the Davies case (HC), where the learned judge carefully examined American property rights jurisprudence.

- (b) the state is entitled to compulsorily acquire land or other natural resources to achieve an equitable land ownership pattern or resource redistribution either to redress past racial discrimination or for the benefit of the people of Zimbabwe, provided the acquisition is done in terms of a law prescribed for that purpose and fair and equitable compensation determined by an independent court is paid within a reasonable time"

It is not difficult to observe that the property rights clause in this NCA document suffer from curiously similar interpretive problems as those ones inherent in the 2013 Constitution. It seems that the NCA draft prohibited compulsory deprivation, but recognised the state's entitlement to compulsorily acquire land and other natural resources. In essence, compulsory acquisition of property by the state is made an exception to the general prohibition against compulsory deprivation. It is also clear that the clause cannot be read as establishing a framework for compulsory acquisition or deprivation of property; indeed the clause permitted compulsory acquisition of land and other natural resources only. It did not create procedures or requirements for the deprivation or acquisition of property other than land and natural resources because such acquisition or deprivation was explicitly prohibited.

2.4 Legislative jurisprudence

Another basis for supporting an interpretation that distinguishes 'acquisition and 'deprivation' of property regimes can be inferred from the jurisprudence of constitutional property law in Zimbabwe since 1980. Such an understanding, as is clear from notable cases, suggests that 'deprivations' are ordinarily uncompensated, unless the statute authorizing specific deprivations say otherwise. The reason for not compensating 'deprivations', which, in the *Davies* case, Chidyausiku J calls 'restrictions' arising out of the proper exercise of the State's police powers, is that it might be impractical for a State to decide to pay compensation for all sorts of control measures that could be encapsulated in the definition of 'deprivations'. In the *Davies* case, Chidyausiku J gives an example of 'designation' under the Land Acquisition Act. Since such 'designation' was later in the judgment, and also in the Supreme Court held to be a mere 'deprivation', it would be 'impractical' and 'ridiculous' to expect the State to pay compensation to all affected commercial white farmers for such a measure.

This point can be stretched even further, using the reasoning of Chidyausiku J in the same *Davies* case. According to the learned judge, there are numerous statutes that recognise

and authorize 'deprivations' or 'control measures' but do not require the State to pay compensation.²² Such control measures are critical for various reasons including public health, public morality, public safety, among other grounds.²³ In the *Hewlett*²⁴ case, Fieldsend CJ clearly agreed with the necessity for such legislation, declaring that:

"Indeed government could be made virtually impossible if every deprivation of property required compensation. A liquor licence, for example, is a valuable asset and may be regarded as property. If legislation were to provide for the compulsory transfer of such a licence to another without compensation it would almost certainly be unconstitutional. But if a government decided to introduce prohibition and to withdraw all liquor licences it could not be said that by its mere extinction a licensee's licence had been acquired."

There is no doubt that both the High Court and the Supreme Court, in the *Davies* case, clearly agreed with Fieldsend Q's approach. It would seem that a state cannot survive without ordinary deprivations, small or large scale and that a small would find it impossible to compensate for all and every kind of deprivation authorized by law. A plethora of statutes, for instance, in environmental management and conservation, defence and security, telecommunications, regional, town and country planning and mining and mineral resource development permit the state to impose restrictions on the use, enjoyment of property.

To exemplify, section 113 of the Environmental Management Act²⁵ clothes the Minister of Environment with power to 'declare any wetland to be an ecologically sensitive area and may impose limitations on development in or around such area.' The provision proceeds to prohibit any owner of land harbouring a wetland from, (a) reclaiming or draining wetlands;

(b) disturbing any wetland by drilling or tunnelling in a manner that has or is likely to have an adverse impact on any wetland or adversely affect any animal or plant life therein; and

(c) introducing any exotic animal or plant species into the wetland. All these measures are restrictions over property and easily fall under deprivations. These deprivations are not compensated, and even the Environmental Management Act does not recognize any need

²² An example is the Regional Country and Town Planning Act.

²³ The reasons are expressed in section 71 (3) (b) of the Constitution.

²⁴ *Supra* at 502.

²⁵ Chapter 20:27

for their compensation. Indeed, any action in contravention of section 113 constitutes a serious criminal offence that attracts a fine or imprisonment of up to two years.²⁶

An analysis of approaches in other jurisdictions might strengthen the argument against compensation for all sorts of deprivations. For the United States, the case of *Pennsylvania Coal Co v Mahon* 260 US 393 (1922) 413, reasoned that:

"[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power."

An eminent American scholar echoed this position, and succinctly illustrated the US position in the following terms:²⁷

"If the government wants to convert a private house into a post office, or run a new highway through a farm, or build a dam which will flood nearby land, it is going to have to compensate the losses sustained as a result of these activities. In such cases courts uniformly hold that property has been taken by the government, thus bringing into operation the constitutional mandate that private property may not be taken for public use without just compensation. But if government prohibits the continuance of a business which has been established for a long time, or outlaws certain businesses altogether, or prohibits the use of land for any of the purposes which give it substantial economic value, it may not have to pay a penny. In cases of this type, where the government is engaged in zoning, nuisance abatement, conservation, business regulation, or a host of other functions, courts will usually decide that the economic loss suffered by the private citizen was a mere incident of the lawful exercise of the "police power," and thus not compensable.'

²⁶ Section 113 (3) of Environmental Management Act.

²⁷ JL Sax 'Takings and the Police Power' 74 (1964) Yale Law Journal 36.

This reasoning clearly supports the views of both Fieldsend CJ in the Hewlett case, and Chidyausiku J in the Davies case, and thus, most certainly, has been echoed in Zimbabwe's jurisprudence of constitutional property law in the last thirty years.

The Constitutional Court of South Africa had a moment to ponder various positions of various legal systems in relation to deprivations in general. The conclusions of Ackermann J in the FNB/Nesbank²⁸ case are opposite:

"Comparative law cannot, by simplistic transference, determine the proper approach to our property clause that has its own context, formulation and history. Yet the comparative perspective does demonstrate at least two important principles. The first is that there are appropriate circumstances where it is permissible for legislation, in the broader public interest, to deprive persons of property without payment of compensation. ... The second is that for the validity of such deprivation, there must be an appropriate relationship between means and ends, between the sacrifice the individual is asked to make and the public purpose this is intended to serve."

Again, this analysis clearly highlights a common, though generally rough approach regarding deprivations. Indeed there is a rough consensus that not all deprivations are compensable. On the basis of this comparative framework, it would be quite strange to interpret section 71 in a manner that drastically departs from positions which the constitutional property law regime has always followed and respected. It is even more difficult to imagine that our constitutional system now requires us, unlike major and most jurisdictions across the world, to pay for all kinds of 'deprivations'.

2.5 Argument Ex Facie section 71(3)

Yet another argument supporting distinct regimes of acquisition and deprivation derives from the fact that the use and specific location of these two terms in section 71(3) appears very deliberate, not random. The term 'acquisition' is carefully employed around procedures commonly associated with compulsory acquisitions, and the same can be said of the term 'deprivation'. A closer analysis of the provisions would therefore seem to suggest

²⁸ First National Bank ofSA Pvt Ltd t/a Wesbank v Commissioner of the South African Revenue Service & Anor; First National Bank Pvt Ltd t/a Wesbank v Minister of Finance CCT19/01.

that section 71 (3) (a) and (b) apply to both acquisition and deprivation, in spite of the insistence on the word 'deprivation'; section 71 (3) (c) and (d) applies to compulsory acquisitions only, and section 71 (3) (e) applies to compulsory deprivations only.

The reasoning behind this conclusion is as follows. Compulsory acquisitions requires the acquiring authority to give reasonable notice of intention to acquire the property to affected persons, to pay fair and adequate compensation for the 'acquisition' before the acquisition, or within a reasonable time after the 'acquisition'. In cases where the acquisition is contested, the acquiring authority is required to apply to court 'before acquiring the property, or not later than thirty days after the acquisition, for an order confirming the acquisition'. The law gives a right to any person whose property has been acquired to apply to a competent court for the prompt return of the property if the court does not confirm the acquisition.

Further there are two clear regimes for compensation, namely section 71 (3) (c) and section 71 (3) (e). These compensation regimes are clearly distinct. For instance, in terms of section 71 (3) (c), fair and adequate compensation has to be paid prior to the acquisition, or within a reasonable time after acquisition. In addition, a court has to confirm the acquisition if it is contested. In contrast, section 71 (3) (e) appears to be restricted to deprivations only. The first basis for this is that, unlike section 71 (3) (d) that is based on acquisition of property, section 71 (3) (e) appears focused on compensation for the deprivation of an 'interest' in property. Further, it seems that under this section, courts can determine the legality of the 'deprivation', unlike under section 71 (3) (d) where courts are not expressly given such powers. Finally, compensation has to be applied for after the deprivation, and there is no indication that it should be fair or adequate. Only that the courts have power to determine the existence, nature and value of the interest in property (not the value of the property as a whole) in the application for compensation. Significantly, there is no remedy for a return of property, and this is not uncommon in deprivations.

If an interpretation that recognises a single compensation regime for both deprivations and acquisitions is preferred, then the implications are 'earth shattering'. For instance, a lot of statutes, such as those identified above, would need amending to bring them in line with section 71. Otherwise, government would have to find the funds to pay compensation for all

deprivations of property, or of rights and interests in property. On the other hand, preferring an interpretation that distinguishes the compensation regime for acquisitions from that for deprivations would retain the old position. It is not clear whether such retention of the age-old position would do justice to section 71. This is because, while it can be argued that the provisions demonstrate a probable intention to depart from the common law distinction between acquisition and deprivation, section 71 does not do this in very clear terms. Consequently, if an interpretation that favours the old approach is preferred, then the reason is that the framing of section 71 is incapable of one interpretation.

3. Conclusion

The true nature, scope and extent of constitutional provisions can only be understood from the meaning attached to such provisions through their interpretation by courts and scholars of jurisprudence. In particular, the interpretation of fundamental rights and freedoms in the Declaration of Rights should be alive to the need to protect rights and ensure their practical protection and implementation. Apart from ensuring that this objective is met, constitutional interpretation should acknowledge state interests in the protection, realization and enforcement of such rights. In essence, the enforcement and implementation of these rights and freedoms is not done in a manner that is oblivious of the tension inherent in rights discourse.

For the past three decades, Zimbabwe's constitutional property law has clearly echoed and reflected national dialogue and debates on the scope, nature and meaning of property rights in the legal system. Significantly, the constitutional property regime has not sought to adopt, embrace or encourage approaches that are fundamentally different to property rights regimes in other jurisdictions across the globe. As demonstrated above, the manner in which the legal regime has entrenched and constricted property rights is not diametrically opposed to the general understanding on these issues in other jurisdictions. The importance of this position is that the constitutional regulation of property rights, and the interpretation of such rights cannot be understood separately from either historical or contemporary influences implicit in such rights. Indeed, the constitutional regulation of constitutional

property, and the conflicts and tension that are accommodated in the property rights framework should be understood in the context of these influences.

Accordingly, the interpretation of section 71 (3) preferred in this paper is one that recognizes two distinct regimes of compulsory deprivation and compulsory acquisition. This preference has been justified above, both from practical and strictly legalist interpretive approaches. It is strongly argued that this interpretation is the only practical interpretation that can be made regarding deprivation and acquisition of property rights. The fact that this preferred interpretation approach might be regarded as controversial is not to be ruled out, but should be accepted in view of the controversial manner in which section 71(3) itself is phrased; the section is capable of more than one interpretation. Inevitably though, this contribution is made in the hope that with time, and through judicial and legislative development as well as academic commentary, the true meaning and interpretation of the constitutional property clause in the 2013 Constitution will be found.

