

# Reflections on the Constitutional Regulation of Property and Land Rights under the 2013 Zimbabwean Constitution

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## Abstract

Property rights discourse, particularly the scope, nature, distribution, redistribution, recognition and protection of property rights, has dominated debate in African post-colonial property rights systems. In Zimbabwe, property rights law has been a contested space since the colonial era. That the property rights system is a contested arena is particularly so in view of the fact that colonial subjugation in Zimbabwe was characterized, in a very important way, by politically motivated land dispossession and, consequently, inequitable property rights distribution patterns. As a result, Zimbabwe's property rights law has always responded to mainstream, albeit fluid, political and economic undercurrents. This has meant that mainstream historical and contemporary debates have provided the context for understanding the constitutional regulation of property and land rights in Zimbabwe. This article assesses the constitutional regulation of constitutional property and land rights in Zimbabwe, and the conflicts and tension that are accommodated in the constitutional property rights framework.

## Keywords

Property, land, deprivation, acquisition, constitution

## INTRODUCTION

The constitutional regulation of property rights in Zimbabwe has always been shaped by the need to achieve a delicate equilibrium between recognition and respect for vested private property rights, and government land reform imperatives in the public interest. For the past three decades, the legal regime governing property rights has consistently reflected this antagonistic compromise between vested property rights and governmental land acquisition policies that directly intrude into the sphere of private property.<sup>1</sup> Shifting

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1 See for instance, G Linington *Constitutional Law of Zimbabwe* (2001, Legal Resources Foundation) at 447–78.

governmental commitments continue to have a direct impact on the scales of the equilibrium and a true balance has been difficult to achieve or maintain. The result is the continuous tipping of the scales to reflect a bias in favour of certain property interests to the detriment of others.

It seems that the challenge facing Zimbabwe's post-independence constitutional property rights system has been to ensure that the legal framework effectively accommodates the inherent tension between public and private interests. This effectively means that Zimbabwe's established property rights regime has gone beyond merely providing the definitions, scope and nature of property rights, or the degree of legal protection or remedies (or their limitations) for the infringement of property rights. Indeed, Zimbabwe's constitutional property rights law has unmasked and exposed the internal conflicts, tensions and contests inherent in its property rights system.

One important element of the property rights system whose constitutional regulation always reflects a conflictive state of affairs and an uneasy compromise is the land rights system. Land rights are property rights of significant import in African society.<sup>2</sup> In most instances, they are regulated largely through either constitutional property rights clauses<sup>3</sup> or distinctive land legislation. Zimbabwe's constitutional framework has been the foundation for land rights law since political independence in 1980 and this framework has always been comprehensively supported by land rights legislation. Accordingly, important norms and principles governing land rights, land acquisition, land redistribution and land tenure systems have always been derived from this constitutional land rights system.

The Constitution of Zimbabwe, 2013<sup>4</sup> (the 2013 Constitution) establishes a property and land rights legal framework with significant implications for Zimbabwe's constitutional property law. Predictably, the land rights system created by the 2013 Constitution adds different dimensions to the age-old debates characterizing land rights in Zimbabwe hinted at above. Even more interesting is the fact that the new land rights system provides an opportunity for some observations and insights into Zimbabwe's constitutional land rights law in general.

This article determines and scrutinizes the fundamental pillars of Zimbabwe's constitutional property and land rights, as established by the 2013 Constitution. In particular, it investigates the implications of the 2013 Constitution on basic property law, constitutional property law and land

2 See generally C Huggins and J Clover (eds) *From the Ground Up: Land Rights, Conflict and Peace in Sub Saharan Africa* (2005, Institute for Security Studies) at 2. For Zimbabwe, see A van Horn "Redefining property: The constitutional battle over land redistribution in Zimbabwe" (1994) 38/2 *Journal of African Law* 144.

3 For instance, the Constitution of the Republic of South Africa, 1996, sec 25; the Constitution of the Kingdom of Swaziland Act, 2005, sec 19; the Constitution of the United Arab Republic of Tanzania, 1977 as amended, sec 24.

4 Passed as the Constitution of Zimbabwe Amendment (No 20) Act, 2013, came into force on the day it was gazetted, 22 May 2013.

rights law in Zimbabwe. Further, it explores the 2013 Constitution's impact on the different modes of land acquisition, land tenure and land redistribution in Zimbabwe's land rights law. This analysis is done in order to probe whether the 2013 Constitution charts a new course in Zimbabwe's constitutional property and land rights law, or the extent to which it deviates from the course established by its predecessor, Zimbabwe's Constitution of 1980 (the 1980 Constitution).

## CONSTITUTIONAL PROPERTY AND LAND RIGHTS IN ZIMBABWE

Zimbabwe's constitutional system has always insisted on the distinction between constitutional property rights and land rights in particular. Various constitutional documents mooted in the past 30 years attest to this fact. For instance, Zimbabwe's National Draft Constitution of 2000, the National Constitutional Assembly's (NCA) Draft Constitution,<sup>5</sup> the Kariba Draft Constitution<sup>6</sup> and the current 2013 Constitution<sup>7</sup> all distinguish the general property clause from the land rights clause. The basis for this is not clear, but it would seem that, since 1980, the general belief has been that land rights are property rights whose status in the constitutional and legal system assumes more significance than other ordinary property rights.<sup>8</sup>

Zimbabwe's constitutional history generally portrays land rights provisions as reflecting fundamental and dominant political considerations of the day. This contrasts sharply with the general property rights provisions that have appeared neutral, value-free and natural, apparently showing no political undercurrents.<sup>9</sup> Thus, on most occasions, the general property clause protects and guarantees vested rights and seeks to protect them, mainly against a capricious state. As contended by van Horn, such seemingly neutral protection and anchoring of existing rights in a post-colonial property law regime "takes for granted and ratifies (the) controversial distribution of property entitlements whose acquisition was aided by an historical pattern of racial injustice".<sup>10</sup> Zimbabwe's common law system is Roman-Dutch law, a system characterized by seemingly "neutral" principles and maxims of property rights law.<sup>11</sup>

5 The NCA Draft, sec 32.

6 The Kariba Draft, secs 56 and 57.

7 The 2013 Constitution, secs 71 and 72.

8 The drafting of the land rights provisions was a cause of disagreement during the 1979 Lancaster House constitutional negotiations that led to Zimbabwe's first constitution and eventual political independence from Britain. See generally A Hammar and B Raftopoulos "Zimbabwe's unfinished business: Rethinking land, state and nation" in A Hammar, B Raftopoulos and S Jensen (eds) *Zimbabwe's Unfinished Business: Rethinking Land, State and Nation in the Context of Crisis* (2003, Weaver Press) 1.

9 See generally van Horn "Redefining property", above at note 2.

10 Id at 146.

11 South African property law has followed a similar position. There is however an acknowledgment that Roman-Dutch common law is far from neutral. For instance, passing judgment in *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at 223,

In contrast to general property rights law, Zimbabwe's post-independence land rights law has openly pulled in a different direction.<sup>12</sup> The land law has given massive powers to a "reformist" state to respond directly to and address the consequences of historical dispossession, conquest-based acquisition and the inequitable distribution of rights in land.<sup>13</sup> Indeed, the state retains massive control and regulatory powers in land acquisition, land redistribution and land tenure reform. In the sphere of land rights law therefore, the scales are tipped heavily in favour of the state.

That power gravitates towards the state in land rights law and against private land ownership can be illustrated by an analysis of the property and land rights provisions in the 2013 Constitution. Such an analysis clearly illustrates the distinction between the extent of state control over land on one hand, and the extent of substantive and procedural protection given to private property rights on the other. Exploring such issues necessitates, albeit incidentally, consideration and assessment of the general attributes of the constitutional property clause, as well as the definition, scope and nature of constitutional property rights in Zimbabwe.

### The constitutional property clause

Section 71 of the 2013 Constitution embodies the constitutional property clause. A notable feature of section 71 is its definition of property, as "property of any description and any right or interest in property". This definition is rather abstract, and does not give the courts a comprehensive guideline as to the exact content, scope and nature of constitutional property. Hence, it is submitted that this definition leaves it to the courts to flesh out and define the content and scope of constitutional property. Apart from defining property, section 71 proceeds to recognize and affirm 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".<sup>14</sup> By so doing, the section clearly recognizes the ordinary common law entitlements that attach to private ownership.<sup>15</sup> Importantly, however, it

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the South African Constitutional Court noted the ability of Roman-Dutch principles of private ownership to give "legitimation in an apparently neutral and impartial way to the consequences of manifestly racist and partial laws".

12 See for instance L Ntsebeza and R Hall (eds) *The Land Question in Southern Africa* (2007), chaps 1 and 2.

13 See J Alexander *The Unsettled Land: State Making and the Politics of Land in Zimbabwe* (2006, James Currey) at 10.

14 Sec 71(2).

15 These entitlements include 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 of 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 P Badenhorst et al *Silberberg and Schoeman's The Law of Property* (4th ed, 2003, Lexis Nexis Butterworths) at 94.

should be stated that section 71 is phrased in positive terms and explicitly guarantees private property rights. This means that property rights are explicitly guaranteed in the 2013 Constitution, contrasting sharply with legal systems where the property rights guarantee is implicit in an otherwise negatively phrased constitutional property clause.<sup>16</sup>

In addition, section 71 provides for the compulsory deprivation<sup>17</sup> of property in certain circumstances, and the conditions that must be satisfied by the acquiring authorities before such deprivation can proceed. The first condition is that the compulsory deprivation should be “in terms of law of general application”. Secondly, the acquiring authority must prove that the deprivation is in “the interests of defence, public safety, public order, public morality, public health or town and country planning”. Further, it must be proved that the deprivation is necessary “in order to develop or use that or any other property for a purpose beneficial to the community”. Apart from these considerations, there are necessary provisions for reasonable notice before “acquisition”,<sup>18</sup> fair and adequate compensation, and judicial remedies in the case of unlawful deprivation or unfair compensation, or to determine the existence, value or nature of interests in property subject to compulsory deprivation.

For these reasons, it is clear that section 71 is a substantive constitutional property clause; it contains the general provisions that take into account the common law position on the content of a property right, protection of such rights and the framework for the deprivation of property rights. Further, the compulsory deprivation framework conforms to the ordinary standards of natural justice, fairness and legality that are critical in a constitutional system that respects the rule of law and human rights.<sup>19</sup> The fact that section 71

16 See for instance sec 25 of the South African Constitution, 1996, which is negatively phrased and reads: “No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.”

17 The 2013 Constitution does not define “compulsory deprivation”. However case law offers some guidance. In *Davies and Others v Minister of Lands, Agriculture and Water Development* 1996 (9) BCLR 1209 (ZS), the Supreme Court attempted to distinguish between “compulsory acquisition” and “compulsory deprivation”. Gubbay CJ (at 1213–19) generally came to the conclusion that compulsory acquisition must refer to “the transfer of property or any interest or right therein to the State in the sense of a parting with ownership or possession”, while compulsory deprivation is related to negative statutory restrictions or injunctions that interfere with property rights, but do not lead to the transfer of ownership.

18 Sec 71 uses the terms “deprivation” and “acquisition” interchangeably. This, it is argued, could be a result of a mistaken belief that there is no difference in the meaning of the two terms. Sec 72, which deals exclusively with the compulsory acquisition of land rights, does not however use the term “deprivation” anywhere.

19 On the explanation of the rule of law in Zimbabwe, see Chinhengo J in *Commissioner of Police v CFU* 2000 (9) BCLR 956 (Z) at 976–78; and *CFU v Minister of Lands, Agriculture and Rural Settlement and Others* 2001 (3) BCLR 197 (ZS) at 205–12. See also generally AT Magaisa “Constitutionality versus constitutionalism: Lessons for Zimbabwe’s constitutional reform process”, available at: <<https://kar.kent.ac.uk/30495/1/Submission4.pdf>> (last accessed 24 February 2016).

entrenches the right of deprived persons to protest to a court concerning any aspect of the deprivation of their property goes a long way to respecting due process and complying with human rights expectations.<sup>20</sup> Certainly therefore, these provisions provide, at least in theory, a measure of protection to land-owners in cases of compulsory deprivation of property, by making sure that the acquiring authority has to discharge the onus upon it to demonstrate that the compulsory deprivation meets constitutional requirements. Considering these features of section 71, it is not difficult to conclude that the constitutional property clause provides both procedural and substantive protection for private property.

It is very clear that section 71 has a dual function; it recognizes and protects private property rights, while affirming the power of the state to subject private property to compulsory deprivation for public benefit. Thus, the recognition, respect and protection of private rights are made subject to the wider national or societal considerations that may necessitate compulsory deprivation in the interests of defence, public safety, public order, public health, or town and country planning. Accordingly, section 71 has an inherent “tension” between the recognition of individual property rights and the national interest in land that could necessitate the compulsory deprivation of property.<sup>21</sup>

Notably, section 71 only regulates “compulsory deprivation” and does not make provision for, or employ the term, “compulsory acquisition”. Whether this omission is by design rather than accident remains unclear. “Compulsory deprivation” is necessarily distinguishable from “compulsory acquisition”, which the 2013 Constitution reserves for agricultural land.<sup>22</sup> The Supreme Court had an opportunity to explore the distinction between these two terms in *Davies and Others v Minister of Lands, Agriculture and Water Development*.<sup>23</sup> Gubbay CJ concluded that compulsory deprivation was more of an attenuation or negative restriction of some rights that come with private ownership, while compulsory acquisition involved the transfer of property rights from owner to state, without the previous owner’s consent. “Compulsory acquisition” thus leads to the extinguishing of property rights altogether, unlike compulsory deprivation which results in negative restrictions.

It should be stated that the two acts of “deprivation” and “compulsory acquisition” are not unique to Zimbabwe’s constitutional system. For instance,

20 See for instance the Universal Declaration of Human Rights, art 17(1) and (2).

21 The South African constitutional property clause is also drafted in a way that promotes this tension between individual property rights and national interests in land reform, land tenure reform and land redistribution objectives. See *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) 226. See also PJ Badenhorst, JM Pienaar and H Mostert *Silberberg and Schoeman’s The Law of Property* (5th ed, 2006, LexisNexis Butterworths) at 561–64.

22 2013 Constitution, sec 72.

23 1996 (9) BCLR 1209 (ZS).

South African constitutional property law recognizes the distinction between “deprivations” and “expropriations.” Hence, according to Van der Walt, deprivation usually constitutes uncompensated, duly authorized and fairly imposed restrictions on the use, enjoyment, exploitation or disposal of property for the sake of public benefit.<sup>24</sup> On the other hand, expropriation refers to “the state’s power to terminate unilaterally, under constitutionally prescribed circumstances, all the entitlements that come with property rights for public purposes”.<sup>25</sup> The interpretation of these two terms is important in a constitutional property rights system and the constitution should therefore acknowledge the clear distinction between them.

### Interpretation of the constitutional property clause

The constitutional property clause is situated in the 2013 Constitution’s Declaration of Rights.<sup>26</sup> Section 46 embodies the interpretation clause for all fundamental rights and freedoms, including the constitutional property clause in the Declaration of Rights. Under this section, in interpreting the rights and freedoms in the Declaration of Rights, a court:

“(a) must give full effect to the rights and freedoms enshrined in [the Declaration]; (b) must promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom, and in particular, the values and principles set out in section 3;<sup>27</sup> (c) must take into account international law and all treaties and conventions to which Zimbabwe is a party; (d) must pay due regard to all the provisions of this Constitution, in particular the principles and objectives set out in Chapter 2;<sup>28</sup> and (e) may consider relevant foreign law.”

Importantly, regarding the interpretation of these provisions, it should be affirmed that Zimbabwe’s constitutional interpretation gives prominence to the purposive approach.<sup>29</sup> This approach characterized the interpretation of the 1980 Constitution and there is no doubt that the context sensitive

24 AJ van der Walt *Constitutional Property Law* (2005, Juta) at 131.

25 AJ van der Walt “The limits of constitutional property” 1997 *South African Public Law* 275 at 279.

26 The 2013 Constitution, chap 4.

27 The values expressed in sec 3(1) are “(a) supremacy of the Constitution; (b) the rule of law; (c) fundamental human rights and freedoms; (d) the nation’s diverse cultural, religious and traditional values; (e) recognition of the inherent dignity and worth of each human being; (f) recognition of the equality of all human beings; (g) gender equality; (h) good governance; and (i) recognition of and respect for the liberation struggle”. An important principle in sec 3(2) is “respect for vested rights”.

28 Chap 2 contains a list of national objectives. It is important to note that there are no provisions directly related to property rights in this section.

29 *In re Munhumeso and Others* 1994 (1) ZLR 49 (S); *Rattigan and Others v Chief Immigration Officer and Others* 1994 (2) ZLR 54 (S); *S v A Juvenile* 1989 (2) ZLR 61 (S).

purposive approach to constitutional interpretation is implicit in section 46 of the 2013 Constitution. The purposive approach was highlighted in *Smyth v Ushewokunze*, where the Supreme Court laid down its major features, observing that:

“[I]n arriving at the proper meaning of a constitutional provision guaranteeing a right, the court should endeavor to expand the reach of the right rather than attenuate its meaning and content. What is to be accorded is a generous and purposive interpretation with an eye to the spirit as well as the letter of the provision, one that takes full account of changing conditions, social norms and values. The aim must be to move away from formalism and make human rights a practical reality ...”<sup>30</sup>

From this context, it is worth reiterating that this approach importantly calls for an interpretation that enhances the recognition and protection of all constitutional values and principles, particularly the protection of fundamental freedoms and rights.<sup>31</sup> In contrast to strict “textualism”, the purposive approach calls for the courts “to have regard to the context in which words occur, even where the words to be construed are clear and unambiguous”.<sup>32</sup>

It can be argued that the recognition of constitutional values and principles in constitutional interpretation ensures that the balance between competing interests is maintained. It further enhances constitutional values by making sure that no particular set of property rights enjoys superiority over others without constitutional justification.

## Limitations

Ordinarily, rights and freedoms in the Declaration of Rights, including property rights, are subject to limitations under certain circumstances. Section 86 of the 2013 Constitution, the constitutional limitation clause,<sup>33</sup> is

30 1997 (2) ZLR 544 (S) at 553.

31 See *S v Mhlungu and Others* 1995 (3) SA 867 (CC). See also *Du Plessis and Others v De Klerk and Others* 1996 (5) BCLR 658 (CC).

32 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC), para 90.

33 Sec 86 reads: “(1) The fundamental rights and freedoms set out in this Chapter must be exercised reasonably and with due regard for the rights and freedoms of other persons. (2) The fundamental rights and freedoms set out in this Chapter may be limited only in terms of a law of general application and 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, taking into account all relevant factors, including - (a) the nature of the right or freedom concerned; (b) the purpose of the limitation, in particular whether it is necessary in the interests of defence, public safety, public order, public morality, public health, regional or town planning or the general public interest; (c) the nature and extent of the limitation; (d) the need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others; (e) the relationship between the limitation and its purpose, in particular whether it



applicable with regard to property rights protected under section 71. Most importantly, the right to property in section 71 can be limited “in terms of a law of general application and 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, and the need to respect and not prejudice the rights of others.

Apart from this limitation clause, other rights can also directly limit the constitutional property clause. For instance, the property guarantees in section 71(2) and the protections against compulsory deprivations in section 71 (3) are subject to section 72, which regulates agricultural land rights. This means that the constitutional regulation of land rights in section 72 has a restrictive impact on the application of section 71.

## THE REGULATION OF LAND RIGHTS

For the past 30 years, Zimbabwe's constitutional land rights system has consistently reflected ongoing national debate on the land issue. Fuelling the land rights debates in particular was the manner of constitutional regulation of private landownership, land acquisition and land distribution in Zimbabwe.<sup>34</sup> In this context, it was inevitable that both the 1980 and 2013 Constitutions emphasized the political contests and political conditions inherent in land rights law and that continue to shape the discourse of land rights in Zimbabwe. Generally, this is apparent when one considers that the constitution reserves greater prominence for the regulation of land rights in general, and the circumstances under which the state can expropriate, alienate and redistribute private agricultural land rights in particular.

### The land rights clause

Section 72 of the 2013 Constitution, the land rights clause, opens with a definitions section, which seeks to define commonly used words and phrases in the section, such as land,<sup>35</sup> piece of agricultural land<sup>36</sup> and agricultural land.<sup>37</sup> These definitions remove any doubt as to what is meant when such

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imposes greater restrictions on the right or freedom concerned than are necessary to achieve its purpose; and (f) whether there are any less restrictive means of achieving the purpose of the limitation.”

34 See United Nations Development Programme *Zimbabwe Land Reform and Resettlement: Assessment and Suggested Framework for the Future* (interim mission report, 2002) at 24.

35 Defined to include “anything permanently attached to or growing on land”.

36 This is to be understood as “a piece of agricultural land registered as a separate piece of land in a Deeds Registry”.

37 “Land used or suitable for agriculture, that is to say for horticulture, viticulture, forestry or aquaculture or for any purpose of husbandry, including (a) the keeping or breeding of

words are used in this section, or when the need arises for their interpretation. Most importantly, agricultural land is defined to encapsulate commercial agricultural activities in Zimbabwe that include crop production, horticulture, viticulture, forestry or aquaculture and livestock production.

The land rights clause establishes a comprehensive regime for the compulsory acquisition of agricultural land. Thus, in order to initiate the compulsory acquisition of land, the state identifies the agricultural land in question and publishes a notice in the Gazette, indicating that the land is needed for agricultural settlement purposes, other agricultural activities or for the relocation of persons who were dispossessed of their land because the land was needed for listed agricultural activities and purposes.<sup>38</sup> The purpose of the notice is to identify the land and, once this has been done,<sup>39</sup> the land in question automatically “vests in the State with full title with effect from date of publication of the notice”.<sup>40</sup> In practical terms therefore, the single act of publishing a notice has important effects, divesting private landowners of their title to land and automatically transferring (“vesting”) that title to the state. Most pertinently, the notice triggers three acts: acquisition, loss of rights by the landowner and automatic transfer of those rights from the previous land owner to the state.

At this juncture, it should be observed that the 2013 Constitution differentiates the remedies available following the act of compulsory acquisition (section 72) from those available after the act of compulsory deprivation (section 71). First, in contrast to compulsory deprivation, no compensation is payable to previous land owners in respect of the compulsory acquisition of their land, except for improvements. Further, in compulsory acquisition, the affected landowners are denied the right to approach the courts to seek compensation and the courts are specifically barred from exercising their jurisdiction in such matters.<sup>41</sup> This judicial ouster clause means there is no recourse to the courts to determine any questions on compensation, except compensation for improvements to the land made before publication of the notice. In contrast, the courts’ jurisdiction is not ousted in cases of compulsory deprivations, and judicial remedies extend beyond compensation claims.

A further noteworthy provision in the 2013 Constitution is the removal of the ground of discrimination as a basis for contesting the acquisition of

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livestock, game, poultry, animals or bees; or (b) the grazing of livestock or game; ... but does not include Communal Land or land within the boundaries of an urban local authority or within a township established under a law relating to town and country planning or as defined in a law relating to land survey.”

38 This section is in fact taken from section 16 of the 1980 Constitution.

39 The detailed process is provided under specific provisions of the Land Acquisitions Act, chap 20:10.

40 The 2013 Constitution, sec 72(2).

41 Id, sec 72(3)(b). Despite these provisions, the state can raise a special plea as a response to applications made.

land.<sup>42</sup> The state is thus able to undertake the compulsory acquisition of private land in a discriminatory manner and cannot be challenged in the courts for such conduct. This controversial provision was inserted in view of the judgment by the SADC Tribunal in *Mike Campbell Pvt Ltd and 78 Others v The Republic of Zimbabwe (Mike Campbell)*,<sup>43</sup> where the applicants had successfully raised the ground of discrimination in challenging the acquisition of their private properties during Zimbabwe's land reform.<sup>44</sup> In reality, this provision empowers the government to formulate and implement land and agrarian reforms whose effect may be regarded as discriminatory on the basis of criteria, for instance those listed<sup>45</sup> in section 56 of the 2013 Constitution.

Indeed, the 2013 Constitution did not address the concerns raised in *Mike Campbell* and derived from the 1980 constitutional framework, that the legal regime for compulsory acquisition targeted one particular race and protected another.<sup>46</sup> The major concern was, in particular, that the compulsory acquisition of agricultural land<sup>47</sup> from private landowners was carried out through the seizure of such land from white (British) commercial farmers only and its distribution to indigenous Zimbabweans.<sup>48</sup> It seems that the government position, expressed through land rights law, was that maintaining such a policy focus was the only way to address the consequences of unjust acquisition of indigenous land by white (mainly British) colonists.<sup>49</sup> Thus, despite concerns that the land acquisition programme under the 1980 Constitution was unjust, the land that was "itemized" (identified as state land) and consequently acquired by the state under section 16A and 16B of the 1980 Constitution continued to vest in the state. No further claims can be made by dispossessed landowners under the 2013 Constitution in respect of land that was lawfully acquired by the state under the controversial provisions of the 1980 Constitution.<sup>50</sup> This was presumably done for the sake of continuity and certainty, and for the legitimization of the land and agrarian reform process that

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42 *Id.*, sec 72(3)(c).

43 SADC (T) case no 2/2007.

44 *Id.* at 41–55. The tribunal concluded (at 54) that in "implementing Amendment 17, the Respondent has discriminated against the Applicants on the basis of race and thereby violated its obligation under Article 6(2) of the (SADC) Treaty".

45 The listed grounds for discrimination under sec 56(3) of the 2013 Constitution include "race, colour, tribe, place of birth, ethnic or social origin, language, class, religious belief, political affiliation, opinion, custom, culture, sex, gender, marital status, age, pregnancy, disability or economic or social status".

46 This argument was raised by Mike Campbell in the case against the government of Zimbabwe. The SADC Tribunal finding on discrimination was based on this argument. See part VI of the judgment, above at note 43.

47 The 2013 Constitution, sec 72(7).

48 See the sentiments of Chidyausiku J in *Davies and Others v Minister of Lands, Agriculture and Water Development* 1994 (2) ZLR 294 (H) at 308.

49 Sec 72(7) of the 2013 Constitution expresses this position.

50 *Id.*, sec 72(4).

had started on the basis of the 1980 Constitution.<sup>51</sup> Persons are thus unable to challenge the legality of state title to their land if that title passed to the state on the basis of the 1980 Constitution.

It is thus clear that the state retains substantial powers of control over agricultural land in Zimbabwe. Private ownership of such land is subject to this state control. For instance, the state power in compulsory land acquisition leaves very few remedies and protection to private landowners. The 2013 Constitution implicitly identifies land matters as political, by prominently affirming the political justification for the compulsory acquisition of private agricultural land for public purposes.<sup>52</sup> Section 72(7) is emphatically clear about the supremacy and primacy of political considerations in land reform. Thus the section regards certain factors “as of ultimate and overriding importance with respect to compulsory acquisition for land resettlement and land reform purposes”. These factors are: Zimbabwe’s colonial history of conquest and land dispossession; the consequent liberation war against colonialism that achieved independence; and the need for the Zimbabwean people to be “enabled to reassert their rights and regain ownership of their land”. The section concludes by affirming that, as a consequence, the obligation to pay compensation for land subjected to compulsory acquisition lay with the former colonial power, and failure by the colonial power to do so divests the Zimbabwean government of an obligation to pay compensation to affected land owners.<sup>53</sup>

It should be noted that, apart from the land rights clause in the Declaration of Rights, the 2013 Constitution contains other important provisions that impact on the legal regime for the acquisition, allocation, tenure and distribution of land rights. These other provisions need to be discussed in relation to section 72 of the 2013 Constitution.

### **Land policy and land rights vis-à-vis indigenous persons**

Chapter 16 of the 2013 Constitution can be viewed as a necessary supplement to the land rights regime established under section 72. Notably, it is located outside the Declaration of Rights, but regulates land acquisition, land distribution and land tenure issues in relation to land not encompassed by section 72. For a start, section 288 identifies a list of principles that should guide national agricultural land policies. Fundamentally, these principles should be considered in view of the overarching objective to “redress the unjust and unfair pattern of land ownership that was brought about by colonialism, and to bring

51 This section is repeated verbatim in sec 290.

52 The 2013 Constitution, preamble and sec 72(7).

53 *Id.*, sec 72(7). This section was transplanted verbatim from sec 16A(1)(a)–(c) of the 1980 Constitution, introduced by Constitutional Amendment No 17 of 2005. Even more interestingly, this section was uprooted from the National Draft Constitution, 2000 which was rejected at a referendum. The Kariba Draft Constitution of 2008 also adopted this provision verbatim (secs 56(7)(a)–(c)).

about land reform and the equitable access by all Zimbabweans to the country's natural resources".<sup>54</sup> Germane to this contribution are the principles of fair and equitable allocation and distribution of agricultural land, the fact that the 2013 Constitution guarantees private property and affirms the common law entitlements that come with it, the protection against arbitrary deprivation of "the right to use and occupy agricultural land" and finally the economic and environmental significance of land in Zimbabwe.<sup>55</sup>

Under section 293 of the 2013 Constitution, the state has the right to deal with agricultural land acquired through compulsory acquisition in three ways. First, the state can transfer ownership to any person through the sale of that land to third parties. Secondly, the state can lease the land to interested persons. Finally, the state can grant persons a right of use or occupation over acquired agricultural land. Hence, this provision clearly recognizes that, as the new owner, the state enjoys all the common law rights that come with private property, such as alienation or disposal. Most pertinently however, the section introduces other rights to land hitherto unknown in Zimbabwean property law, namely use rights and occupation rights. This is so because the section recognizes that the state can dispose of agricultural land by giving persons a "right of occupation or use".

The discourse on rights of use and occupation of land is very limited in Zimbabwe.<sup>56</sup> However, in other jurisdictions, most notably South Africa, the recognition of other land rights different to, and competing with, private land ownership has attracted wide-scale debate.<sup>57</sup> These debates have stemmed from the inescapable need to enable citizens to have equitable access to land, to have legally secure tenure of land and to benefit from the restitution of lands previously seized during the colonial era on the basis of colonial land laws.<sup>58</sup> The result in South Africa has been a preference for a model that features "fragmented use rights".<sup>59</sup> This model is based on the

54 The 2013 Constitution, sec 289.

55 *Id.*, sec 289(a)–(f).

56 The 2013 Constitution does not define the term "occupier of agricultural land". Section 3 (1) of the Rural Occupiers (Protection from Eviction) Act 20:26 recognizes a "protected occupier". This is a person who occupies rural agricultural land without permission and who would ordinarily be subjected to legal proceedings for his eviction, but occupied such land in anticipation of being resettled by an acquiring authority on that or any other land for agricultural purposes and qualifies for settlement on that or any other land in accordance with the relevant administrative criteria fixed by an acquiring authority for the resettlement. Such a person shall not be evicted from such land since he is protected by the act.

57 See generally AJ van der Walt (ed) *Land Reform and the Future of Landownership in South Africa* (Juta, 1991); LK Caldwell "Right of ownership or rights of use? The need for a new conceptual basis for land use policy" 1975 *Environmental Law Review* 409; Van der Walt "Property rights and hierarchies of power: A critical evaluation of land-reform policy in South Africa" (1999) 64 *Koers* 259.

58 The Constitution of the Republic of South Africa, 1996, sec 25.

59 Van der Walt "Property rights", above at note 57 at 264–65.

position that ownership must not dominate the land rights system. A fragmented use-rights system does not consist of one right of ownership located at the top of a hierarchy of rights. Instead, it consists of a variety of inherently limited use-rights that are not structurally or hierarchically related to one another.<sup>60</sup> These considerations have provided the impetus for a fragmented use-rights system that seeks to accommodate a diverse array of rights juxtaposed against each other and recognized or protected on their merits. Indeed, van der Walt notes that, under this model, the rights enjoy a significant measure of legal protection and recognition based on their own merits, albeit without being necessarily classified as weaker, stronger or superior.<sup>61</sup>

Importantly however, the success of a fragmented use rights system depends on the fact that land “title and use are separated and security of tenure is based on legislation”.<sup>62</sup> For an occupation and use rights system to be established, enabling legislation<sup>63</sup> must be promulgated to make provision for the registration of rights of occupation<sup>64</sup> and of use. Legislation should further require such rights to be registered as limited real rights and for security of title to be guaranteed as long as the rights holder complies with legal requirements.<sup>65</sup> It is stated that the development of a regime of use and occupation rights in Zimbabwe might have to proceed by making reference to the South African use rights system, particularly as established around relevant pieces of legislation, such as the Land Reform (Labour Tenants) Act<sup>66</sup> and the Extension of Security of Tenure Act.<sup>67</sup>

### Compensation regime vis-à-vis indigenous persons

Section 295 of the 2013 Constitution creates a separate and distinct compensation regime for agricultural land compulsorily acquired by the state from “indigenous Zimbabweans”. Importantly, an indigenous Zimbabwean whose agricultural land was compulsorily acquired by the state before the 2013 Constitution came into effect “is entitled to compensation from the state

60 Id at 267–69; G Pienaar “Registration of informal land-use rights in South Africa: Given teeth to (toothless?) paper tigers” 2000 TSAR 445.

61 Van der Walt, id at 267.

62 G Pienaar “The registration of fragmented use rights as a development tool in rural areas” (paper delivered at a University of Potchefstroom conference on constitution and development, 2000) at 109.

63 The 2013 Constitution, sec 293(3) provides for legislation that must prescribe necessary “procedures for the alienation and allocation of agricultural land by the State”.

64 Under sec 294 of the 2013 Constitution, an occupier of agricultural land “has the right to transfer, hypothecate, lease or dispose of his or her right in agricultural land”. This means that the right holder can sell or dispose of his right, albeit “subject to limitations imposed by law”.

65 See generally DL Carey Miller and A Pope “South African land reform” (2000) 44 *Journal of African Law* 167. The registration system must provide for a simplified certificate of title that rights holders may then use to access forms of assistance.

66 Act 3 of 1996.

67 Act 62 of 1997.

for the land and any improvements that were on the land when it was acquired".<sup>68</sup> In order to emphasize the legal position in section 72, section 295 reiterates that any other person<sup>69</sup> whose agricultural land was subject to compulsory acquisition by the state can only claim compensation for improvements that were on the land at the date of acquisition.

It should be noted that the 2013 Constitution does not define "indigenous Zimbabwean". It recognizes three kinds of citizenships, namely by birth, descent and registration,<sup>70</sup> and does not differentiate the nature, scope and extent of rights enjoyed by each category.<sup>71</sup> The term "indigenous person" is currently defined in the Indigenization and Economic Empowerment Act to mean "any person who, before 18th April 1980, was disadvantaged by unfair discrimination on the grounds of his or her race, and any descendant of such person, and includes any company, association, syndicate or partnership of which indigenous Zimbabweans form the majority of members holding the controlling interest".<sup>72</sup> The validity of applying this definition to the term "indigenous person" in the 2013 Constitution is contestable.<sup>73</sup> In order to resolve the problem, the author recommends constitutional development of the term "indigenous Zimbabwean" and that such development could be guided by earlier non-constitutional definitions. There is no denying that the definition of "indigenous Zimbabwean" should be developed as a matter of urgency in order to provide clarity and remove existing controversy.

Finally, it seems important to examine current governmental practices in land acquisition and redistribution in order to identify any new patterns or the extent to which the government is abiding by relevant constitutional provisions. Such an exercise requires a comprehensive survey of governmental practice in relation to lands subjected to acquisition and redistribution on the basis of the 2013 Constitution. While such a survey might provide useful data to discern emerging trends or new patterns, it is beyond the scope of this article. However, it seems clear on the basis of anecdotal evidence that the government's land acquisition policy and practices have not been altered or affected by the fact that the 2013 Constitution has replaced the 1980

68 The 2013 Constitution, sec 295(1).

69 The recognized exception is for land belonging to other entities under the terms of bilateral investment promotion and protection agreements signed between the government and other countries.

70 The 2013 Constitution, sec 35(1).

71 Under sec 35(2), all Zimbabwean citizens (by birth, descent and registration) are equally entitled to the rights, privileges and benefits of citizenship and are equally subject to the duties and obligations of citizenship.

72 Indigenization and Economic Empowerment Act, chap 14:33, sec 2(1).

73 This definition is highly controversial and might be regarded as unconstitutional. According to Matyszak, the definition in the act only encompassed black Zimbabwean citizens and had the effect of excluding persons in the country, such as white Zimbabweans; see D Matyszak "Everything you wanted to know (and then some) about Zimbabwe's indigenisation and economic empowerment legislation but quite rightly were too afraid to ask" (2011, Research and Advocacy Unit).

Constitution.<sup>74</sup> Indeed, the government has maintained a “business as usual approach”, justified on the basis that the 2013 Constitution has not created a land acquisition and redistribution regime fundamentally different to that established under the 1980 Constitution. This argument is substantially correct. The 2013 Constitution reaffirms the major pillars of government policy on land reform. Indeed, apart from this, it simply adds clarity to the process, while further removing complicated procedural prerequisites and plugging obvious loopholes in the law that left the state susceptible to legal challenges from private landowners.

To some extent therefore, the practical procedures for land acquisition and redistribution under the 2013 Constitution have in essence remained as controversial as the land acquisition and redistribution formula established under the 1980 Constitution. However, it should be conceded that a particular pattern is yet to emerge, so it might be premature to draw specific conclusions based on current anecdotal evidence. Regarding the land reform exercise under the 2013 Constitution however, what actual governmental practice demonstrably illustrates, even in these early stages, is the excessive control powers maintained by the state over private land rights and thus a clear subjugation of private property rights by government interests in land reform.

## CONCLUSION

The land rights regime established by Zimbabwe’s 2013 Constitution attempts to strike a compromise between the inherent tensions created by the government’s commitment to land reform and the recognition of vested private property rights. The resultant system of land rights clearly goes some way towards guaranteeing the substantive and procedural protection of land rights. Further in the same context, the introduction of other land rights, namely rights of use and occupation, can be a welcome development in Zimbabwe’s land law and it is hoped that legislation will develop this new direction of land rights law further.

The author further recommends that, when interpreting some of the terms, phrases and provisions identified in this article as being unclear, controversial

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74 Farm invasions have been reported on a number of occasions in the aftermath of the 2013 Constitution. They have assumed basically the same shape as those carried out under the 1980 Constitution. See for instance “New farm invasions should be halted” (22 February 2015) *The Standard*, available at: <<http://www.thestandard.co.zw/2015/02/22/new-farm-invasions-halted/>> (last accessed 25 March 2015); “Govt’s farm invasions threats spark anxiety” (13 March 2015) *Zimbabwe Independent*, available at: <<http://www.theindependent.co.zw/2015/03/13/govts-farm-invasions-threats-spark-anxiety/>> (last accessed 25 March 2015); “We don’t support invasion of dairy farms” (4 December 2013) *The Herald*, available at: <<http://www.herald.co.zw/we-dont-support-invasion-of-dairy-farms/>> (last accessed 25 March 2015); Commercial Farmers Union of Zimbabwe “Cyrene farm takeover ‘error’” (12 March 2015), available at: <<http://www.cfuzim.org/index.php/newspaper-articles-2/land-issues/5178-cyrene-farm-takeover-error>> (last accessed 25 March 2015).



or potentially problematic, the courts should be guided by the values and principles in the 2013 Constitution, the need to enhance national unity, peace and stability and the necessity of achieving a balanced property rights system. Indeed, the constitutional land rights clause should be understood and interpreted in view of the underlying constitutional values, the significance of secured, vested private property rights, the need for socio-economic development and Zimbabwe's history of land dispossession and political conflicts over land.

A separate examination of the prominent features of the land rights regime suggests that a number of areas of Zimbabwe's constitutional land rights system still need further clarification. For instance, the constitutional property clause does not provide for "expropriation" or "compulsory acquisition" as it is limited to compulsory deprivations. This seems to suggest that expropriations or compulsory acquisitions are only possible with respect to agricultural land in section 72.

Further, the compensation regime for the compulsory acquisition of agricultural land should be developed so that it is less discriminatory and is all inclusive. Indeed, to differentiate the extent of compensation creates a clear platform of inequality that is difficult to justify. The compensation regime, the reallocation and redistribution of land rights and the reorganization of land tenure systems must not sacrifice the socio-economic and political aspirations of future generations. While it is conceded that land rights regimes are necessarily conditioned by historical, political and other social considerations, this should not be at the expense of the national economy or the livelihoods of all Zimbabweans. Land rights provisions that permit discrimination, deny access to courts for affected landowners and deny compensation for acquired land fall foul of the principles and values of the 2013 Constitution, and clearly conflict with the rule of law and human rights considerations.

There is currently no escaping the reality that the current land rights system fails to strike a balance between public land reform commitments and vested private property rights. The scales of the balance still weigh too much in favour of state commitment to land reform and state control of land, and against private property rights. As it stands, however, the land rights regime created by the 2013 Constitution is more than a revision of the old system, despite the fact that a number of issues that emerge cry out for clarification and review. Ultimately, the constitutional land rights system mirrors the social tension and contests inherent in a property rights framework dominated by stricter state control over land, but which aspires to accommodate different, oftentimes conflicting interests.