9 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 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 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

[*] Senior Lecturer, Faculty of Law, University of Zimbabwe. LLB (UZ), LLM (UKZN, South Africa) and PhD Law (Rhodes, South Africa). The author is grateful to the Raoul Wallenberg Institute for a research grant (financed by the Swedish International Development Cooperation Agency (Sida)) that made this research possible.

[**] Director, Zimbabwe Environmental Law Association. LLM.

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. 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 paper 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 paper examines the diamond consolidation process, and its implications to the right to property. Consequently, the paper 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.

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 i*n 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

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

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 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

[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

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 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

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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.

[7] *See* C. Cross and R. Haines, *Towards Freehold? Options for Land and Development in South 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.

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 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

[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.

[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

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 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

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.

[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.

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.

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,

[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.

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 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

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[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).

[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.

or mechanism to assess the amount. However, it is submitted that the 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 industry, as well as promote transparency and accountability in the entire diamond value chain, with the ultimate result

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[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%20Report%20on%20the%20Consolidation%20of%20the%20Diamond%20Mining%20Companies%20-%20SC%209-2017.pdf>

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

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 them at very low prices.[36] Pertinently, the real danger this created

[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.*
[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.

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] 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.

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]

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[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.*

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

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 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

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[41] *Ibid.*
[42] *Ibid.*
[43] *Ibid.*
[44] *Ibid.*
[45] Section 71(3) of the 2013 Constitution.

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 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.

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:

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[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.
[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.

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 a 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 paper 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.

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.

[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.

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