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Property Rights and Social Responsibility:

A Zimbabwean, South African and German Comparative Analysis

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Abstract

The scope and content of property rights in any given jurisdiction reflects fundamental issues underpinning that society's socio-economic and cultural foundations. Pertinently, the level of protection accorded to property rights determines the scope and content of such rights, and also the inevitable interests of society in private property. These positions illustrate that a property rights system is a contested space, pitting the interests of the private owner against the interests of the society at large. This research makes an analysis of the extent that the property rights regimes of Zimbabwe, South Africa and Germany reflect this contestation between private interests and social responsibility. It questions whether societal objectives are integral to the right of ownership in the three jurisdictions. It, however, concedes that there is no single approach countries have sought to follow in striking a balanced property rights framework. Through a comparative analysis, it concludes that the inevitability of societal objectives in the right of ownership must be accepted, but that such a position must undermine the worth and value in the content of the right of ownership.

Key words

Property Rights, Zimbabwe, South Africa, Germany, Legality of Property Rights, Private Property, Private and Public Rights

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1. Introduction

The philosophy underlying the property rights framework of any jurisdiction depends on various factors, including social, political, economic and comparative factors. With globalization, the degree of contradistinction in property rights regimes and paradigms has gradually narrowed. Despite this move towards convergence, important differences can still exist in relation to the philosophies underpinning property rights regimes. A common thread that is clear in most, if not all, property rights regimes is the inherent tension and contests between private property interests and public interests, or the relationship between property ownership and social objectives.

A very important angle to explore property rights regimes is the nexus, or lack of it, between social objectives or responsibilities and property rights. Social responsibilities in this research will refer to societal objectives in the public interest. There are clearly many questions that emerges from this research. For instance, does ownership entail social responsibilities, and if so, to what degree should it defer to societal objectives in the public interest? Should ownership always be subject to the public interest, or there should be a balance between private ownership and the public interest? These questions form the bedrock of this research, and will be explored from a Zimbabwean, South African and German constitutional property rights perspective.

1.1 Private Ownership and Social Responsibility

From a classical Roman-Dutch law perspective, the right of ownership is generally regarded as giving the right holder unfettered power to do as he or she likes with his or her property to the exclusion of the whole world. Barring legal restrictions that are generally frowned upon by the owner, the right of ownership is idolized as the most superior, strongest and most protected property right that is enjoyed only in accordance with the wishes and choices of the right holder. Subsequent commentators of Roman-Dutch law continued to refine and re-interpret the attributes of the right of ownership, giving it more unfettered power. For instance, German Pandectists, refined the concept to correspond to the dictates of economic liberalism of imperial Europe.[1] Consequently, the right of ownership was a concept that was blind to social objectives, giving too much power to the owner to do as he or she likes, and with all the remedies to resist regulation. This traditional definition emphasises the limitless bounds of the right of ownership as opposed to

1 P Birks, 'The Roman Law Concept of Dominium and the Idea of Absolute Ownership' 1985 *Acta Juridica* 1-37, 3.

duties and responsibilities that should rest upon owners, meaning that the exercise of the right is not accompanied by, nor balanced with the obligation to ensure that property is used responsibly and in the community's interests.[2]

It is inescapable to observe that in such form, the absolute right of ownership per se was opposed to property rights paradigms that existed in most southern African socio-legal systems at the dawn of colonialism. The legal conventions, traditions and doctrines underlying the superimposed Eurocentric property rights framework predominantly reflected Western values and norms.[3] The political and economic system introduced by colonialism justified, complemented and augmented this property rights regime[4] in the interests of imperial capitalism.[5] This was essentially a system that worshipped the ideals of maximum liberty of the individual in the acquisition, control and exercise of the right of ownership.[6]

Despite the populism surrounding the understanding of private ownership as unfettered and independent of societal interests, various criticisms have been made against such a position. These criticisms need to be discussed.

1.2 Criticisms of Common Law Right of Ownership

One of the criticisms is based on the original nature of Roman and Roman-Dutch law. One critic, Freedman, argues that the characterisation of ownership as absolute is inaccurate because it is based on the *mistaken* belief that ownership was conceived as absolute in both Roman and Roman-Dutch law. Indeed, Birks' careful analysis of the concept's origins convincingly shows that Roman and Roman-Dutch law did not conceive of ownership as absolute; rather the absoluteness characteristic was a later development and addition by German Pandectists, most importantly, Windschied.[7] He applied the traditional Roman law concept of dominium in a philosophical and theoretical context that recognized the autonomy of the individual as an ethical subject and whose private property has to be shielded against the power of the state at all costs[8]. Freedman posits that this position put forward by Windscheid was not the position of Roman-Dutch law.

Studies show that no theory could be found in Roman-Dutch legal history that prevent the constriction of or limitations to the right of ownership in the interests of 'collectivist schemes

2 See above. See also LK Caldwell 'Rights of Ownership or Rights of Use? The Need for a New Conceptual Basis for Land Use Policy' (1975) 6 *Environmental Law Review* 409-425.

3 AJ Van der Walt 'The Effect of Environmental Conservation Measures on the Concept of Landownership' *1987 South African Law Journal* 469, see also W Freedman 'Environmental Conservation on the Concept of Ownership as an Absolute and Unrestricted Right: *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another* 2001 (8) *South African Journal of Environmental Law and Policy* 128.

4 AJ Van der Walt, A 'Dancing with Codes: Protecting, Developing, Limiting and Deconstructing Property Rights in the Constitutional State' in *Constitution and Law IV: Developments in the Contemporary Constitutional State* 9.

5 Capitalism was popularized in the 19th century by Adam Smith in his book, *'The Wealth of Nations'*.

6 AJ Van der Walt above note 4, 475.

7 P Birks, above note 1. DP Visser 'The absoluteness of ownership: The South African common law in perspective' 1985 *Acta Juridica* 39, 46.

8 See AJ Van der Walt A, op cit note 4, 66; W Freedman above, 128.

of the kind that derogates from the owners' powers such as those schemes for environmental, zoological or historical conservation for town and country planning, public health or planned agricultural production'.[9] Essentially, the right of ownership was subject to limitation in the public interest even under classical Roman law. Ownership was subject to what Birks calls 'the interest of certain important aspects necessary for human development, public safety and survival'. It can be concluded that under classical Roman-Dutch law, there was scope for limitations of the right of ownership prior to subsequent Pandectists' 'pollution', and such limitations were generally in the public interest, or in line with societal goals.

Many examples exist to substantiate the classical Roman law, for instance, recognised the possibility of ownership being restricted and interfered with in the public interest or to meet a societal goal. The Roman law principle of eminent domain is one such example.[10] This principle allows the state to confiscate, expropriate or compulsorily acquire private property in the public interest albeit subject to compensation.[11] Coupled with eminent domain power is the state's police power to regulate the property of private citizens.[12] Unlike the power of eminent domain that arises out of the state's sovereignty (imperium), the state's police power implies regulation of private property by way of imposition of restrictions or limitations on the manner in which the property may be used, exploited or enjoyed.[13] To demonstrate this, a prominent Roman-Dutch commentator, Hugo de Groot, discussing ownership and limitations said:

> The property of subjects is so far under the eminent control of the State, that the State or the sovereign who represents it, can use that property, or destroy it, or alienate it, not only in case of extreme necessity, which sometimes allow individuals the liberty of infringing upon the property of others, but on all occasions, where the public good is concerned, to which the original framers of society intended that private interests should give way. But when that is the case, it is to be observed, the State is bound to repair the losses of individuals, at the public expense, in aid of which the sufferers have contributed their due proportion.[14]

The above-mentioned statement is clear testimony that, under Roman and Roman-Dutch law, limitations, and restrictions, mostly in the public interest, were permissible. Compensation is also recognised in cases of expropriation. The existence of these restrictions shows that Roman-Dutch law itself recognised restrictions and regulation of private property in the public interest, and in no way rejected such limitations or restrictions. These restrictions are essentially powers that are exercisable by the state and override the private owner's powers and rights for purposes of achieving a social goal.

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9 P Birks above, 5.

10 Known in Latin as '*dominium eminens*'. However, see Johannesburg Council v Rand Township Registrar 1910 CPD 1314, 1319.

11 See W McNulty 'Eminent Domain in Continental Europe' *The Yale Law Journal* Vol 21 No 7 (1912) 555-570, 559.

12 Above, 555.

13 W Freedman 'The Constitutional Protection of Property, the Conservation of the Environment and the Doctrine of Constructive Expropriation: Steinberg v South Peninsula Municipality (2002) 9 *South African Journal of Environmental Law and Policy* 63-71, 65.

14 Grotius, *The Rights of War and Peace*, Book 1, section 6, Book 2 Chapter XIV section VII and Book III, Chapter XX section VII.

In contemporary times, the right of ownership has largely retained space for limitations in the public interest, or for purposes of achieving a societal goal. Legislative acts that seek to ensure that ownership is subject to the public interest or societal imperatives diminishes the actual power of the right of ownership. In some instances, legislation has easily overridden or modified attributes of ownership by seeking to advance or promote a universally accepted public good, such as environmental protection.

Ownership is now subject to societal interests, which have eroded its theoretical dominance and independence. Societal interests come in various forms in modern times, and include issues as modern town planning and urbanisation, industrial exploitation of resources and environmental considerations. Most legislation restricting the powers of landowners serves social, economic and political goals. Examples falling under this are town planning regulations, mining regulations and environmental controls. Planning law has been described as constituting one of the most serious forms of interference with the right of ownership.[15] The consequence of these limitations means that ownership can no longer be understood as absolute, exclusive and unlimited.[16] It now defers to societal considerations or the public good.

Having explored the general position in relation to ownership and social responsibility, it becomes necessary to interrogate the approaches adopted in the three constitutional systems identified above, starting with the Zimbabwean perspective.

2. The Zimbabwean position under the 2013 Constitution

At independence in 1980, Zimbabwe's land rights law was largely understood as based on the seemingly neutral definitions of property rights as dominated by the right of ownership. However, the 1980 Constitution made provision for 'compulsory acquisition' of property by an acquiring authority for public purposes, meaning that the legal protection afforded to property was subservient to the public interest.[17] It has to be stated that despite this limitation, the courts frowned upon interferences against the right of ownership, and in some instances, emphasized the right even in the backdrop of the extremely squalid plight of landless social groups in forcible occupation of private land. For instance, in *Commissioner of Police v Rensford*, the Supreme Court held that the police were obliged by law to remove land invaders ('squatters') who were illegally occupying the land despite their landlessness.[18]

It is arguable that such patently rigid interpretations of the law were a missed opportunity by the courts to creatively subject the right of private landowners to the public interest in social justice in the land issue. Particularly so for the various communities that practised subsistence peasantry in unproductive, overcrowded and continually fragmenting communal landholdings or alternatively

15 Grotius, *The Rights of War and Peace*, Book 1, section 6, Book 2 Chapter XIV section VII and Book III, Chapter XX section VII.
16 Above, 77.
17 These constitutional provisions in section 16 were substantially amended by Constitution of Zimbabwe Amendment Act 10 of 1990, Act 11 of 1990, Act 12 of 1993 and Act 13 of 1993.
18 *Commissioner of Police v Rensford and Another* 1984 (1) ZLR 202 (SC).

'squatted' on privately owned land.[19] The areas they inhabited were insufficiently productive and unsustainable and could not provide the basis for mere survival, economic enterprise or security for capital investment. In view of the predominantly agricultural sector based Zimbabwean economy, the judicial approach ignored the reality that land is at the heart of rural livelihoods in Zimbabwe and any legal system (and its courts) that seeks to serve Zimbabwean society needs to acknowledge such a fact.[20] The cases seemed to confirm that there are very few societal obligations inherent in the private right of landownership.

2.1. The 2013 Constitutional Property Clause

It is critical to examine the constitutional property clause in the 2013 Constitution and determine whether there is an embedded social responsibility interest in the right of ownership.

Section 71 opens with a definition of property. Its definition of property, is that property means "property of any description and any right or interest in property." This definition is rather abstract, and does not give a comprehensive guideline to the courts as to the exact content, scope and nature of constitutional property. 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 recognise 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."[21] In so doing, the section gives recognition to the ordinary common law entitlements that attach to private ownership.[22] However, it should be stated that section 71 is phrased in positive terms and explicitly guarantees private property rights. This means that the Constitution explicitly guarantees property rights, which is in sharp contrast to legal systems where the property rights guarantee is implicit in an otherwise negatively phrased constitutional property clause.[23]

In addition, section 71 makes provision for the compulsory deprivation[24] of property in certain circumstances, and the conditions that must be satisfied by the acquiring authorities before such

19 In contrast, see the approach of South African courts to this in *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).

20 This approach can be contrasted with the decision in the South African case of *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another* 2001 (3) SA 1151 (CC).

21 Section 71 (2).

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

23 See for instance section 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."

24 There is no definition for 'compulsory deprivation' provided in the Constitution. Some guidance however exists from case law. In *Davies & Ors 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 (pp 1213-1219) 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", whilst compulsory deprivation is related to negative statutory restrictions or injunctions that interfere with property rights, but do not lead to the transfer ownership.

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[25], fair and adequate compensation, judicial remedies in case of unlawful deprivation or unfair compensation, or to determine the existence, value or nature of interests in property subject to compulsory deprivation.

In terms of the reasons stated above, section 71, is a substantive constitutional property clause; it contains the general provisions that consider the common law position on the content of a property right, protection of such rights and the framework for 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.[26]

It is easy to note that section 71 has a dual function: it recognises and protects private property rights on one hand, whilst affirming the power of the state to subject private property to compulsory deprivation for public benefit on the other. 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'; it manifests a tug of war between recognition of individual property rights and the national interest in land that could necessitate compulsory deprivation of property.[27] Without doubt, such interests are in the interests of Zimbabwean society, and include the need to address social injustice and inequalities inherent in Zimbabwean society, but which were engendered by colonialism.

2.2 The Constitutional Land Rights Clause

The land rights clause enshrined in section 72 of the 2013 Constitution has specific features that raise a lot of questions. In brief, the clause establishes a comprehensive regime for compulsory acquisition of agricultural land on three important public interest bases. These are, (i) acquisition for agricultural settlement, (ii) acquisition for land reorganisation, forestry, environmental conservation

25 Section 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. Section 72, which exclusively deals with compulsory acquisition of land rights, does not however use the term 'deprivation' anywhere.

26 On the explanation of the rule of law in Zimbabwe, see Chinhengo J in *Commissioner of Police v CFU 2000* (9) BCLR 956 (Z), 976-978; *CFU v Minister of Lands, Agriculture and Rural Settlement and Ors 2001* (3) BCLR 197 (ZS), 205-212. See also generally, A Magaisa 'Constitutionality versus Constitutionalism: Lessons for Zimbabwe's constitutional reform process' OSISA 2011 available at http://www.osisa.org/openspace/zimbabwe/constitutionality-versus-constitutionalism/ accessed on 27 August 2017.

27 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) 561-564.

or the utilisation of wildlife or other natural resources, and finally, (iii) acquisition for relocation of persons dispossessed due to utilisation of the land for the first two purposes. There is no doubt about the prominence of public interest objectives as a limitation to private ownership rights.

For compulsory acquisition of land to be initiated, the state must first identify the agricultural land in question and thereafter publish a notice in the Gazette, indicating that such land is needed for agricultural settlement purposes or other agricultural activities or for the relocation of persons who were dispossessed of their land because that land was needed for listed agricultural activities and purposes.[28] The purpose of the notice is to identify such land and once that is done,[29] the land in question automatically "vests in the State with full title with effect from date of publication of the notice". In practical terms, the single act of publication of a notice has important effects, namely it divests private landowners of their title to land and automatically transfers ('vests') such title to the State. Most pertinently, the notice triggers three acts of acquisition, loss of rights by landowner, and automatic transfer of such rights from the previous land owner to the state.

It is very clear that the state retains massive powers of control over agricultural land in Zimbabwe, be it privately held or otherwise. Private land ownership of such land is subject to state control that is purportedly in the public interest. For instance, the state power in compulsory land acquisition leaves very few remedies and offers little protection to private landowners. The Constitution implicitly identifies land matters as political by prominently affirming the political justification for compulsory acquisition of private agricultural land for public purposes.[30] Section 72 (7) is clear and emphatic on the supremacy and primacy of political considerations in land reform. The section regards certain factors "as of ultimate and overriding importance with respect to compulsory acquisition for land resettlement and land reform purposes", and these factors are: (a) Zimbabwe's colonial history of conquest and land dispossession (b) the consequent liberation war against colonialism that achieved independence, and (c) the need for the Zimbabwean people to be "enabled to reassert their rights and regain ownership of their land". The section concludes by ultimately affirming that as a consequence, the obligation to pay compensation for land subjected to compulsory acquisition lay with the former colonial power, and a failure by the colonial power to do so divests the Zimbabwean government of an obligation to pay compensation to the affected land owners.[31]

In summary, socio- and economic justice considerations that found expression in Zimbabwe's history of colonialism underpin the land rights clause. The clause is unapologetic about its political character as it is emphatic about the societal objective it seeks to achieve. However, it can be observed that, while there is no doubt that the land rights regime is necessarily conditioned by historical, political and other social considerations that are plausible, it should not be at the expense of other national imperatives critical for social transformation. To entrench discrimination

28 This section is taken from section 16 of the old 1980 Constitution.

29 The detailed process is provided under specific provisions of the Land Acquisitions Act Chapter 20:10.

30 See the Preamble, and section 72 (7) (discussed below) of the Constitution.

31 Section 72 (7) of the Constitution of Zimbabwe, 2013. As mentioned previously, this section was transplanted verbatim from section 16A (1 a-c) of the 1980 Constitution, introduced by Constitutional Amendment No. 17 of 2005. Even more interesting, this section was uprooted from the national Draft Constitution, 2000 which was rejected at a referendum. The Kariba draft Constitution of 2008 also adopted, verbatim, this provision (section 56 (7) a-c).

in a land rights clause and deny judicial involvement or comprehensive protest procedures to aggrieved persons fall foul of the principles and values of the 2013 Constitution, and clearly conflicts with rule of law and human rights considerations.

3. The South African Perspective

The constitutional property clause (section 25) under the 1996 South African Constitution also incorporates public interest considerations. The first part of section 25 provides as follows:

> No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
>
> (2) Property may be expropriated only in terms of law of general application -
>
> (a) for a public purpose or in the public interest; and
>
> (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

Clearly under these provisions, the South African constitutional property law recognises both 'deprivations' and 'expropriations' of property rights in the public interest. According to Van der Walt, in South Africa, a deprivation constitutes (usually) uncompensated, duly authorized and fairly imposed restrictions on the use, enjoyment, exploitation or disposal of property for the sake of public benefit.[32] 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."[33]

Another important aspect of this part of the constitutional property clause is that it defines the public interest as including "the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources." There is no doubt that this definition locates the property rights clause in the social justice arena; private property rights must meet the constitutional imperatives aimed at addressing land based inequality in South Africa that was brought about by apartheid and other colonial laws.

The second part of section 25 provides that:

> (5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

32 AJ Van der Walt *Constitutional Property Law* (2005) Cape Town, Juta 131.

33 See AJ Van der Walt 'The limits of Constitutional Property' 1997 *South African Public Law* 275, 279.

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36 (1).

As the Constitutional Court explained in *First National Bank of SA Ltd t/a Westbank v Commissioner, SARS*, the protection conferred on existing property rights in subsections (1) to (4) of section 25 has to be read subject to the other subsequent provisions which acknowledge that the past racially discriminatory legal framework is responsible for the currently skewed distribution of land in South Africa.

In addition, and as the Constitutional Court explained further, the subsections (5) to (9) must be kept in mind whenever section 25 is being interpreted, because they emphasise the fact that the protection of private property is not absolute but is subject to the interests of the general public. The court asserted as follows:

> The purpose of section 25 has to be seen both as protecting existing private property rights as well as serving the public interest, mainly in the sphere of land reform but not limited thereto, and also as striking a proportionate balance between these two functions . . . When considering the purpose and content of the property clause it is necessary, as Van der Walt puts it –
>
> > '. . . to move away from a static, typically private-law conceptualist view of the constitution as a guarantee of the status quo ante to a dynamic, typically public-law view of the constitution as an instrument for social change and transformation under the auspices [and I would add 'and control] of entrenched constitutional values.'
>
> That property should also serve the public good is an idea by no means foreign to pre-constitutional property concepts.

Another South African scholar echoes the courts' sentiments. According to Kidd, issues of environmental injustice have focused on the need for transformation of South African society, in general, and on broadening access to natural resources, in particular. Consequently, in South

Africa, definitions of environmental injustice are linked to the effects of colonial land dispossession and denial of access to land in general and productive land in particular.[34]

Most notably, South African property rights regime, in as far as it impacts on land ownership, is underpinned by the social, economic and political implications inherent in ownership. Ownership can be exploited to benefit society, or endanger a segment of its people. In this vein, Van der Walt illustrates as follows:

> The supremacy of white land rights and the deficiencies of black land rights under the apartheid regime were of course primarily the result of political choices and the concomitant inequitable division of available land, but the deficiencies of black land rights were supported and exacerbated by the hierarchical civil-law property system. Even apart from the underlying political choices and policies, white land rights were strong and efficient because they were defined and protected in terms of the strong ownership paradigm, whereas black land rights, for the most part consisting of either traditional tribal land rights or statutory land 'rights' such as site permits, residential permits, lodger's permits, hostel permits or certificates of occupation, were weak and insecure because they were defined and treated as unrecognised and unprotected property relations.[35]

In summary, the South African constitution makes provision for public interest considerations in its constitutional property clause to address the social injustice occasioned by apartheid government's manipulating of property rights to promote racialism. The private property right in section 25 is subject to deprivation or expropriation in the public interest, and such public interest is defined in the clause to mean the nation's commitment to land reform and enhancing access to natural resources. Clearly, these imperatives are social justice issues aimed at destroying entrenched social and economic inequalities that currently characterise South African society.

4. The German Approach

The German Constitution is explicit on the philosophy that underlies its property rights because of Article 14 (2) and 14 (3). These two articles provide as follows:

> (2) Property entails obligations. Its use shall also serve the public good.
>
> (3) Expropriation shall only be permissible for the public good. It may only be ordered by or pursuant to a law that determines the nature and extent of compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In case of dispute concerning the amount of compensation, recourse may be had to the ordinary courts.

A commentary of these two sections is apposite. German constitutional property law is underpinned

34 M Kidd *Environmental Law* (2008) 230.

35 AJ Van der Walt 'Property Rights and Hierarchies of Power: A Critical Evaluation of Land - Reform Policy in South Africa' (1999) 64 *Koers* 259-294.

by a consensus that ownership of property entails obligations. These obligations impose burdens which must be carried by owners. Property rights are therefore not exclusive or blind to social objectives; they should incorporate the corresponding social duties or obligations. It is submitted here that a general reading of German constitutional property law suggests that these obligations are social obligations, not other types of obligations.[36] According to G Alexander, for instance, the German constitutional property rights philosophy is expressed in this manner to facilitate and practically mediate individual liberty and social welfare in a manner that promotes the virtues of social responsibility.[37]

To a larger extent, German constitutional property rights admits to the natural tension between private interests and the public interests in the property rights arena. Most jurisdictions have struggled to find an approach that strikes a satisfying balance between these two competing interests. As far as the German approach is concerned, there is no doubt that the private interests in property rights are subservient to the public interests, or the public good. However, according to one scholar, the phrasing of the German property rights clause does not create massive powers for the state to acquire property under the guise of public interest; the bias is on the public interests, and not the state.[38]

To properly determine the social responsibility inherent in the German constitutional property regime, it is necessary to discuss the expropriation clause. Expropriation is recognised, but must be conducted in manner that satisfies the public interest. Most importantly, the balance between the public interest and the private interest manifests in the requirement for compensation to follow expropriation. It contrasts sharply with the Zimbabwean perspective where expropriation for land is uncompensated, whilst all expropriations for any other property are compensated.[39] The assessment of the compensation value is also important; equity must be struck between the two competing interests of the affected victim and of the public interest. The interests of the expropriating authority are not important.

To an extent, the German approach to the determination of compensation is remotely comparable to the Zimbabwean and the South African approaches. Under the Zimbabwean approach, expropriation of property in general must be accompanied by fair and adequate compensation. There is nothing in the general property clause to suggest that the public interest must be considered in assessing this fair and adequate compensation. However, for the expropriation of agricultural land, no compensation is paid at all for loss of property. The only compensation paid is for improvements made by the victim to the land in question. In fact, courts are explicitly denied jurisdiction to entertain matters for the determination of compensation for loss of the land.

At best, this approach can be understood in the context of the public interest. The land question in Zimbabwe has a chequered and contested history, and the government's position has always been that such land was forcibly and unlawfully acquired by colonists through conquest. Further,

36 See G Alexander *The global debate over constitutional property: Lessons from American takings jurisprudence* (2006).
37 Ibid 146.
38 See H Dagan 'The social responsibility of ownership' 2007 (97) *Cornell Law Review* 1250, at 1257.
39 Section 72 and section 71 of the 2013 Constitution of Zimbabwe.

such land had to be acquired, redistributed and repossessed in the public interest without compensation. Although this view is explicit in the 2013 Constitution, it was inserted in the 1980 Constitution through Constitutional Amendment Number 16 (Act 5 of 2000). In summary, section 16 a (2) provided for criteria to be relied on in assessment of compensation for expropriation of agricultural land. The criteria included: (a) consideration of the history of the ownership and use and occupation of the land; (b) the price paid for the land when it was last acquired; (c) the cost or value of improvements on the land; (d) the current use to which the land and any improvements on it are being put; (e) any investment which the State or the acquiring authority may have made which improved or enhanced the value of the land and any improvements on it; (f) the resources available to the acquiring authority in implementing the programme of land reform; (g) any financial constraints that necessitate the payment of compensation in instalments over a period of time; and (h) any other relevant factor that may be specified in an Act of Parliament.[40] Clearly, the criteria illustrate that the government always considered expropriation as being in the public interest, and the need for a compensation regime to be subject to such public interest.

For the South African regime, Van der Walt argues that the public purpose requirement in section 25(2)(a) of the Constitution serves the classical liberal function of property law clauses, namely, "to prevent or stop expropriations of private property for improper, unlawful purposes; and to control legitimate exercises of the power to expropriate." Again, as with the German constitutional property position, the bias here is on the public interests, and not the state interests. Section 25(4)(a) of the Constitution, defines 'public interest' for the purpose of the interpretation of section 25, and this definition ensures that the traditional function of the property law clause does not frustrate the government's transformative and land reform goals. Again, the phrasing takes for granted, and assumes that land reform is a socially desirable policy objective that must be considered in the public interest.

5. Major Findings

5.1 All three constitutional systems recognise the necessity of public interest in their property rights philosophy. To that extent, there is a general agreement that private ownership is not independent of societal objectives, and should be conditioned by social obligations. In essence, the three constitutional property rights clauses admit to the superiority of the public interest over the individualism of private ownership.

5.2 The three constitutional property clauses recognise the right of the state to expropriate private property for a public purpose or public interest. In Zimbabwe, the terminology adopted is compulsory acquisition or deprivation, whilst the South African and German constitutions prefer the term expropriation.

5.3 The three systems differ on compensation, and its assessment. Under the Zimbabwean constitutional system, compensation is paid after expropriation of any property except

40 See section 16 a (2) of the 1980 Constitution of Zimbabwe, as amended by Constitutional Amendment Act 5 of 2000.

agricultural land. Such compensation needs to be fair and adequate. There is no compensation for agricultural land, except for improvements made to the land. The South African and German constitutions call for compensation in cases of expropriation of any kind of property.

5.4 For the Zimbabwean position, the lack of compensation in agricultural land is perceived as justified by the public interest. For the South African system, compensation is assessed in the context of criteria squarely located within the public interest argument. For the German system, compensation is arrived at by balancing the public interest and the interests of the affected owner. Consequently, all three systems incorporate the public interest argument in their compensation regimes, with the Zimbabwean being the most radical, and the German approach the least contentious.

5.5 For the Zimbabwean system, the radicalism in its compensation regime is exacerbated by the call for compensation on both deprivations (restrictions) and acquisitions (expropriations) of ordinary property. Even minor restrictions are potentially compensable, and will create problems. For the South African and German systems, compensation is clearly confined to expropriations, and is a sensible approach.

6. Recommendations

Several recommendations can be proffered to improve and enhance the Zimbabwean approach to constitutional property. In brief, the most important recommendations are as follows:

6.1 The private ownership of property must be read, understood, applied and enjoyed as entailing social obligations on the owner in Zimbabwe. Private owners of property must not exercise and enjoy their property independent of social duties and responsibilities. With ownership comes power, and with power necessarily comes responsibility. The greater the powers that accrue to any kind of owner, the more the responsibilities that should come with the ownership. Further, the greater the power entrusted to an owner, the greater the expectation that the interests of the owner should be subservient to the public interest or the public good. The German constitutional system is clear on this, and the Zimbabwean and South African systems can follow that lead.

6.2 Zimbabwe's constitutional property clause must restrict compensation to expropriations only, and not extend compensation to ordinary deprivations or restrictions. The German and South African approaches have confined compensation to expropriations which makes government possible. In the Zimbabwean case of *Hewlett v Minister of Finance and Anor*,[41] Fieldsend CJ correctly claimed that,

> "Indeed, government could be made virtually impossible if every deprivation of property required compensation."

41 1982 (1) SA 490 (ZS), or 1981 ZLR 571.

The same sentiments were made in the United States, in the case of *Pennsylvania Coal Co v Mahon* 260 US 393 (1922) 413, where the court reasoned that:

> [G]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and musht yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.

6.3 The acquisition of agricultural land in Zimbabwe must be accompanied by the payment of reasonable compensation, taking into various factors contextualised in the public interest. The current position where compensation is not payable is unsustainable, anachronistic and racially motivated. An expropriation regime must be forward-looking, not backward-looking. The German and South African systems have called for compensation, with such compensation assessed from a public interest perspective. The Zimbabwean approach should follow this lead.

6.4 The Zimbabwean system must develop a comprehensive definition of public interest. Such definition must incorporate aspects such as the social, political and economic interests of society. These interests include economic development, social progress and stability, peace, good governance, human development and welfare, human security, equalitarianism, fairness, impartiality and social justice perspectives. In so doing, it would be readily understandable to justify expropriation of property in the public interest.

6.5 The Zimbabwean constitutional system must clearly distinguish the public interest from the state interests as state interests are not always public interests. The dominance of state interests in expropriation suggests that the property of an owner is subject to expropriation to fulfil a state interest which might not be a public interest. The South African and German systems have been more distinctive on these two issues, and it is submitted these systems are more protective of private property than the Zimbabwean approach.

Conclusion

The ownership of property is a contested space, pitting as it does society and the individual. In modern constitutional systems, the conflict in property rights regimes is between the state behemoth and the individual owner. Consequently, the regime for expropriation must strike a balance between the interests of these eternally fighting parties, i.e. the individual and the state. For the sake of public interest, the state needs to enter the private space of the property owner, on the presupposition that ownership should defer to societal objectives, not state objectives. In other words, private ownership carries a social burden that is for the public good.

The German system is more emphatic about ownership necessarily translating to social obligations. Interestingly, the German system suggests that this position should be the universal one. The South African and Zimbabwean systems have not been that explicit in regarding ownership as social responsibilities. However, both systems go some way towards ensuring that private ownership is subject to the public good, with the Zimbabwean approach being rather too radical in some parts. However, as the analysis of the three constitutional systems mentioned above has shown such a view is to be expected. It is the norm in view of the contradistinctions underpinning different jurisdictions and constitutional systems of the world, and the lack of universal definition of terms such as social responsibility or public interest.

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Founded in 1925 as the first German political foundation, the Friedrich-Ebert-Stiftung (FES) is a private, non-profit organisation committed to the value of social democracy. The Foundation bears the name of the first democratically elected President of Germany, in 1918, Friedrich Ebert, and seeks to preserve his political legacy: the promotion of freedom, solidarity and social justice. The Foundation pursues these aims through its programmes of political education, international co-operation, scholarships and research in Germany and abroad.

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