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**Foreign Direct Investment and the Curse of Property Rights in Zimbabwe**

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### **Abstract**

The study explores the relationship between property rights and foreign direct investment in Zimbabwe. It argues that the past violations of property rights and the weak property rights regime in Zimbabwe is one of the key determinants of FDI inflow. It focuses on the period from the year 2000 to 2019. Rampant property rights violations began in Zimbabwe in the year 2000. This happened during the government's land reform program which saw thousands of white local and foreign farmers evicted from their farms without following due process. Thousands of farm workers were also displaced in the process. Historical imbalances of land distribution needed to be addressed. The need to redistribute land in Zimbabwe for inclusive and sustainable growth is not disputed. The state however violated the rights of the existing owners during the fast track land reform programme. The research explores the manner in which the government of Zimbabwe exercised its right to regulate. The research will look at the impact that this violation of property rights has had on investor sentiment. Laws that enabled expropriation without compensation and the ouster of the courts' jurisdiction from hearing expropriation matters concerning agricultural land will be considered. The research will focus on land property rights in particular and property rights in general will also be considered. The weak property rights in Zimbabwe is what is referred to as a curse as the research argues without adequately secured property rights investor attraction will remain a challenge.

## CHAPTER ONE

### GENERAL INTRODUCTION

#### 1.1 Introduction

This study is an analysis of the relationship between property rights law and foreign direct investment (FDI) in Zimbabwe from the year 2000 to present day. The property rights law regime will be analysed from both historical and contemporary perspectives. In this study this researcher will argue that property rights in Zimbabwe are a curse because they are not adequately secured. The insecure property rights have thus posed a hindrance to both domestic and foreign investment. Zimbabwe is rich in mineral resources and is ideal for investment in agriculture. The investment required to viably invest in these sectors require more than what is readily available domestically. The country has low savings and low incomes making domestic investment an important but inadequate source of solely funding the country's investment needs. External injection through FDI thus becomes an alternative means to augment domestic investment. <sup>1</sup>The same security of property rights issues that affect FDI also affect the sentiment of domestic investors. The country has faced economic decline in the past two decades. The research will explore the link between FDI inflow, property rights and the economy of Zimbabwe. While FDI does not guarantee growth some writers like F Sader argue that FDI can unlock value in anchor sectors such as mining and infrastructural development. Private infrastructure investment made up 17 percent of the FDI inflows in developing countries between 1990 and 1998.<sup>2</sup>This is evidence of developing countries' reliance on FDI for their infrastructural needs. To realise the benefits of FDI, Zimbabwe would need to have enabling industrial policies in place. A number of variables including political stability, economic stability, infrastructure, available opportunities, ease of doing business and property rights influence investor's decision to invest. Authors such as Everest-Philips, Besley and

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<sup>1</sup> S Chaudhuri & U Mukhopadhyay *Foreign direct investment in developing countries* (2014) 1.

<sup>2</sup> F Sader *Attracting foreign direct investment into infrastructure* (2000) 9.



Ghatak argue that property rights are a key determinant of investor confidence. The study will also explore the interconnectedness of property rights, the economy and the political landscape.

The history of property rights in Zimbabwe is one characterised by rampant expropriation without compensation of land. Respect and observance of property rights is a key driver for the efficient functioning of any society. Although there are various positions regarding property rights Adam Smith in the 18<sup>th</sup> century highlighted the importance of property rights for an enabling environment for increasing ones capital and the need for government to protect these rights. He proffered that property rights encourage an individual to invest in his property by developing it, make a profit from it and channelling his income into other new investments thus growing the economy. Property rights must be certain and predictable for the orderly conduct of a society. These attributes give clarity to who the right holder is and what they are entitled to as the right holder. Where property rights are uncertain it makes the rights insecure and productive man hours will be expended on litigation.<sup>3</sup> With the haphazard expropriation without compensation Zimbabwe's property rights regime became uncertain and unpredictable. In February 2000 the government of Zimbabwe had a referendum on a draft constitution which had a provision which would increase presidential powers and undermine parliament .The draft constitution also provided for expropriation without compensation. Due to an awareness campaign by Zimbabwe's opposition party the MDC Zimbabweans voted against the draft constitution. However, through parliament the government successfully went on to amend the constitution and added section 16A .The section extended circumstances under which land could be expropriated. It provided for compensation for improvements only and made compensation for the land a responsibility of its former colonial power.<sup>4</sup>

Property rights violation has been more rampant in agriculture but it has also been exhibited in mining and in money as an asset.<sup>5</sup> Zimbabwe has been facing challenges in stimulating economic growth and foreign direct investment.<sup>6</sup> The research will argue that strengthening of property rights and addressing its past property rights violations is one way Zimbabwe may stimulate foreign investment. John Robertson one of Zimbabwe's leading economist observed how agriculture used to be a key driver of the Zimbabwean economy. He held the view that

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<sup>3</sup> JW Singer 'The Rule of reason in property law' (2013) 46 *UC Davies Law Review* at 1372.

<sup>4</sup> Fast track land reform in Zimbabwe [https://www.hrw.org/reports/2002/zimbabwe/ZimLand0302-02.htm#P112\\_20168](https://www.hrw.org/reports/2002/zimbabwe/ZimLand0302-02.htm#P112_20168) (accessed 2 June 2019).

<sup>5</sup> *Bernhard von Pezold and Others v Republic of Zimbabwe*, ICSID Case No.ARB/10/15.

<sup>6</sup> The World Bank's lending program in Zimbabwe is inactive due to arrears <https://www.worldbank.org/en/country/zimbabwe/overview> (accessed 22 June 2019).

upholding of property rights attracted investors even in manufacturing as they were guaranteed of raw materials from the agricultural sector.<sup>7</sup>

The necessity of land redistribution to redress historical imbalances is not disputed by many Zimbabweans. In light of the inequality in land holding due to colonialism there was need to restructure landholding in Zimbabwe for more equitable distribution.<sup>8</sup> Planned and well-intended redistribution would have likely led to a less disruptive outcome as in the case of Rietkloof 2 farm acquired under South Africa's Proactive Land Acquisition Strategy (PLAS) Programme.<sup>9</sup> At the height of the expropriation the arbitrary manner in which land reform was carried out led to Zimbabwe's isolation by most countries. Through the Zimbabwe Democracy and Economic Recovery Act (ZIDERA) of 2001 the United States imposed sanctions on selected individuals and entities in Zimbabwe. They also cut off lending by international institutions and debt cancellation. One of the purposes of the Act was to push for a return to the rule of law after the land invasions. The amendment Bill to ZIDERA in section 11 states the possibility that ties with Zimbabwe will probably increase including in trade and investment if Zimbabwe '(2)takes concrete, tangible steps towards-(B) economic reforms such as respect for contract and private property rights.' In 2002 Zimbabwe was suspended from the Commonwealth. During the land reform exercise agricultural land was expropriated from white local and foreign commercial farmers without compensation. The government lost the initial expropriation cases brought before its local courts. The court held that the land resettlement programmes was a violation of the rule of law.<sup>10</sup> The ruling was however disregarded as the farms were not returned. The state went on to ouster the courts' jurisdiction in hearing expropriation and compensation cases through a constitutional amendment. The courts no longer had the jurisdiction to hear challenges pertaining to expropriation of the land.<sup>11</sup> The ousting of the domestic courts' jurisdiction in matters pertaining to expropriation and compensation of agricultural land will be considered.<sup>12</sup> A legal framework providing for certain and predictable property rights will help stimulate investment. Genuine public interest

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<sup>7</sup> Restore property rights on agric land

<https://www.theindependent.co.zw/2018/02/23/restore-property-rights-agric-land/> (accessed 22 June 2019).

<sup>8</sup> William Gumede Lessons from Zimbabwe's failed land reform

<https://m.news24.com/Columnists/GuestColumn/lessons-from-zimbabwes-failed-land-reforms-20181014> (accessed 10 July 2019).

<sup>9</sup> Stories –Rietkloof 2 farm becomes a success story for DRDLR

<http://www.ruraldevelopment.gov.za/news-room/news-flash/file/3419> (accessed 24 June 2019).

<sup>10</sup> Commercial Farmers Union v Minister of Agriculture Land and Resettlement (HC3985/2000).

<sup>11</sup> Constitutional Amendment Number 17 2005.

<sup>12</sup> F Francioni 'Access to justice, denial of justice and international investment' (2009) 20 *European Journal of International Law* at 729.

should not be used as an excuse to exercise wanton abuse of a country's citizens' rights and those of its foreign investors. Some foreign investors who had made their investment in post independent Zimbabwe lost their investments during this period. Some of these investors lost their farms in violation of the bilateral investment treaties their countries had with Zimbabwe.<sup>13</sup>

## **.1.2 Background of the study**

### **1.2.1 Violation of property rights through the lens of land reform**

From the year 2000 the government of Zimbabwe under President Mugabe embarked on a fast track land reform exercise that saw an approximated 3000 out of an approximated 4000 white farmers dispossessed of their farms by 2009 according to the Geneva based Internal Displacement Monitoring Centre. Over a million farm workers and their families were said to have been evicted during this period.<sup>14</sup> This expropriation of land happened with no due process being followed. The farmers did not get compensated for the land which was forcibly taken from them. This period saw a degradation of property rights of such a magnitude never experienced before in post independent Zimbabwe. Both domestic and foreign investments were low during this period and economic growth was subdued especially in comparison to growth rates of other countries in the region.

It is the purpose of this research to explore what Zimbabwe needs to address pertaining to property rights to stimulate FDI inflows. The current government led by President Emmerson Mnangagwa which came to power in November 2017 has vocalised its intentions to compensate the dispossessed white farmers. The Minister of Finance mentioned at a discussion on Zimbabwe hosted at the Cato Institute in the United States of America in April 2019 that the government had so far set aside \$58 million (approximated to be \$US12m at the time) to compensate the white farmers that were affected by land reform.<sup>15</sup> The government will have to address the ICSID award of \$US265million issued in the Border Timbers and Pezold cases. Since this case involves international investors coming to an acceptable settlement of this case will have a bearing on how investors view Zimbabwe as an investment destination. The compensation for agricultural land in a treaty protected investment is now provided for in the Constitution of Zimbabwe 2013. Zimbabwe must also be seen to be upholding its supreme law.

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<sup>13</sup> Border Timbers and others v Zimbabwe ICSID Case No ARB/10/25.

<sup>14</sup> Zimbabwe Human Rights NGO Forum 'Land reform and property rights in Zimbabwe' (2010) 5.

<sup>15</sup> Zimbabwe: Africa's shame and opportunity Cato Institute policy forum live streaming. [https://youtu.be/V\\_7AdktNqEg](https://youtu.be/V_7AdktNqEg) (accessed on 15 April 2019).

Clauses in the Constitution of 2013 which still enable expropriation without compensation, lack of due process, discriminatory security of property and denial of access to justice will be discussed.<sup>16</sup>

From its independence in 1980 to the period 1999 Zimbabwe only experienced negative growth in two of those years. The first was a drought induced negative growth in 1992 and the second was in 1999. Some attributed the 1999 negative growth to poor rainfall but some research has concluded that one of the reasons for growth decline was a result of investors starting to hold back from investing in the country as the government had made public its plans to expropriate without compensation.<sup>17</sup>

### **1.2.2 Violation of property rights through the lens of monetary policy**

Infringement in property rights has been rampant in agricultural land but it has also been evident in property rights in money. In the *Pezold* case one of the issues in contention was that its US dollar bank deposits from tobacco were directly expropriated when the respondent refused to release proceeds in US dollars. The unfair and arbitrary monetary regulations are not only a thing of the past as evidenced by one of the statutory instruments introduced this year.<sup>18</sup> Beattie Studio is suing one of the country's commercial banks, CABS over their money which has been unceremoniously converted to an electronic currency the RTGS dollars.<sup>19</sup> CABS has used the provisions of this statutory instrument in its defence. The court has reserved judgment in the case. Such matters will be explored in the paper and will be weighed in light of the best practice for secure, certain and predictable property rights regime. If property rights violations are condoned they may become epidemic. The research will explore how property rights violations have also been evident in mining and in the property rights in money. The Deputy Governor of the Reserve Bank Zimbabwe (RBZ) admitted that the business community and the public had lost confidence in the banking system because of poor policies. At an Annual General Meeting of the Confederation of Zimbabwe Industries he was quoted as saying, 'As authorities, we have been very good in changing and chopping policies in the past ten years or so. Sometimes we are very good at implementing policies that we must not be implementing.'<sup>20</sup>

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<sup>16</sup> Section 72 Constitution of the Republic of Zimbabwe, 2013.

<sup>17</sup> C Richardson 'Loss of property rights and the collapse of Zimbabwe' (2005) 25 *Cato Journal* at 3

<sup>18</sup> Statutory instrument 33 of 2019.

<sup>19</sup> High Court reserves judgment in RTGS challenge <https://businesstimes.co.zw/high-court-reserves-judgment-in-rtgs-challenge/> (accessed on 15 May 2019).

<sup>20</sup> RBZ admits that poor policies have eroded public confidence 1 June 2019 <https://www.newzimbabwe.com/rbz-admits-that-poor-policies-have-eroded-public-confidence/> (accessed 1 June).

The regulations that affect business also influence future investment decisions. Policy may shape the law as evidenced in the land reform policy. The arbitrary alteration of the value in money and taking of foreign currency through changes in regulations has resulted in a mistrust of the banking system. If foreign currency runs the risk of being changed to local currency at a massive discount this becomes a disincentive to savings or transacting through the local banks. The Deputy Governor was at the same AGM quoted saying, ‘So you will realise that lack of property rights is also a factor contributing to the loss of confidence, because everyone will do anything to protect that which they own’.<sup>21</sup>

### **1.2.3 Violation of property rights through the mining lens**

In February of 2019 a violation of property rights occurred at Gaika Gold Mine in Kwekwe. This violation eventually led to its invasion by some unruly elements who allegedly managed to mine gold illegally from it. The police and the soldiers who were sent to secure the mine were reported to have also joined in the looting. The research will delve into the crux of the matter as it progresses.<sup>22</sup> This is not the first reported case of invasion of a lucrative mining claim belonging to someone else.

### **1.2.4 Violation of property rights through the lens of the verdict**

Zimbabwe has lost a number of cases so far in regional and international tribunals such as the Border Timbers case. In two cases The ICSID ruled in favour of the complainants and made awards running into over US\$200million which Zimbabwe is still to settle.<sup>23</sup> How Zimbabwe responds to these judgment and how they will settle is important for their reputation. These cases concerned expropriation without compensation of farms owned by foreign investors. These investments were covered by bilateral investment treaties between Zimbabwe and their home states. The cases will be considered in preceding chapters and possible settlement options will be proffered.

Zimbabwe’s highest FDI to GDP percentage from the year 2000 to 2018 was 2.98 percent in the year 2014. The level of FDI between 2000 and 2018 has been erratic but in the low ranges.

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<sup>21</sup> n 20.

<sup>22</sup> Police, soldiers join in Gaika looting spree <https://www.zimbabwesituation.com/news/police-soldiers-join-gaika-looting-sprees/#more> (accessed on 10 May 2019).

<sup>23</sup> A Mizner, ‘Multi-million dollar payment hangs over Zimbabwe’ <https://www.africanlawbusiness.co/news/7593-multi-million-dollar-payment-hangs-over-zimbabwe> (accessed on 15 May 2019).

An FDI percentage of GDP of above 5 % is considered good.<sup>24</sup>The fact that Zimbabwe has a lot of underutilised rich soils and mineral resources indicates that there is room for investment in these and other areas. Out of a ranking of 125 countries Zimbabwe is ranked 117 in the international property rights index (IPRI) and 23 out of 25 countries in the region.<sup>25</sup> The index measures the degree to which a country's laws protects private property rights and the extent to which they are enforced. Zimbabwe has unexplored mineral resources which require expertise, modern technology and significant investment to monetize. The country also has very rich soils which are suitable for food production and these are underutilised thus more secure property rights may stimulate FDI into these sectors. The state has to show consistency in securing property rights both in actions and in providing a legal framework which secures property rights for everyone. Investor and citizen trust was lost as a result of the property rights violations as will be explored. An investor in Zimbabwe needs to know that breach of a contract in Zimbabwe has legal consequences. It must be certain that the law will be applied where a contract has been breached. A violation of property rights is a violation of the rule of law. From the Zimbabwe scenario setting aside of the rule of law led to politically driven conduct where some elements took the law into their own hands. It is the purpose of the law to protect.

### **1.3 The research problem**

Zimbabwe's economy has been performing below its potential for the past 20 years since 1999. It has gone through periods of negative and of low growths. Most countries in Africa have attracted growing FDI inflows and have been experiencing faster, more consistent economic growth. Africa is generally an emerging market with 5 of the 10 fastest growing economies in the world in 2018 being from Africa.<sup>26</sup> Zimbabwe has investment potential since it is endowed with fertile land and mineral resources which can attract investors who want to grow their capital. Insecure property rights in our two main sectors with potential have a negative impact on FDI inflows.

The period that Zimbabwe's economy started underperforming was when the country announced plans to expropriate agricultural land without compensation in 1999. With the erosion of property rights the erosion of the economy also began. Zimbabwe was once a bread basket and exported a significant amount of its agricultural produce. Zimbabwe's economy has

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<sup>24</sup> Zimbabwe foreign direct investment, percent of GDP-data, chart [https://m.theglobaleconomy.com/Zimbabwe/Foreign\\_Direct\\_Investment/](https://m.theglobaleconomy.com/Zimbabwe/Foreign_Direct_Investment/) (accessed 25 June 2019).

<sup>25</sup> Zimbabwe <https://www.internationalpropertyrightsindex.org/country/zimbabwe> (accessed 3 Sept 2019).

<sup>26</sup> World Bank Report 'Global economic prospects June 2019'.

not been growing as fast as other developing economies in Africa. A series of past and on-going events have led to a sustained interest in property rights.

The government has been on an international charm offensive to attract investors and since the new government took over in Zimbabwe investor's expression of interest has been on the increase. This interest may be a result of the fact that the current government has indicated that property rights will be protected in Zimbabwe. The protection is however uncertain because of some of the constitutional provisions in the Zimbabwean constitution. Amendment of the Constitution to provide secure property rights for all and bringing all other legislation pertaining to property in conformity to the constitutional amendments may prove necessary. Property rights have been raised as a concern and stronger property rights will create a safer investment environment.

For the past 20 years the country has been characterised by a property rights regime that is porous (insecure) and is neither investor nor citizen friendly. This has contributed to the country's massive capital flight and inability to attract substantial foreign direct investment. The study will argue that the insecure property rights regime has made investors reluctant to invest in Zimbabwe despite the potential that the country has especially in mining and agriculture. Without effectively addressing the past and amending its laws to effectively secure property rights Zimbabwe will not stimulate as much investment as it potentially can. Both issues need to be addressed for a swifter realisation of its investment potential.

#### **1.4 Research question**

How does Zimbabwe address its past property rights violations and fashion a legal framework that would foster investor confidence?

- What are some of the theories that speak to property rights of investors?
- What impact has the property rights regime had on Zimbabwe's investment climate?
- Do current laws adequately secure property rights and if not how can the legal framework be framed to foster investor confidence?
- What possible options can Zimbabwe consider to appease those that have had their property rights directly violated?

- With the secure property rights legal framework in place what is the role politics place in creating an enabling environment?

## **1.5 Significance of the study**

### **1.5.1 Contribution to academia**

This research will add to the existing body of knowledge on how property rights may affect investors' appetite for an otherwise potentially lucrative investment destination. Ideas generated will add to the options available to a country that has had a bad history pertaining to property rights violations. The research will proffer ways to dealing with the past that are unique to the Zimbabwean scenario. This may encourage academia to come up with original ideas that address the country's needs. The position that Zimbabwe finds itself in is a unique position in that it has to deal with post-independence property rights violations that started as result of the country trying address the inequality caused by colonialism.

### **1.5.2 Contribution to countries with similar inequality colonial challenges to solve**

The research will give other countries with a similar history as that of Zimbabwe insight into what could happen if solutions to addressing the inequality dilemma which was propagated by colonialism is not handled well and property rights with other human rights are not taken into consideration. For instance South Africa is faced with the same scenario in which most of the rich fertile land is in the hands of a few white South Africans. How South Africa handles the necessary redistribution of land could have a significant bearing on its short to medium term investment profile. The inequality cannot be ignored and has to be dealt with as a matter of urgency. Land is an emotive issue and one of the key issues in the struggle for the end to apartheid. Maintaining the status quo is thus not an option. It would be imperative though that the rule of law is observed during this process. The manner should not be haphazard. As far as property rights go in land redistribution clear guidelines must be set and the necessary discussions held. Inclusive growth can only be realised if the land question is addressed by redistribution.<sup>27</sup>

### **1.5.3 Contribution to the Government of Zimbabwe**

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<sup>27</sup> P Jordan, 'What does addressing the land question in SA actually involve' <https://www.businesslive.co.za/bd/opinion/2018-12-18-pallo-jordan-addressing-the-land-question-in-sa-actually-involve/> (accessed on 5 June 2019).



The research will highlight to the government the concerns of potential investors pertaining to the property rights regime of the country. It will help them see how inconsistency pertaining to property rights is affecting the confidence of investors. It will point the government to areas that need sprucing up for the country to be considered an attractive investment destination where investments are adequately protected. It will proffer solutions to giving investors more comfort through a property rights regime that adequately secures property rights. The research will also provide the government with possible ways to deal with past grievances. African economies have generally been experiencing high growth and attracting FDI. Zimbabwe has the potential to be one of the fastest growing economies in the world. The research is timely and relevant as the current government has expressed its desire to attract investors and provide an investment friendly environment. It has made overtures of compensation and has shown a desire not to be treated as a pariah state.<sup>28</sup> This study if considered may help Zimbabwe change its economic trajectory and become an attractive investment market.

## 1.6 Literature review

Numerous articles have been written pertaining to property rights and investment attractiveness. Views on what the main determinants of FDI are differ.<sup>29</sup> Scholars may not always mention property rights as an important determinant of an investment decision because in developed economies the security of property rights is taken for granted whereas in developing countries such as Zimbabwe the security of property rights is not always guaranteed.<sup>30</sup> Well defined and well protected property rights create an enabling environment for prosperity.<sup>31</sup> Growth in an economy hinges on investment and investors are not too keen to invest where their property is under constant threat and their rights are not guaranteed.<sup>32</sup> Most articles generally hold the view that investors may invest in a community with a porous property rights regime but would rather invest in one with a property regime that is certain and that respects property rights. Property rights are a major concern especially in areas that are

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<sup>28</sup> Land compensation: I am simply following the Constitution, says Zim president <https://m.fin24.com/Economy/Africa/land-compensation-i-am-simply-following-the-constitution-says-zim-president-20190414-2> (accessed 10 May 2019).

<sup>29</sup> Chaudhuri-Mukhopadhyay (n1) 8.

<sup>30</sup> TL Anderson & LE Huggins *Property rights a practical guide to freedom and success* (2003) xi.

<sup>31</sup> G O'Driscoll Jr L Hoskins 'Property rights: the key to economic development' <https://www.libertariansim.org/publications/essays/property-rights-key-economic-development> (accessed on 15 May 2019).

<sup>32</sup> A Locke 'Property rights and development briefing: Property rights and economic growth' 8 <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/8513.pdf> (accessed on 6 June 2019).

characterised or have a history of rampant and widespread abuse of property rights. Private ownership, though the most complete type of property right is certainly not the only significant type. Property rights vary. Leasehold and use rights over a property may have significant guarantees for the right holder if they are secure.<sup>33</sup> Property rights in their entirety and not just private ownership will be considered in the research. Various articles have also been written specifically on the property rights violations in Zimbabwe and the impact it has had on the economy.

In the year 2000 when Zimbabwe implemented its fast track land reform programme the economy shrunk by 5 percent, then went down by 8 percent in 2001, followed by a 12 percent drop in 2003 and an estimated 18 percent drop in 2004. Successive years of economic decline characterised this period of rampant property rights violation.<sup>34</sup> By the time IMF produced its 2003 report Zimbabwe's inflation had risen to 500 percent and its currency had devalued by 99 percent. This happened to a country which The Business Times in 1997 had called a darling of the investors as its stock market was bullish and investors were investing on the Zimbabwe Stock Exchange. Investor trust slumped when property rights were disregarded in the year 2000 at the start of land reform.<sup>35</sup>

During the land reform exercise the state had set up a Land Identification committee to identify farms which would be expropriated. The role of the committee proved redundant as soon as it had been set up as events overtook the committee. The rule of law was put on ice and orders from the High Court were ignored.<sup>36</sup> Rampant arbitrary expropriation without compensation became the order of the day. In the Border Timbers case the government of Zimbabwe was ordered to return the farms it had seized without compensation in the year 2005. The expropriation was deemed to be in contravention of the fair and equitable treatment clause in the Switzerland-Zimbabwe bi-lateral investment treaty (BIT).<sup>37</sup> This case clearly shows that even foreign investors were not spared from the property rights violations. In this scenario the company had bought some of its farms in post independent Zimbabwe in 1988 hence the company had paid value for these. Zimbabwe is still to settle the award. The state's failure to protect such an investor will make potential investors in agriculture hesitant to invest.

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<sup>33</sup> FAO, 'Land and property rights', Facilitator's guide, 26.

<sup>34</sup> 'OECD report 2004', 357.

<sup>35</sup> Richardson (n 17) 12.

<sup>36</sup> Zimbabwe Human Rights NGO Forum (n 14) 4.

<sup>37</sup> Border Timbers Limited case (n13).

The Constitution of Zimbabwe provides for expropriation without compensation for land and does not give access to justice where agricultural land has been expropriated. It states that discrimination shall not be used as a ground for challenging discrimination.<sup>38</sup> In the Campbell case before the SADC tribunal Zimbabwe lost the case and its expropriation was held to be discriminatory.<sup>39</sup> It was held in this same case that the complainants had been denied access to justice by the state through its ouster clause contained in the amendment to its Constitution. In the commercial farmers union case in 2001 in the early stages of the violation of property rights through land reform the Supreme Court of Zimbabwe had this to say:

We are not entirely convinced that the expropriation of white farms, if it is done lawfully and fair compensation is paid, can be said to be discriminatory. But there can be no doubt that it is unfair discrimination...to award the spoils of expropriation primarily to ruling party adherents.

On a daily basis someone's property rights are infringed somewhere in the world. John Locke opined that property rights are one of the reasons why society saw the need for government.<sup>40</sup> It is the government's duty to safeguard property rights. Even where ownership to property is in question due process must be followed to resolve the matter.<sup>41</sup> A rational society will tend to observe and uphold property rights where the benefits of doing so outweigh the benefits of not doing so.<sup>42</sup> The current government's realisation of the need to compensate and their official announcement of it speaks to this view. Zimbabwe will benefit more from respecting property rights than from not doing so. Even after a change of government investors are uncertain and still assessing the situation. Zimbabwe used to be referred to as the bread basket of Africa. Agriculture can still be a key catalyst to economic recovery and attract foreign investments into other sectors of the economy such as mining and manufacturing. Attracting FDI, policy consistency, monetary policy and cordial international relations are key to economic growth.<sup>43</sup> All the four factors are negatively impacted by Zimbabwe's property rights violations as will be explored.

Literature on how Zimbabwe can address its past is still limited. This may be explained by the fact that the previous government did not seem committed to doing so and also because the

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<sup>38</sup> Section 72 of the Constitution of the Republic of Zimbabwe 2013.

<sup>39</sup> Mike Campbell (Pvt) and others v Republic of Zimbabwe (2/2007) (2008) SADCT (28 November 2008).

<sup>40</sup> Anderson & Huggins (n 30)5.

<sup>41</sup> Anderson & Huggins (n 30)64.

<sup>42</sup> Anderson & Huggins (n 30)10.

<sup>43</sup> R Gopaldas 'Zimbabwe what does the future hold under new leadership' (2018) SAIIA Policy Insights 64.

land question in Zimbabwe was so dynamic and ever changing. The current government has however expressed the need to respect the rule of law and to compensate those that were dispossessed of their farms. How to effectively carry out the exercise of making sincere amends and ensuring that property rights going forward are well defined and strongly protected is still scanty. This study will contribute to filling this gap.

### **1.7 Research methodology**

This research is exploratory in nature. Exploration of the issues at hand will help establish if property rights violations of the past are indeed hampering Zimbabwe's investment pull. Exploratory research will allow framing of possible solutions for how Zimbabwe may effectively and fairly address its past. An exploration of the current legal framework will reveal possible ways of strengthening the country's property rights regime. Since the research pertains to property rights a quantitative study may have excluded a substantial amount of literature that is relevant to the subject.<sup>44</sup>

Secondary data will mainly be used for the research. Most of the sources that will be used are journal articles, institutional reports, working papers and newspaper articles. Besides being easily accessible these also tend to be more current and country specific. Books will also be used especially to substantiate legal principles and for the definition of terms.

The Constitution of Zimbabwe and some of the Zimbabwean legislation will be used as primary data.

### **1.8 Synopsis of the chapters**

This study consists of six chapters

Chapter One: This chapter will introduce the research and give a brief overview.

Chapter Two: Theories that speak to the issues at stake.

This chapter will look into the relevant theories pertaining to the topic. Focusing especially on general theories on expropriation without compensation and on FDI.

Chapter Three: In pursuit of the land question: Property rights violation and its effect.

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<sup>44</sup> Locke (n 32) 3.

This chapter will look into how the property rights regime became porous. It will give the history of post independent Zimbabwe and where it is now, paying particular attention to property rights. It will look into investors that were forced out and general investor flight. The focus will be mainly on events from the year 2000 upwards.

Chapter Four: Zimbabwe today .The current law and property rights. Its impact on investor sentiment. This Chapter will be a discussion of the issues.

Chapter Five: A framework that fosters investor confidence.

This chapter will recommend how Zimbabwe can make its property laws more certain and predictable. It will recommend how to secure property rights to attract, facilitate and retain foreign investment enabling it to build a united prosperous nation as envisaged in the preamble to its Constitution. It will also propose a possible way to deal with the past pertaining to the foreign investors that had their investments expropriated. This chapter will proffer options that Zimbabwe may use to address the past and promote re-engagement.

Chapter Six: Conclusion. Prerequisites to support an effective legal framework.

This will bring a conclusion to the study.

## **1.9 Limitations**

Desktop research for the study will be effective but the study would have been even more effective if face to face interviews were carried out for the current issues .For instance going on the ground to investigate the Gaika Mine issue would have yielded first-hand information. This will however not be possible because of financial and security constraints .Mining areas with such issues also tend to be quite volatile during these periods.

## CHAPTER TWO

### THEORIES THAT SPEAK TO THE ISSUES AT STAKE

#### 2.1 Introduction

This chapter will look into the general theories surrounding the topic. This is to give a better understanding of the topic as these theories will be referred to often in the research. Explaining them in this chapter will dispense of the need to keep explaining them due to frequency of their use. To bring clarity to the topic: FDI and the curse of property rights in Zimbabwe, this chapter will explain what property rights are, what FDI is and what infringements on property rights in Zimbabwe have had a curse like effect to the extent of being a hindrance to FDI and economic prosperity. As shall be seen an overlap exists in the theories. One theory may speak to the other or may be an attribute of another theory. The curse referred to in the topic will be shown through the extreme violation of several internationally observed legitimate expectations and rights which has become a hindrance in Zimbabwe's investment drive. This violation has been a major contributor to Zimbabwe economic affliction.

#### 2.2 Property rights

Philip Keefer and Stephen Knack broadly define property rights as 'the rights of a firm or individual to assets, to the revenue streams generated by assets, and to any other contractual obligation due the firm or the individual'.<sup>45</sup> This definition encompasses the definition of property rights referred to in this research. Property rights entail rights to self (human capital) and to one's ideas (intellectual property).<sup>46</sup> The function of money as a medium of exchange makes it an asset and as an asset it is property associated with property rights.<sup>47</sup> To label it a right means it is a claim which should be honoured and upheld. Rights may be founded on a moral basis or a legal basis. Those founded on a legal basis are enforceable by law. A right's

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<sup>45</sup> P Keefer and S Knack 'Why don't poor countries catch up? A cross-national test of institutional explanation' (1997) XXXV *Economic Enquiry* at 591.

<sup>46</sup> Anderson & Huggins (n 30) xi.

<sup>47</sup> D Fox *Property rights in money* (2008) 7.

function to protect is made possible by its enforceability.<sup>48</sup> Alchian and Demsetz described property rights as a bundle with the characteristics of being exclusive, transferable, inheritable, and enforceable through enforcement mechanisms. In terms of exclusivity property rights will define the parameters of the exclusivity and who holds the right to exclusiveness.<sup>49</sup> Claims for money or its equivalent are recognized under property rights.<sup>50</sup> Milton Friedman saw property rights as form of empowering individuals. It is viewed as a bastion against tyranny of the state. When one has a property right in an item it gives some independence over that item.<sup>51</sup> Property rights define 'who has exclusive rights over property'. According to the natural law theory of property put forward by Grotius originally all things were without an owner who ever possessed them became the owner.<sup>52</sup> Bentham's criticism against this is that possession does not give title. He holds the view that the two co-exist. In his view without the law property cannot exist.<sup>53</sup> Smith ascribes the motivation to engage in production due to the resultant ownership.

Property rights in land: Uses of land may include farming, hunting, gathering, passage, growing trees and grazing.<sup>54</sup> Property rights in land define what rights the holder has and how transfer is effected. Institutes that play an enforcement mechanism role to support land rights include the courts, police, lawyers, deeds office, and financial institutions. Social legitimacy also plays a role in enforcement.<sup>55</sup> Where exclusivity lacks there is an assumption that the land users will have no real incentive to conserve and the land will degrade.<sup>56</sup> The non-exclusivity creates hesitation in investing in the land and food production will not be maximised. Thus ultimately the economy will not realise the benefit of efficient raw material and food production. Inadequate enforcement of private property rights or non-recognition of their legitimacy may result in the property becoming open access.

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<sup>48</sup> A Randall 'Property rights and economics for helping address environmental problems' in MD Kaplowitz (ed) *Property rights economics and the environment* (2005) at 12.

<sup>49</sup> G Feder & D Feeny 'Land tenure and property rights: theory and implications for development' (1991)5 *World Bank Economic Review* at 135.

<sup>50</sup> R Cass 'Property rights systems and the rule of law' in E Colombatto (ed) *The economics of property rights* (2004) at 224.

<sup>51</sup> A Rapaczynski 'Can constitutions protect private property against governmental predation' in E Colombatto (n 50) 198

<sup>52</sup> H Grotius *The rights of war and peace* (2005)427.

<sup>53</sup> TW Merrill & HE Smith 'The morality of property' (2007) *William and Mary Law Review* at 1849.

<sup>54</sup> Feder-Feeny (n 49)136.

<sup>55</sup> Feder-Feeny (n 49)137.

<sup>56</sup> Feder-Feeny (n 49)137.

It is possible for individuals to personally secure their property rights but this may prove expensive, ineffective or even dangerous thus the state is tasked with securing property rights within its borders. It carries out this role through law enforcement and individuals have to obey these laws.<sup>57</sup> The state is the sole enforcer permitted to use force to protect one's property rights from infringement this avoids a scenario of chaos where people may forcibly protect their own property rights from being violated. It is through an effective enforcement of the law and protection of these property rights that peace is maintained. Where there is a rampant violation of property rights the state has the police and the army at its disposal to protect the property rights of individuals.<sup>58</sup> Since the state has the power to enforce property rights it thus also has the potential to take those rights. It then makes it important for the state to provide a framework which makes arbitrary violation of property rights illegal. The government's power to expropriate land for public use is normally governed by legal procedure and the payment of compensation.<sup>59</sup>

The following international and regional instruments speak to property rights and their security. Universal Declaration of Human Rights, 1948 (Article 17) states that- 'everyone has the right to own property alone as well as in association with others', and that 'no one shall be arbitrarily deprived of his property.'

Article 14 of the African Charter on Human and Peoples Rights provides that:

The right to property shall be guaranteed. It may only be encroached upon in the interest of the public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

In Zimbabwe's land redistribution process, human rights including property rights were grossly violated for political expediency this was also in violation of the regional and international human rights treaties that it has ratified. The right to own property and its security thereof is regarded as a right everyone is entitled to hence their inclusion in international human rights instruments.

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<sup>57</sup> Anderson & Huggins (n 30)50.

<sup>58</sup> Anderson & Huggins (n. 30)50.

<sup>59</sup> Anderson & Huggins (n. 30)56.



### 2.3 Foreign direct investment

The basic description of foreign direct investment is that of capital crossing a border. The broader definition would be wealth creating assets crossing a border.<sup>60</sup>For the purpose of this research FDI inflows into Zimbabwe will be referred to as FDI. OECD defines FDI as ‘a category of cross-border investment in which an investor resident in one economy establishes a lasting interest in and a significant degree of influence over an enterprise resident in another economy’.

FDI is generally considered to be influential in growing economies especially developing economies .Most developing countries have low savings and low incomes thus FDI enables importation of expensive capital goods and facilitate technology transfer.<sup>61</sup>Some authors however have a pessimist view of FDI. While writers Brecher-Alejandro (1977) propose that FDI is welfare deteriorating in a small open economy and may distort resource allocation.<sup>62</sup> Other writers such as Chaudhuri-Mukhopadhyay make a case for FDI as a means to boost an economy.<sup>63</sup> While it is debatable whether Zimbabwe would benefit from FDI in the long run, Zimbabwe is however resource rich and thus if it is to leverage these resources it would require significant investments into sectors such as mining and agriculture which it is currently failing to do domestically. Zimbabwe has been on an investor attraction drive. Its economy has been performing below expectations and FDI inflow has been a much smaller percentage of GDP compared to pre-2000 levels. However considering that Zimbabwe has substantial infrastructural needs such as roads, rail, steady supply of electricity and an economy that is facing challenges if it has the right policies in place it is likely to benefit from FDI. The owners of capital consider a number of factors when deciding on which economies and industries to invest. Property rights is one of the determinants of FDI especially in a country such as Zimbabwe that has experienced rampant violation of property rights during the last two decades. The consideration of property rights by a potential investor to Zimbabwe may be more significant as compared to an economy which has not experienced rampant expropriation without compensation or violated some investment treaties in the near past.

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<sup>60</sup> B Bora *Foreign direct investment* (2002)2.

<sup>61</sup> Chaudhuri-Mukhopadhyay (n1) ix.

<sup>62</sup> Chaudhuri-Mukhopadhyay (n1) 48.

<sup>63</sup> Chaudhuri-Mukhopadhyay (n1) ix.

## 2.4 Zimbabwe and bilateral investment treaties (BITs)

A breach of international customary law creates a legal obligation on the nation in breach. In the past a state would enforce the obligation against the state in breach on behalf of its nationals through diplomatic protection. In more recent times nations developed bilateral investment treaties which are investment agreements which define the standard of treatment of investments between the countries. One of these standards of treatment is that compensation must be given where expropriation occurs. These agreements enable investors from a state party to it to resort to international arbitration to enforce the standards against another. The International Centre for Settlement of Investment Disputes (ICSID) is part of the World Bank Group and provides international arbitration for investor state disputes. Zimbabwe ratified the ICSID Convention and may thus be sued as a host state and the matter may be decided on by ICSID.<sup>64</sup>

At the time Zimbabwe began its controversial land reform it had several BIT's and all its treaties provided for market value compensation in the event of expropriation. The constitutional amendments in the year 2000 and 2005 (permitting expropriation without compensation except for improvement, ousting jurisdiction of the court and doing away with due process) were in contradiction to some of the provisions of the BITs .As a result ICSID decided in favour of the investors in the expropriation cases against Zimbabwe. BITs provide protection under international law.<sup>65</sup>

## 2.5 Expropriation without compensation

Customary international law requires that expropriation of an investment by a government is compensated for. <sup>66</sup>Expropriation in itself is not prima facie unlawful. Expropriation is a states sovereign right and carries no international liability if it does so in a lawful manner. International investment treaties such as BIT's and customary international law provide rules that govern what standard expropriation of an investors assets has to meet for it to be deemed lawful. Failure to meet any of these requirements creates obligations on the host state (the expropriating country).<sup>67</sup> For expropriation to be deemed lawful it must meet three cumulative criteria's which are: must be for public interest; must be non-discriminatory and compensation

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<sup>64</sup> International arbitration in Africa- Opinion|Politicsweb P Leon 30 Sept 2017.  
<https://www.politicsweb.co.za/opinion/international-arbitration-in-africa> ( accessed 12/08/2019)

<sup>65</sup> International arbitration in Africa- Opinion|Politicsweb P Leon 30 Sept 2017  
<https://www.politicsweb.co.za/opinion/international-arbitration-in-africa> (accessed 12/08/2019).

<sup>66</sup> M Sornarajah *The international law on foreign investment* (2010) 131.

<sup>67</sup> SH, Nikiema ' Compensation for expropriation' (2013) Best Practices Series International Institute for Sustainable Development IISD at 2.

must be paid.<sup>68</sup>In most bi-lateral treaties and constitutions due process is also a requirement for lawful expropriation. The cumulative nature of the requirements means that expropriation does not have to satisfy just one of the requirements for it to be deemed lawful but has to satisfy all of them. The issues that arose in the Zimbabwean cases brought before ICSID and the SADC tribunal were of discrimination and non-compensation. Only white farmers had been affected by the expropriation and at the time of the claims no compensation had been paid. Not paying compensation for expropriation of property is a breach of international law. International Investment Agreements (IIA) typically contain a requirement for compensation in the event of expropriation.<sup>69</sup>

For compensation to be deemed fair it must be ‘prompt, adequate and effective’. In principle an expropriation that fails to fulfil the compensation condition is unlawful. In *Funnekotter v Zimbabwe* the land reform was deemed unlawful as the compensation obligation was not complied with. The tribunal saw no need to consider if the ‘due process of law’ condition as stated in the Zimbabwe-Netherlands BIT was complied with (unlawfulness sub modo).<sup>70</sup> The tribunal took a similar decision in *RosInvest v Russia* and found the expropriation unlawful on the basis that no compensation was paid. The tribunal did not have to consider the alleged discrimination in finding the expropriation unlawful.<sup>71</sup> Even if public purpose is clearly established where there is no compensation an expropriation will be rendered unlawful as in the *Vivendi III* case. The purpose is immaterial for as long as the compensation requirement has not been met. The purpose of an Investment treaty is to guarantee a minimum standard of protection to an investment regardless of a country’s laws. Compensation is that minimum standard imposed by international law. Where it has been established that there has been expropriation without compensation the other considerations normally considered in determining lawfulness of expropriation become irrelevant as the expropriation is deemed unlawful on that single basis.<sup>72</sup>

The *Chorzow* factory case is considered a pivotal case pertaining to the issues of compensation in international investment law. In that case the Permanent Court of International Justice (PCIJ) held that the reparations must have the effect of wiping out the illegality. This may be done by

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<sup>68</sup> Nikiema (n 67) 1.

<sup>69</sup> J Hepburn *Domestic law in international investment arbitration* (2017)58.

<sup>70</sup> Bernadus *Funnekotter v Zimbabwe* (ICSID Case No ARB /05/6), Award, 22 April 2009(107).

<sup>71</sup> *RosInvest Co UK Ltd v Russia* (SCC Case No V079/2005), Final award, 12 September 2010(631-633).

<sup>72</sup> Hepburn (n69) 60.

restitution or an award of equivalent value. It held this to be the standard for determining compensation in international law. It ruled that compensation is an imperative for treaty protected investment.<sup>73</sup>

## **2.6 Due process**

### **2.6.1 Linking due process to domestic law**

Due process is one of the conditions required for a lawful expropriation in most international investment treaties and constitutions. This does not however dispense of the host nation's right to regulate. Due process in treaties will normally state either 'due process of domestic law; due process of law or it will require the state to provide for procedure for reviewing expropriation.'<sup>74</sup>

Therefore in considering the legality of the expropriation an international tribunal will consider compliance of the process with host nation's laws.<sup>75</sup> This compliance with the nation's laws was considered in *Goetz vs Burundi* and *Pezold v Zimbabwe*. Some treaties formulate the due process requirement by referring to due process of law.<sup>76</sup> Thus where the law does not have a provision that speaks to due process in expropriation violation may still be found by that very absence in the domestic law .If domestic law exists and is complied with then it may be argued that 'due process of law' was met.<sup>77</sup> According to Newcombe and Paradell compliance with domestic laws is a good first step in testing due process.<sup>78</sup>

In *Siag vs Egypt* the direct expropriation was not in dispute and the matter to be considered in case was the international legality of the expropriation in regards to the BIT which covered the investment.<sup>79</sup> The court considered the lack of notice or hearing given to investor before expropriation and found procedural violation of due process.

### **2.6.2 Due Process as existence of domestic legal guarantees including judicial review**

Due process may still be found lacking even where there is no relevant domestic law which may have been violated by the state's conduct of expropriation. In *ADC v Hungary* which

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<sup>73</sup> *Factory at Chorzow, Germany v Poland* (PCIJ) 1928.

<sup>74</sup> Hepburn (n 69) 48.

<sup>75</sup> Hepburn (n 69) 49.

<sup>76</sup> Hepburn (n 69) 51.

<sup>77</sup> Hepburn (n 69) 51.

<sup>78</sup> Hepburn (n 69) 52.

<sup>79</sup> Hepburn (n 69) 49.

involved an alleged expropriation of airport operations covered by a Cyprus –Hungary BIT, at issue was whether the ‘due process of law’ requirement in the BIT was fulfilled. Hungary held they had met the due process requirement because it was in compliance with their law. The tribunal held that there must be a legal procedure that gives aggrieved opportunity to determine that local laws were followed. For a meaningful procedure the tribunal laid out the following criteria ‘reasonable advance notice, a fair hearing and an unbiased and impartial adjudication to assess the actions in dispute’. The process must allow the right to be heard within a reasonable time. ‘Due process of law’ was held to have lacked because the host country did not provide a mechanism for claimant to seek review of the matter. In *Kardassopoulos v Georgia* the arbitrators found the same requirements of due process as in the ADC case were not met. There was no reasonable review mechanism of expropriation within a reasonable time thus due process was not followed.<sup>80</sup> By ousting the courts’ jurisdiction from hearing expropriation cases, Zimbabwe flouted the due process requirement in an investment treaty. By fast track land reform the government of Zimbabwe did not give sufficient notice to the farmers to satisfy the due process requirement. Due process of law ‘in a BIT gives a tribunal more leeway to apply international law corrective function than BITS with ‘in accordance with the law’. The framing of the due process requirement in the treaty and the domestic law are important considerations pertaining to determining if due process was followed.

## **2.7 Denial of justice**

Historically countries have realised statehood by maintaining the notion of acceptable legal order. Guaranteeing the rights of aliens and protection of their property gave a host nation an expectation of reciprocity from the home nations. In striving to have sovereignty over its internal processes a country would agree to maintain a minimal international standard of its legal processes.<sup>81</sup> According to J Paulson the content of what is deemed to be a denial of justice is a matter of controversy. The word justice is emotive and as a result is reflected on differently by people. What is however universally accepted from time immemorial is that the denial of justice to an alien is a violation of international customary law.<sup>82</sup> One factor that opens up denial of justice to a broader interpretation on the international arena is the universal acceptance that the national courts are a part of the state together with the legislature and the executive hence their actions are attributable to the state .The second factor is that such claims have

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<sup>80</sup> Hepburn (n 69) 54.

<sup>81</sup> J Paulson *Denial of justice at international law* (2005)1.

<sup>82</sup> Paulson (n 81)2.

increased as a result of international human rights treaties and investment treaties. So on the international stage different forms of national court judgments may be tested as a case of denial of justice.<sup>83</sup>

The definition of denial of justice for national law is normally much narrower than that available at international law.<sup>84</sup> For the purposes of this research access to justice, the more basic denial of justice which would meet both thresholds in international law and national law will be the main form of denial of justice referred to. Access to justice is a condition sine qua non for a constitutional democracy which observes the rule of law. It is a fundamental freedom.<sup>85</sup> The United States Institute of Peace defines access to justice as 'the ability of people to seek and obtain a remedy through formal or informal institutions of justice for grievances in compliance with human rights standards.'<sup>86</sup> An ouster of the national courts' jurisdiction to hear a case within their usual jurisdiction is a denial of justice. This represents the most obvious form of denial of justice.<sup>87</sup> Without effective judicial remedies protection of human rights cannot be guaranteed both in the national and international sphere. To be able to protect a right the aggrieved has to have access to justice. In the most general sense access to justice refers to the ability of one to bring a matter before the courts. A deeper meaning would be the right to be heard before a court that applies fairness and justice.<sup>88</sup> Where there is no rule of law and separation of powers between the organs of state is blurred then the general sense of access to justice as stated above will prove insufficient.<sup>89</sup> Access to justice is guaranteed as legal right in many national constitutions and in the Universal Declaration of Human Rights.<sup>90</sup> The African Charter on Human and Peoples' Rights (ACHPR) in article 7.1 provides, 'Every individual shall have the right to have his cause heard.' The United Nations observes access to justice as a basic rule of law principle. Through it people may be heard, make governments accountable and defend themselves against discrimination.<sup>91</sup>

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<sup>83</sup> Paulson (n 81)3.

<sup>84</sup> Paulson (n 81)11.

<sup>85</sup> F Francioni Access to justice, denial of justice, and international investment law in PM Dupuy & F Francioni (eds) *Human rights in international investment law and arbitration*(2009) at 63.

<sup>86</sup> Necessary condition: access to justice' <https://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/rule-law/access-justice>(accessed 10July 2019)

<sup>87</sup> Paulson (n 81)134.

<sup>88</sup> F Francesco 'The development of access to justice in customary law' in F Francesco (ed) *Access to justice as a human right* (2007) at 64.

<sup>89</sup> F Francesco 'The development of access to justice in customary law' in F Francesco (n 88) 67 .

<sup>90</sup> F Francesco 'The development of access to justice in customary law' in F Francesco (n 88) 66.

<sup>91</sup> Access to justice-United Nations and the rule of law <https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/> (accessed 10July 2019).

## 2.8 Rule of law

The rule of law speaks to societal goals of equality, impartiality, justice, freedom from oppression and non-arbitrary use of power. The rule of law may not guarantee these but it correlates with justice and fairness.<sup>92</sup> Respect for the rule of law both locally and internationally ensures predictability of relations. Delivery of justice for all is highly unlikely without the rule of law.<sup>93</sup> The Zimbabwe scenario shows how relations may be stifled by not upholding the rule of law. The United Nations in its Delivering Justice report defined the rule of law as:<sup>94</sup>

A principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.

The above definition of the rule of law will be used to explore if the rule of law has been observed in Zimbabwe in the past and present. The definition and protection of property rights in a society is also a determinant of a country's commitment to the rule of law.<sup>95</sup> How society is bound by law and the degree of commitment to securing property rights under a legal framework which is predictable are factors that matter in determining the rule of law.<sup>96</sup> The change management in property rights and the legal framework governing property rights combined with how officials are restrained from arbitrary actions that infringe on property rights have a bearing on the rule of law. Change is permitted and expected overtime but change must be done in a way that still ensures good governance. The arbitrariness shown by Zimbabwe in going against its BIT's in the Border Timbers and Pezold cases would be going against the rule of law as expected in international investment law.

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<sup>92</sup> R Cass 'Property rights systems and the rule of law' in E Colombatto (n 50) 222.

<sup>93</sup> Delivering justice: programme of action to strengthen the rule of law at the national and international levels, Report of the Secretary General UN Doc A/66/749 at 1.

<sup>94</sup> Delivering justice: programme of action to strengthen the rule of law at the national and international levels, Report of the Secretary General UN Doc A/66/749 at 2.

<sup>95</sup> R Cass 'Property rights systems and the rule of law' in E Colombatto (n 50) 222.

<sup>96</sup> R Cass 'Property rights systems and the rule of law' in E Colombatto (n 50) 222.

One of the tenets of the rule of law is that justice must be impartial and non-discriminatory. The way the land reform was handled was held to be discriminatory by the SADC tribunal in the Campbell case. Another prerequisite of the rule of law is an independent judicial system with integrity.<sup>97</sup> This research will explore how an independent judiciary will not amount to much if its jurisdiction from hearing expropriation cases pertaining to agricultural land is ousted. Access to justice is also a basic principle of rule of law.<sup>98</sup>

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<sup>97</sup> What is the rule of law?-United Nations and the rule of law <https://www.un.org/ruleoflaw/what-is-the-rule-of-law/> (accessed 28 June 2019).

<sup>98</sup> [www.un.org](http://www.un.org) (n 94).



## CHAPTER THREE

### IN PURSUIT OF THE LAND QUESTION: PROPERTY RIGHTS VIOLATION AND ITS CURSE.

#### 3.1 Introduction

There was a rampant violation of property rights in Zimbabwe under the guise of the state initiated fast track land reform programme. This violation was carried out by the state and individuals. ‘Land reform is the deliberate change in the way agricultural land is held or owned.’<sup>99</sup> The purported objective of land reform in Zimbabwe was to change the colonial land ownership and redistribute land in a manner that makes it inclusive and catered for the landless black people. It is important for land reform to be well planned and for it to be done in a manner that does not violate the rights of the affected. This averts anarchy and upholds fundamental human rights. A well-structured legal framework which takes into consideration legal norms is pivotal in guiding the process if the rule of law is going to be upheld and rights of the land owners respected. This framework will alleviate the violation of any rights during the process and where rights are infringed it must provide remedies. Considering the objectives of land reform it is vital that redistribution is inclusive, not based on party lines and that the resettled people are given the required support to equip them for farming .Land reform may be abused and used to push a political agenda. Accountability is a prerequisite for a successful countrywide land reform .Marginalised people groups are meant to benefit from land reform and displacement of individuals should be minimised.<sup>100</sup>The research will explore the legal frameworks that Zimbabwe used to pursue the land question and the role of politics in the whole process will be considered.

President Mugabe justified the use of force to economically empower the black majority. He was quoted as saying, ‘It is perfectly justifiable to use necessary force to overcome resistance to the transformation of the economy for the black majority to achieve economic justice.’

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<sup>99</sup> Zimbabwe Human Rights NGO Forum (n 14)6.

<sup>100</sup> Zimbabwe Human Rights NGO Forum (n 14) 6.

Availing effective remedies to property rights infringement and access to justice are recognised under international law.<sup>101</sup> These were both denied in the Zimbabwean scenario through non-compensation and ousting the jurisdiction of the courts in agricultural land related matters.

Before the implementation of the fast-track land reform in the year 2000 agriculture had been the backbone of the Zimbabwean economy. It employed an estimated 60 percent of the employed population and supplied 60 percent of the raw material needs of the industrial sector. The sector contributed 40 percent of export earnings.<sup>102</sup> These statistics show how influential the agricultural sector is to the Zimbabwean economy. It is critical that the agricultural sector has secure property rights to enhance investment stimulation in the sector and other sectors as well. There has been a massive de-industrialisation of the Zimbabwean economy and its output halved between 1997 and 2008.<sup>103</sup> It is during this same period that there was rampant violation of property rights. The threat to expropriate without compensation had become real and imminent in the late 90s before its implementation in the year 2000.

### **3.2 Property rights and the economy**

One of the reasons that warrants an exploration of Zimbabwe's property rights regime and the violation of property rights is the fact that in a world where very few governments still openly support nationalisation whether compensated or uncompensated Zimbabwe went on to embark on an equivalent exercise and without compensation.<sup>104</sup> It is this oddity in modern times that this researcher argues that the impact of property rights in Zimbabwe on FDI might be more significant than in most economies. Investment in many economies is generally considered fairly safe as rampant expropriation fuelled by ideology is unlikely in a modern era.<sup>105</sup> In view of this property rights in such economies may not be considered significant determinants as in an economy where expropriations occur or have occurred on a wide scale in the economy's recent past countries known for business friendly policies and regulations are less likely to depend on strong re-assurances of investment protection rights to attract investors. The impact

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<sup>101</sup> Zimbabwe Human Rights NGO Forum (n 14) 11.

<sup>102</sup> Zimbabwe(114) [www.fao.org](http://www.fao.org) <http://www.fao.org/3/y4632e/y4632e0y.htm>.

<sup>103</sup> Biti T. (2015), *Rebuilding Zimbabwe: Lessons Learned from a Coalition Government*, Washington: Centre for Global Development, <http://www.cgdev.org/sites/default/files/Tendai-Biti-Zimbabwe-Sept-2015.pdf>. (accessed 6 July 2019).

<sup>104</sup> A Rapaczynski 'Can constitutions protect private property against governmental predation' in E Colombatto (n 50) 209.

<sup>105</sup> A Rapaczynski 'Can constitutions protect private property against governmental predation' in E Colombatto (n 50) 209.

of rampant arbitrary violation of property rights has a greater negative effect on the economy than the positive impact an improvement in property rights is likely to have. This would explain the nose dive Zimbabwe's economy took in 2000.<sup>106</sup> As property rights improve their impact will have diminishing returns to GDP growth. Consequently a country without a history of property rights violation may not consider property rights a major determinant of investor pull. A developing country like Zimbabwe with a history of property rights violation will need a legal framework that adequately secures property rights and serves as an impediment to politically driven agendas. C Richardson proffers three ways in which investor perception may be impacted by a violation of property rights: loss of trust in the government to carry out the duty of law enforcement; lack of title affects capacity to borrow thus affecting business activity; reduces incentive to pass on knowledge. The loss of confidence in Zimbabwe is evidenced by how Zimbabwe Stock Exchange had been doing well from inception in 1993 up to 1998. Zimbabwe was rated a top performer in the emerging markets. The drop in activity in 1998 was attributed to the government's announcement of its intention of land reform and high interest rates on the money market. The value of the stock market dropped by 88 percent by end of 1998. Investors became even more unsettled and had a serious loss of trust after the Supreme Court of Zimbabwe in the year 2000 ruled that the land seizures were unconstitutional and the ruling was ignored.<sup>107</sup> The land reform process posed a threat to property rights as the government had no budget to ensure that the process would be done in a manner that would respect property rights and compensate those whose rights were infringed. At the time land invasions began in the year 2000 the act was in violation of the Constitution at the time.

An operating environment with uncertain property rights or policies affects the efficiency of firms in terms of adjustments to changes in technology. The uncertainty discourages additional investment in new technology as this may be lost to expropriation. As a result profits and economic performance are negatively affected.<sup>108</sup> As firms operating in Zimbabwe report weaker profits in their annual reports and state the impact of their operating environment on their profits this is likely to affect international investors' confidence in the country as the profit motive is one of the major drivers for an investment. Ultimately companies want to maximise profit and are likely to find investment destinations that offer the opportunity to maximise profits more attractive.<sup>109</sup> If vulnerability to expropriation is high companies are less likely to

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<sup>106</sup> Richardson (n 17)11.

<sup>107</sup> Richardson (n 17)12.

<sup>108</sup> Keefer-Knack (n 45) 591.

<sup>109</sup> Keefer-Knack (n 45) 591.

invest in new machinery unless absolutely necessary.<sup>110</sup> So using an example in agriculture a farmer who has investments in a Zimbabwean farm is more likely to be hesitant about investing in the latest equipment for as long as his property rights are insecure. This impacts his immediate production and the country's economic performance. With insecure property rights investors are discouraged from investing in the market activities as the likelihood of realising full benefit of their investment is uncertain.<sup>111</sup> As a result Zimbabwe's agricultural sector has hardly advanced in terms of mechanisation and land under irrigation actually dropped during land invasions. D North attributed underdevelopment to third world countries' inability to provide low cost efficient contract enforcement.<sup>112</sup> Where contracts are not easily enforceable the assumption is contracts concerning property rights will also not be easily enforceable. Investors are likely to find high growth markets more attractive than low growth markets. Property rights thus have an impact on capital returns and investors are likely to channel investments in destinations with greater capital returns.<sup>113</sup> The fact that infringement of property rights slows down economic growth makes the economy a low growth market thus potentially less attractive as an investment destination. So besides posing a direct threat of expropriation the slow growth resulting from less investment will also make the market less attractive to investors thus the influence of property rights on FDI inflows is more than just through the threat of expropriation.

If institutions do not adequately protect property rights this may channel the means of production to less capable producers who are not equipped to take advantage of technological changes thus interfering with economic growth.<sup>114</sup> The farm invasions period that Zimbabwe went through meant that factors of production suddenly ended up in the hands of mostly ill equipped people in terms of productivity. The gains in new farming technology and methods of production regressed and yields from farms drastically reduced. Pre year 2000 agriculture contributed about 18 percent of the country's GDP and by 2004 this had fallen to 10 percent. In 2016 it stood at 11 percent. This fall in production has had a major impact on the economy considering agriculture feeds into the rest of the economy.<sup>115</sup> Exports from farming and foreign exchange earnings from agriculture were also affected. Low levels of technology, reduced

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<sup>110</sup> Keefer-Knack (n 45) 591.

<sup>111</sup> E Dabla-Norris & S Freeman 'The enforcement of property rights and underdevelopment' (1999) IMF

<sup>112</sup> D C North *Institutions, institutional change and economic performance* (1990) 55.

<sup>113</sup> Keefer-Knack (n 45) 591.

<sup>114</sup> Keefer-Knack (n 45) 591.

<sup>115</sup> W Odero 'Zimbabwe 2018 African economic outlook' Country note AfDB.

exports, reduced foreign currency earnings and reduced food production have characterised the Zimbabwean economy during this period. This shows that property rights can directly and indirectly affect the flow of FDI into a country. When an economy is performing badly this also affects the discretionary incomes of the wider population resulting in them spending less. The economic downturn is a disincentive to investors. The interconnectedness of factors in the economy beginning with property rights violation is evident in this chain of events. Property rights may indeed be the root cause of most of the challenges this Southern African country is going through.

Modern day China first captured property rights in its Constitution in 2004. This speaks to the value placed on property rights for an orderly, productive society and for attracting foreign investors. Societies with secure property rights are likely to be more successful.<sup>116</sup>

### **3.3 Human rights and property rights**

Different views from lawyers, human rights advocates and international institutions exist as to whether protection of property rights is a fundamental right or not.<sup>117</sup> The importance of property rights is however evidenced by their prevalence in at least thirty five international instruments such as the ILO Convention (no 95), Convention Relating to the Status of Refugees and the Paris Convention for the Protection of Industrial Property. The majority of the world's constitutions have a provision for respect of property rights. The protection of property appears in all regional human rights instruments.<sup>118</sup> The protection of property rights has fortified its importance by being the subject of international adjudication on numerous occasions. As a result there is growing international jurisprudence pertaining to property rights. International finance institutions such as the World Bank regard property rights as a factor to consider when determining good governance.<sup>119</sup>

In a corrupt system those that are tasked with protecting property rights such as the police, soldiers and government officials may end up being the predators themselves. The predator may directly infringe upon one's property rights by forcibly expropriating from the right holder or they could bribe or use their authority to infringe on one's property rights.<sup>120</sup> This was the case in the Gaika mine scenario in Zimbabwe where the soldiers and police that were sent to

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<sup>116</sup> R Cass 'Property rights systems and the rule of law' in E Colombatto (n 50)222.

<sup>117</sup> J Alvarez 'The Human Right of Property' (2018) 72 *University of Miami Law Review* at 584.

<sup>118</sup> J Alvarez (n 1117) 586.

<sup>119</sup> J Alvarez (n1117) 584.

<sup>120</sup> Dabla-Norris & Freeman (n 111).

guard the mine ended up in cohorts with the gold panners (informal miners). It is alleged they would mine and share in the proceeds of the mining activities.

The fact that discrimination may not be used as a ground for opposing expropriation of agricultural land in Zimbabwe enables an element of arbitrariness in the procedure of expropriation. An aggrieved may genuinely have been discriminated on the basis of tribe or race but the law bars them from using this ground. This creates a loophole for discriminatory expropriation as it is shielded by the law. Non-discrimination is an essential element of the rule of law. It is thus challenging to test if a law is discriminatory if discrimination may not be raised in court. The right not to be discriminated against is a fundamental right that is enshrined in section 56 of the Zimbabwean constitution which states that, 'all persons are equal before the law and have the right to equal protection and benefit of the law.' Discrimination which does not meet the requirements for an exception thus violates the supreme law of the land. To discriminate on the basis of colour is to violate a fundamental human right. Zimbabwe has ratified international human rights instruments that have enshrined non-discrimination provisions.

### **3.4 Breakdown in the rule of law**

In July of 2000 Mugabe announced the fast track land reform. Observers believe that the loss of the referendum by the Mugabe led government marked the beginning of state sponsored violence.<sup>121</sup> After the Mugabe led government lost in the year 2000 referendum to amend the Constitution to increase presidential powers and allow for expropriation without compensation they went on to fulfil the same purpose they had intended in the proposed constitution through the Zanu PF led parliament's passing of a constitutional amendment. This amendment to the constitution marked a significant weakening of the property rights regime in the country. The amendment which added section 16A enabled the government to expropriate land without compensation and held compensation would be the responsibility of the former coloniser, Britain. The historical background of the matter was stated in the section as justification in the constitution to absolve the government from compensating and making compensation the former colonial power's obligation.<sup>122</sup> The fact the state now had no obligation to compensate

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<sup>121</sup> 'Zimbabwe Not eligible: The politicisation of food in Zimbabwe' (2003) 15 *Human Rights watch* at 14.

<sup>122</sup> Section 16 A (1) Constitution of Zimbabwe, 2000.

made it easier for government to target even the most productive farms. President Mugabe amended the Land Acquisition Act to bring it in line with the constitutional amendment using extraordinary presidential powers to enact temporary legislation dealing with emergencies. The parliament (Zanu Pf majority) went on to pass this legislation. Mugabe argued that his government was fighting a third war for economic freedom and that European powers were sponsoring the opposition in a move to protect property rights of whites. He held the fast track resettlement was government's response to the 'spontaneous' prior invasions of farms by the landless poor.<sup>123</sup> This led to a surge in land grabs. At the peak of the land reform a self-help scenario arose where some citizens including war veterans joined in the rampant expropriation. In 1999, 11 million hectares of agricultural land was in the hands of white commercial farmers. Between June 2000 and February 2001, 6 million (2706 farms) plus of those hectares were gazetted for compulsory acquisition. These figures show how fast paced the country's fast track land resettlement programme that had been officially announced by the Zimbabwe government in July year 2000 was going to be. The rapid pace of fast track also resulted in short circuiting some legal procedures.<sup>124</sup>

Human rights groups however held a different opinion from that expressed by the president. They held that the fast track resettlement programme was being used by the government to try and salvage its popularity which was fast declining. What the government claimed to be spontaneous land occupation was held to be planned Zanu (PF) sponsored farm invasions. The mainly Zanu (PF) affiliated war veterans were at the forefront of the invasions and they were transported by government vehicles on some of their land invasion missions. It was held that the invaders were receiving food and monthly allowances from Zanu (PF) whilst on the farms that they invaded. The invaders in some cases used violent attacks knowing fully well that the law would not be applied to address this. This state of lawlessness was a breakdown in the rule of law. During this period most of the invaders felt like they were above the law and rightly so. Some Zanu (PF) party officials, government ministers, soldiers, Central Intelligence Organisation members (security agents) and parliamentarians were complicit in the farm invasions. These invasions increased in momentum soon after the no vote in the constitution referendum. The invasions were thus viewed by human rights organisations as a strategy to thwart the opposition parties growing popularity and to strengthen the ruling party's rural

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<sup>123</sup> Human rights watch (n121) 14.

<sup>124</sup> Fast track land reform in Zimbabwe <https://www.hrw.org/reports/2002/zimbabwe/ZimLand0302-02.htm> (accessed 17 August 2019).

support by promising them land. The fast track land resettlement was characterised by human rights abuses and violence. Some of the land occupations were violently achieved especially in cases where the white farmers had resisted the occupation and in other cases the farmers fled for safety.<sup>125</sup> There was a domino effect on the violation of property rights and the ruling party churned out messages that indirectly spurred on the violators of such rights with election messages such as ‘the land is the economy the economy is the land’.<sup>126</sup> No due process was followed in these acts of expropriation which targeted white owned farms. This shows how an anomaly can be normalised to a point where ordinarily law abiding citizens may choose to see nothing wrong with what they are doing or may feel justified for violating another’s rights as some citizens joined in the fray. The resettlement seemed to be based on political affiliation as it mainly benefited Zanu PF supporters.<sup>127</sup> The tightly contested elections held in the year 2000 were characterised by violence and at least 35 MDC supporters are said to have been murdered during the campaigns. This is the first time Zanu PF had faced such a stiff challenge since independence. The MDC had a slight majority but Zanu PF had won more seats than MDC, 62 to 57.<sup>128</sup> This narrow win is an indication that the ruling party was losing its popularity and may have seen fast track land reform as way to raise its appeal with the landless masses.

The land invasions were condemned both locally and internationally.<sup>129</sup> In December 2000 the courts of Zimbabwe in the CFU case had shown the effectiveness of the rule of law by keeping the government of Robert Mugabe in check and handing down a decision which held the Presidential Powers (temporary measures) Act to be unconstitutional delegation of legislative power. The court also held that the land reform was happening in a manner which was unconstitutional and didn’t conform to the requirements of the Land Acquisition Act. They ruled against the expropriation without compensation. It was declared to be invalid. The occupiers’ actions were declared haphazard and unlawful. The court held that the rule of law had been disregarded and a network of different organisations had with permission from the government been allowed to take over the resettlement process. The court held that the invaders had been backed by Zanu PF financially and materially.<sup>130</sup> The police did not comply with the court order to restore normalcy on the farms arguing that it was a political matter.<sup>131</sup> In the year

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<sup>125</sup> R Cass ‘Property rights systems and the rule of law’ in E Colombatto (n 50) 228.

<sup>126</sup> Fast track land reform in Zimbabwe <https://www.hrw.org/reports/2002/zimbabwe/ZimLand0302-02.htm> (accessed 17 August 2019)

<sup>127</sup> Human rights watch (n 121) 15.

<sup>128</sup> Human rights watch (n121) 16.

<sup>129</sup> Human rights watch (n121) 16.

<sup>130</sup> CFU vs Minister of Agriculture, Land and Resettlement (SC132/2000).

<sup>131</sup> Zimbabwe Human Rights NGO Forum (n 14) 4.



2000 there were three CFU cases in which the High Court ruled in favour of the farmers and the police were to enforce removal of the invaders. The Police Commissioner appealed stating that they did not have the resources to carry out the evictions. The appeal was dismissed and the court held that the police had a duty to comply and ensure that the white farmers received the protection of the law as enshrined in the Constitution.<sup>132</sup>

The events that followed showed a further disregard of the rule of law by the Zimbabwe government. The government moved swiftly to replace the Chief Justice who resigned under what seemed to be forced circumstances. Three new judges were appointed to the Supreme Court and the land acquisition case was reviewed by the reconstituted bench which was supposedly chosen by the new Chief Justice. The initial ruling was overturned and 4 of the five judges voted that the land acquisition laws were constitutional. The one who voted against soon resigned under presumed pressure from the government.<sup>133</sup> With this disregard of the rule of law began the widespread alienation of Zimbabwe by most western countries. The government was urged to review its land reform policy and to uphold the rule of law by civil society organisations and the international community. As is clearly shown the year 2000 was a year in which the Zanu PF government moved swiftly to legitimise an illegitimate process. The constitutional amendment was tantamount to going against the essence of the constitution by allowing a discriminatory violation of property rights. This was a disregard of the rule of law and the political agenda was advanced through legal forms.<sup>134</sup> The Mugabe led government seemed to have changed the laws to enable expropriation without compensation for their own political mileage and survival. They also replaced some of the judiciary with those that were favourable to their brand of land reform. Some members of the judiciary were even subjected to death threats. For legal judgements to be given in order to satisfy the whims of a president or the ruling party represents a breakdown in the rule of law. The interpreters of the law were changed not only in the middle of cases but after the law had already been interpreted by what had been viewed a more independent and unbiased judiciary.<sup>135</sup> The arbitrariness shown during this period by Zimbabwe's violation of property rights and the changes in the legal regime that speaks to property rights is repugnant to the rule of law. The gymnastics the Mugabe led government went through to make an otherwise illegal process legal is clear in all the events.

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<sup>132</sup> Zimbabwe Human Rights NGO Forum (n14)11.

<sup>133</sup> R Cass 'Property rights systems and the rule of law' in E Colombatto (n 50) 230.

<sup>134</sup> R Cass 'Property rights systems and the rule of law' in E Colombatto (n 50) 230.

<sup>135</sup> R Cass 'Property rights systems and the rule of law' in E Colombatto (n 50)230

The absence of the rule of law made stopping the invasions such a challenge.<sup>136</sup> The year 2000 was the first time that Zimbabwe's property rights were grossly violated at such a magnitude and on such large scale. The economy took an immediate nose dive and shrunk by 5 percent in 2000, 8 percent in 2001 and 12 percent in 2002.<sup>137</sup> Economic recovery has proved an uphill task for the economy for the past 19 years. Torstenson's research showed that countries that had wide scale land seizures also experienced negative growth. Some of these countries included Chad and Zaire.<sup>138</sup> Though distribution of land was desirable in Zimbabwe the government's land reform programme seems to have been conveniently used for political mileage disregarding the rights of the affected white farmers. The government could have carried out this exercise in a fair manner which did not violate human rights. The political messages around election periods seemed tailor made to indirectly influence invaders and the rate of land invasion seemed to increase during elections as evidenced by the 2000 parliamentary elections, 2002 presidential elections and the 2008 elections.<sup>139</sup> The president would make statements in his speeches stating that the taking of land from the white minority to give it to the landless was the final solution and would not be reversed. After one such speech soon after elections the violent invasions increased. For the year 2000 elections the ruling party which formed the government of the day rode on the slogan 'land is the economy and the economy is land'. A combination of the president's speeches, the election slogans, the inaction against invaders of farms, and the financial and material support by the Zanu PF led government gave invaders the assurance that the ruling government was behind them and their actions. In September of 2001 faced with enormous local and international pressure the Zimbabwean government committed at a conference in Abuja to uphold the rule of law, cease land acquisition in its current form and end violent farm occupations.<sup>140</sup> Government's commitment to this is confirmation that it was complicit in the violent farm invasions. Despite this commitment the violent farm invasions and human rights abuses continued. The Presidential elections of 2002 were not spared of the disorder which characterised Zimbabwe at that time. There were gross human rights abuses including murder, electoral fraud, wrongful arrest, torture, abduction, rape, theft, and looting and property destruction. This string of events shows what began as a violation of property rights morphed into a scenario of chaos and gross human rights abuses. Such a scenario does not offer the most suitable environment in which

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<sup>136</sup> Zimbabwe Human Rights NGO Forum (n 14) 5.

<sup>137</sup> Richardson (n 17) 2.

<sup>138</sup> Torstenson J (1994) 'Property rights and economic growth: An empirical study'.

<sup>139</sup> Zimbabwe Human Rights NGO Forum (n 14)

<sup>140</sup> Human rights watch (n 121) 16.

sustainable investment may thrive. The possibility of property expropriation, looting, theft of your products, unlawful arrest, attack of your family and employees are disincentive to investors. Besides the expropriation most investor policies will not overlook human rights abuses. Environmental, social and governance (ESG) issues are factors which continue to grow in importance to modern business. Socially conscious investors may thus decide not to invest in an otherwise potentially profitable investment if it is in a market where human rights are abused. Chaos through demonstrations and work stoppages also discourages investors as they find stable environments more attractive. It is this wide ranging impact of property rights violations that has the effect of a curse by becoming a major hindrance to stimulating investment. Europe and the US government held that the elections were invalid and they imposed smart sanctions on some individuals with close links to President Mugabe. This period marked the beginning of a major strain in Zimbabwe's relationships with the international community.

There was a drastic fall in food production and the evicted farmers were not given an opportunity to harvest their crop. The loss of their crop meant a loss of revenues for the investors. The invaders ate the farm animals and seeds. The farmers that had not yet been evicted minimised efforts to plan ahead and to invest in new equipment.<sup>141</sup> This shows how when property rights are not adequately protected an investor is discouraged from investing in their property. It is risky business to invest in something that you may lose the very next day. A third of the existing commercial farms had ceased or were operating well below capacity by the end of 2001. Farm workers were suddenly out of employment and an estimated 2 million family members were affected by this loss.<sup>142</sup> The Zimbabwean economy took a nose dive .In 2003 John Robertson one of Zimbabwe's leading economist stated that Zimbabweans were at that moment economically worse off than they had been at the time of gaining independence in 1980. <sup>143</sup>

### **3.5 Denial of access to justice**

Through constitutional amendment 17 in 2005 the government moved to nationalise most farmland in Zimbabwe. Many farms previously owned by white farmers became state land .To deal decisively with a scenario where the government may continue to lose their court cases

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<sup>141</sup> Human rights watch (n 121)17.

<sup>142</sup> Human rights watch (n 121) 18.

<sup>143</sup> Human rights watch (n121)19.

pertaining to land reform the government went on to ouster the jurisdiction of the courts from hearing matters pertaining to expropriation of agricultural land through constitutional amendment no.17 .This effectively meant that the aggrieved farmers had been denied access to justice. They had their right to recourse pertaining to expropriation of agricultural land denied. This represents a gross violation of property rights and goes against the general principles of law .The right to be heard is a general principle of law without it fairness of the law is seriously compromised . Justice may in such a scenario be whatever the executive deems it to be as the judiciary does not get to adjudicate over matters.

By 2009 the violent farm evictions were still ongoing .Majority of the white farmers and over 1 million farm workers had been evicted since the year 2000.Court rulings continued to be disregarded and a SADC Tribunal in 2008 held that the land reform programme was discriminatory and violated human rights. In this case, Campbell and Other vs Zimbabwe: The farmers brought the case before the tribunal citing that Zimbabwe had violated its SADC treaty and international human rights instruments by carrying out a land reform programme which was discriminatory and in which no compensation was given. The tribunal ruled in favour of the farmers. The reform was held to be discriminatory and the Zimbabwean government was ordered to pay compensation. Zimbabwe disregarded the ruling. It is such disregard of international human rights instruments that caused a rift between Zimbabwe and the international community. International instruments are meant to serve a purpose and disregarding them strains a country's international relations.

### **3.6 Conclusion**

The chapter shows how politicising the land reform process by the state led to property rights violations .The rule of law was not upheld, human rights where abused and the process was characterised by chaos. The evidence in the chapter shows how politics was used to weaken Zimbabwe's property rights regime. It is evident that the government could have achieved land redistribution in a manner that upheld the rule of law and respected property rights but chose a route that seemed politically expedient at the time. This disregard for some internationally observed human rights including property rights has caused a rift between Zimbabwe and the international community .The porous property rights and the history of their abuse ,like a curse stand in the way of Zimbabwe's reengagement initiatives and have been a major hindrance to stimulating foreign direct investment.

## **CHAPTER FOUR**

### **ZIMBABWE TODAY: THE CURRENT LAW AND PROPERTY RIGHTS**

#### **4.1 Introduction**

Since the influence of property rights law on investor sentiment and the economy is a gradual process 'Zimbabwe today' will mainly focus on the period since the adoption of the Constitution of Zimbabwe Amendment (No.20) Act 2013 to the events of 2019. The current Constitution of Zimbabwe is an improvement from the old in that it now makes provision for compensation of previously acquired agricultural land in certain scenarios though it is still porous and property rights can still be strengthened. This is especially considering the history of property rights in Zimbabwe.

#### **4.2 Regarding compensation for previously acquired agricultural land**

In terms of the current Constitution section 295 in regards to previously acquired agricultural land only those considered indigenous Zimbabweans or foreigners who had their property rights guaranteed by a bilateral treaty will be awarded compensation for both their land and any improvements on the land. Any other person who does not fall into this category will receive compensation only for the improvements that were on the land at the time of acquisition.<sup>144</sup>The majority of the Zimbabwean white farmers who lost their farms in previous acquisitions are thus constitutionally only entitled to compensation for improvements only. White foreign farmers who are not be from a country with a treaty protecting their property rights will also not be entitled to compensation for their land but for improvements only. This is still a violation of property rights. Imagine the unfortunate scenario where one actually paid value for the agricultural land in a commercial transaction and did not inherit the land through their family line. This section besides being a violation even for those that were advantaged through inheritance of the historical past would seem to assume that all those who had their rights violated as long as they are white own the property based on historical events.

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<sup>144</sup> Section 295 of Constitution of Zimbabwe Amendment (No.20) Act 2013.

### 4.3 Regarding rights to agricultural land

Section 72 of the Constitution speaks to rights to agricultural land. The paper will highlight what it considers contentious issues in this section of the Constitution that still make for porous property rights. Sec 72(2) reads-

Where agricultural land, or any right or interest in such land, is required for a public purpose including-

- (a) settlement for agricultural or other purposes;
- (b) land reorganisation, forestry, environmental conservation or the utilisation of wild or other natural resources; or
- (c) the relocation of persons dispossessed as a result of utilisation of land for a purpose referred to in paragraph (a) or (b);

the land, right or interest may be compulsorily acquired by the State by notice published in the Gazette identifying the land, right or interest, whereupon the land, right or interest vests in the State with full title with effect from the date of publication of the notice.

This form of notice for such a significant property right is not sufficient. A procedure where one is told of a major change of an individual specific infringement on his property right without the need for direct prior communication cannot be deemed to be proper and within the spirit of fairness which the Constitution enshrines. The notice violates some of the provisions of the constitution considering it's a direct infringement on one's habitation, source of livelihood and property. The person whose property right is infringed should hear of this infringement in direct personalised communication before it is gazetted. In its preamble the Constitution speaks to freedom, fairness, justice, equality and resistance to racism. The notice stated does not espouse the freedom, fairness, justice and fight against racism espoused by the Constitution.<sup>145</sup> Transparency, honesty and dignity of hard work are also stated as tenets of the Constitution. This notice does not satisfy the requirements of transparency or honesty. Such a notice is open to being arbitrary and subjective. A true respect of hard work should in itself show how this form of notice is insufficient as a show of respect of the dignity of hard work the current right holder might have put on the property and the farming he was doing on that property. To have this form of notice being given to a hardworking individual is discouraging and does not promote the value to be placed on hard work. The preamble commits to upholding

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<sup>145</sup> Preamble Constitution of Zimbabwe, 2013.

and protecting fundamental rights .This form of notice does not adequately uphold and protect fundamental rights

Sec 72(3) provides:

Where agricultural land, or any right or interest in such land, is compulsorily acquired for a purpose referred to in subsection (2)-

- (a) subject to section 295(1) and (2), no compensation is payable in respect of its acquisition, except for improvements effected on it before its acquisition.
- (b) no person may apply to court for the determination of any question relating to compensation except for compensation for improvements effected on the land before its acquisition, and no court may entertain any such application and
- (c) the acquisition may not be challenged on the ground that it was discriminatory or in contravention of section 56.

This provision curtails the jurisdiction of the domestic courts from hearing expropriation cases. This is a violation of property rights which persists in our law. One may not bring before the courts a contestation for compensation of the land but can only contest compensation in relation to improvements in the land. It makes the matter of compensation for land not debatable. It is this very framing of the Constitution which enabled rampant expropriation without compensation to take place. This makes anyone with property rights in agricultural land who is not an indigenous Zimbabwean or not protected by a treaty have very porous agricultural land rights .This section goes against the principles espoused in the Constitution .It removes the right to protection of the law which is supposed to be a right guaranteed to anyone citizen or not. Section 68 enshrines the right to administrative justice. It states that:

- (1) Every person has a right to administrative conduct that is lawful, prompt efficient, reasonable, proportionate, impartial and both substantially and procedurally fair.
- (2) Any person whose right, freedom, interest or legitimate expectation has been adversely affected by administrative conduct has the right to be given promptly and in writing the reasons for the conduct.
- (3) An Act of Parliament must give effect to these rights, and must-
  - (a) provide for the review of administrative conduct by a court or, where appropriate by an independent and impartial tribunal;
  - (b) impose a duty on the State to give effect to the rights in subsections(1) and (2); and

(c) promote an efficient administration.

Clearly section 72 is in violation of the right to administrative justice. Section 44 which speaks to the duty on the state, every person and institution 'to respect, protect, promote and fulfil the rights and freedoms set out' in the bill of rights. Section 72 violates the duty stated in section 44 and other sections of the Constitution. Some provisions in section 72 are a neglect of the duty on the state to respect, protect, promote and fulfil an individual's rights and freedoms. The worst case scenario of section 72 is a scenario where a right holder can wake up the next day after the publication of a notice in the gazette without a house, a farm and a source of livelihood thus affecting not only his family but numerous other families that work his land. Considering the significance of the right that is being infringed by section 72 the administrative conduct provided for in handling the infringement is neither reasonable nor proportionate to the infringement. To deny an individual the right to be heard goes against a basic principle of law. The law will thus not be serving its purpose if an individual is denied the right to come before the courts to have their matter heard. Access to justice is a general principle of law that is recognised in both domestic and international settings. Section 68 of the Constitution of Zimbabwe enshrines the right to administrative justice that is both substantially and procedurally fair. There is no fairness in a law that removes the right to go before a court pertaining to a matter. The right to be heard is in my opinion an inalienable right no matter what a case pertains to. An individual affected by the provisions in section 72 has a legitimate expectation to be able to contest both the expropriation and the compensation because of the other constitutional provisions. If the reasons for expropriation are valid and satisfy the expropriation criteria the individual has a legitimate expectation to be compensated for infringement of the rights to the land. Sec 68(3) provides any administrative conduct may be brought before the court for review. Sec 68(3) (b) imposes a duty on the state duty to ensure lawful, substantially and procedurally fair administrative conduct is availed if required.

Section 69 on the right to a fair hearing in subsection 3 provides that every person has access to the courts or forum or tribunal for resolution of any dispute. This section makes no exceptions .To then limit an individual's grounds to go before a court goes against that which the Constitution aims to protect.

Section 51 which entrenches the right to human dignity is also violated by the provisions of section 72.It is not respecting an individual's inherent dignity to leave them without property, a home and a source of livelihood without sufficient notice ,compensation nor the right to bring



the matter before the courts. The fact that sec72 (3) (c) states that discrimination is not permissible as a ground that a case may be brought before the courts is in itself discriminatory. To remove the discrimination ground is in essence to allow for discrimination to be used in the expropriation exercise. Sec 56 enshrines the right to equal protection of the law to all. Sec 25 speaks to protection of the family unit as a national objective .To then abruptly cut off the livelihood and habitat of a family with no alternative plan for them for a decent transition does not promote this value of protecting the family .The family might go through untold suffering and may even have to live separately and in abject poverty because of the actions of the state. Instead of enabling every person access to adequate shelter as aspired to by section 28 of the Constitution the actions in section 72 may in fact stand to disable one of having access to adequate shelter. Most people who own agricultural land have their homestead and those of their farm workers on that land .The sudden loss in title to these will in most cases affect several people, leaving them without shelter. This is the curse which has brought severe affliction to Zimbabwe's property rights with extreme consequences that have affected the economy and investor sentiment. The right to personal security entrenched in section 52 is under threat from the provisions of section 72.

Section 52 reads: 'Every person has the right to bodily and psychological integrity ,which includes the right...'Considering the infliction that can befall both the human body and psyche by suddenly losing something that you have always known you had a right to section 72 may definitely be a threat to bodily and psychological security. Section 53 asserts that no one shall be subjected to physical or psychological torture or cruel, inhuman or degrading treatment. The wording of section 72 makes being subjected to such treatment a possibility. The violation of property rights may cause a violation of other rights as shown above. It is no surprise that property rights are viewed as a foundation of all rights known to humans. The human right to be free is violated by a violation of property rights. Legal claims are basically an offensive or defensive claim to something.<sup>146</sup>The things that humans are entitled to can be summed up in property rights.

From an exploration of the other rights that are violated by violating property rights it is evident why certainty and upholding of property rights is important for both economic and political stability. The impetus to invest where property rights are porous and have been violated before is low both for domestic and international investors. Zimbabwe's porous property rights are

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<sup>146</sup> Property rights and the constitution Cato Handbook for policy makers 7<sup>th</sup> edition at 346.

likely to lead to challenges in stimulating investment. The United States' Department of State published an assessment entitled 2019 Investment Climate Statements, Zimbabwe in which they raised concerns that Zimbabwe's property rights remained porous under the new government. The assessment welcomed the amendments to the country's Indigenisation Act and economic reforms. It alluded to the fact that the country's history with expropriation without compensation made security of property rights a real concern and investors remain cautious even though the current government was indicating that it will respect property rights. The report also mentioned Zimbabwe sectors that investors are mainly attracted in as agriculture, mining, energy and tourism.<sup>147</sup> Considering that these sectors rely heavily on land rights it would explain why investors may be uncomfortable investing in these sectors if the property rights regime is weak and does not offer adequate protection for their investment. Such sentiments coming from a political and economic powerhouse with global influence do not auger well for the country's investment drive. The United States still has targeted sanctions on Zimbabwe and ZIDERA is still in force as the US is not satisfied with reforms made thus far and has mentioned property rights as a concern. ZIDERA was enforced to push for good governance, democratic processes, respect for human rights and property rights.

A violation of human rights is generally frowned upon both locally and internationally. Some companies will even make investment decisions based on whether a potential investment destination respects human rights or not.<sup>148</sup> It is a violation of human rights for a family to end up destitute through avoidable actions of the state. A gross violation of human rights may be repugnant to most investors and may lead to isolation and to sanctions like in the Zimbabwe case. Rampant violation of property rights directly and indirectly affects the other determinants of FDI pull as evidenced by the Zimbabwe scenario. The violation of property rights in Zimbabwe led to a weakened economy and unstable political environment. The weak economy has also led to a brain drain with a lot of educated Zimbabweans leaving the country in search of better opportunities. The quality of human capital is also something an investor considers when making an investment decision.<sup>149</sup> The weak economy also means that the technology in use in most processes in the country has also legged behind. This makes stimulation of

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<sup>147</sup> Zimbabwe: Reformer Mnangagwa leaves U.S unsure <https://allafrica.com/stories/201907160662.html> (accessed 10 Aug 2019).

<sup>148</sup> SL Blanton, RG Blanton 'what attracts foreign investors? An examination of human rights and foreign direct investment' (2007) 69 *The journal of politics* at 143

<sup>149</sup>MS Karimi and others 'Effect of human capital on foreign direct investment inflows' (2013)18 *Journal of Economic Research* at 1.

economic growth a bigger challenge.<sup>150</sup> Considering that some foreign investors prefer to enter a foreign market through a joint venture or merger with a local company the fact that they may need to replace all the production machinery may make the country's manufacturers not such attractive partners. The above shows how property rights that are porous have the capacity to cause a myriad of interconnected issues that affect a country's ease of doing business. Zimbabwe's property rights violation and its property rights regime have caused a myriad of such issues which have also contributed to the country ranking poorly on the World Bank's ease of doing business index. Registration of property is one of the key considerations of the doing business index, this considers quality of land administration and equal access to property rights concerning land. Zimbabwe is ranked 155 on the World Bank's ease of doing business index.<sup>151</sup>

The violation of property rights that has been more evident in agricultural land rights has also permeated into the mining arena and in money. The infringement in the mining arena has not necessarily been state driven though the infringement of property rights in money is attributed to the state. The property rights violation in agricultural may have precipitated an attitude from the community of not respecting property rights as they should.

#### **4.4 Property rights violations in mining**

The state assisted rampant property rights violation in agricultural land in Zimbabwe has led to a scenario where the law especially pertaining to property rights seems to be selectively applied. A violation of property rights in one sector may have a domino effect and result in spread of violation of other property rights especially where the laws role to protect property rights has been compromised. This has been evident in mining where groups of informal miners have been known to occupy and mine on lucrative mining claims that do not belong to them and without permission from the claim holder. Some of these violators of property rights have been alleged to have links within the ruling party whilst some are independent .This shows the side effects of a disregard of the rule of law scenario.

In March 2018 Gaika gold mine in Kwekwe was invaded by a group of individuals who were said to have links within the ruling party .It is reported that a week before the invasion the

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<sup>150</sup> Outdated equipment in Zimbabwe and investors  
<https://www.google.co.za/m?q=outdated+equipment+in+zimbabwe+and+investors&client=ms-opera-mobile&channel=new&espv=1> The Herald. ( accessed 15 July 2019).

<sup>151</sup> Explore economies [https://www.doingbusiness.org/en/data/exploreconomies/zimbabwe#DB\\_pi](https://www.doingbusiness.org/en/data/exploreconomies/zimbabwe#DB_pi) (accessed 10 August 2019).

Court had ordered the ministry of mines not to issue mining rights to a Zanu PF legislator, Vongaishe Mupereri who was in a violent attempt to take over the mine. The Mine Manager, Hendrik Meyer approached the court for an interdict .In his affidavit Meyer stated that on March 2 2018 violence broke out amongst the illegal occupiers resulting in some being hospitalised .An innocent by stander is said to have been killed in the clashes .Meyer’s first port of call was the Zimbabwe Republic Police but these did not avail themselves to protect him and the mine from invasion.<sup>152</sup>In April 2019 the soldiers and police who were then deployed to protect the mine are reported to have been receiving bribes from the invaders to allow them to continue looting the mine. Allegations were the invaders had been given permission by a minister to mine in violation of the court order .Faced with these challenges the mine owners had to upgrade their security systems as the soldier and police protection was proving insufficient .Gaika mine is owned by foreign investors .The ongoing disturbances had by April been going on for over 18 months.<sup>153</sup> The duty to protect was abused and instead the protectors became the violators .This speaks to how the country’s recent history may have shaped the minds of the enforcers not to expect any repercussions going by past events especially in scenarios where there had been political meddling. This event shows the erosion of the rule of law and property rights .The commitment of the state through its institutions to uphold property rights is questionable .The court in the Gaika case must be applauded for issuing the interdict .Where the rule of law is not compromised and property rights are respected the expectation would be for immediate protection by the police of the asset, the human capital and the supposed right holder who was on the mine at the time the matter is being investigated. These events raise investors wariness about investing in Zimbabwe .This does not auger well for a resource rich country aiming to stimulate foreign investment into the country. Facts on the ground may have a greater influence on the investor sentiment than rhetoric that property rights are respected without adequate backing at law and inaction of the institutions. Police inaction in a violent raid in property rights especially in mining may lead to injuries and deaths as has been known to happen in Zimbabwe. Valuable mineral resources may be stolen and assets stripped during police inaction making swiftness of action imperative when there is an alleged invasion on property rights. Investors are in business to earn a return on their capital. An environment where both capital and the profit are inadequately secure is not

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<sup>152</sup> Property rights: Govt should act <https://www.theindependent.co.zw/2018/03/16/property-rights-govt-act/> 16 March Zimbabwe Independent (accessed 10/08/2019).

<sup>153</sup> Police, soldiers join Gaika looting spree- Zimbabwe Situation, 26 April Zimbabwe Independent <https://www.zimbabwesituation.com/news/police-soldiers-join-gaika-looting-spre/#more> (accessed 11 August 2019).

the most conducive. Such incidences of violation of property rights in mining happen are not isolated though most of them are normally on a smaller scale and may not necessarily end up involving the armed forces. Violations even on a small scale will have a domino effect especially if the law is not enforced to curtail such violations.

#### **4.5 Property rights violations in money**

Money is an asset which fulfils economic functions and as such it can be categorized as personal property. Thus proprietary interest vests in money.<sup>154</sup> Money claims, claims for services equivalent to money and claims for employment that earns money are recognised under the property rights rubric.<sup>155</sup> The function of money as a medium of exchange is the asset used in transactions and performing obligations. This function is the subject of an individual's property rights.<sup>156</sup> An individual may hold a specific type of currency as it may be viewed on the market as a stable store of value making it more capable of fulfilling its medium of exchange function. For instance the US dollar is more stable than the Zimbabwe \$RTGs (currently in use in Zimbabwe). It has a more predictable value thus making it a better store of value and medium of exchange. Based on this premise for the state to unilaterally change an individual's holdings in US dollars to \$RTGs dollar at a rate that's arbitrary when considering the value it would have initially gazetted is a violation of property rights.

The Zimbabwe government has changed their policy pertaining to money in ways that may advantage the government but violate the property rights of the owners of the foreign currency. This scenario has been happening from the time the farm invasions where at their peak right up until 2019. One of the issues raised in the Border Timber's case was that the government had paid Border Timber's USD denominated invoices in a more unstable Zimbabwe dollar currency and at a value which did not match the true value of the USD.<sup>157</sup> Not getting fair value for your investment or profits is a disincentive for an investor. An otherwise profitable business venture may register losses because of government legislation pertaining to money which in Zimbabwe has been known to change quite regularly considering money requires some stability and predictability in order for it to fulfil its function efficiently. The qualities of certainty and predictability that are important pertaining to property rights in general are also important to property rights in money. Some of the properties considered in choosing a medium

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<sup>154</sup> Fox (n 47) 4.

<sup>155</sup> R Cass 'Property rights systems and the rule of law' in E Colombatto (n 50)223.

<sup>156</sup> Fox (n 47) 5.

<sup>157</sup> Border Timbers case (n13).

of exchange is stability in value ;homogeneity ,that is any single unit of it must be the same value as another single unit of it; easily recognisable as the medium of exchange. The value placed on it in exchange must be apparent as it is passed on in transactions.<sup>158</sup>To temper with these characteristics affects the propriety rights in money.

The Beattie case (2019) highlighted in chapter 1 in which the High Court reserved judgment is a more current example of how property rights in money have been violated by the state through its regulations. The company an architectural firm deposited US142000 into Central African Building Society (CABS) in 2016. On withdrawal demand the bank now wanted to give the company its withdrawal as 142000 bond notes or Real Time Gross Settlement (RTGS) dollars. This is the local currency in use in Zimbabwe which can only be used for transactions within the Zimbabwean border but is worthless and inconvertible outside the borders of Zimbabwe. Even within the country's borders the currency is highly volatile and has way less value compared to the USD. At the time the case was brought before the courts the parallel rate was approximately USD1:4RTG (USD is as good as good as inaccessible through official channels). CABS had offered to satisfy the withdrawal request by using the rate of 1:1 as provided for by Statutory instrument 33 which was introduced in February 2019. The SI provided for issuance of electronic money called the RTGS Dollar as legal tender in Zimbabwe. The balances that had been expressed in the United States Dollar were now deemed opening balances in RTGS dollars at par with the USD. It is on this provision that CABS relied on to meet the withdrawal by settling it using 142000 RTGS dollar (approximately equivalent to USD14000 as at 30 June 2019) which was in reality far from equivalent to what the company had deposited, Beattie studio had deposited their money in USD and expected it in USD. When the government of Zimbabwe first issued the bond note it had assured the market that the note will continue to be pegged at the same value as the USD and it was only a surrogate currency meant to facilitate transactions. The Reserve Bank through its governor issued statements to this effect. By making this statement promising and stating that the policy would be to maintain the rate at 1:1 the state created a legitimate expectation from the public. The public was assured and encouraged to continue to depositing either USD or bond notes into their accounts as the two had the same value. It was held that officially this value was held to be in USD. The impact of this statutory instruments further eroded trust in the banking system as property rights in

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<sup>158</sup> Fox (n 47) 7.

money were once again violated. Such violations have affected business operations and livelihoods .Life savings and pensions are lost through such regulations.

Andrzej Rapaczynski defined investment property as ‘the right of an investor to receive, after allowing for some moderate and legitimate measure of taxation, a significant portion of the market returns on his investment.’<sup>159</sup>This would mean regulations that have the effect of diminishing the value of the revenue an investor is entitled to would amount to an infringement on property rights .For instance where one has invoiced and sold their goods in USD only to be given their payments by the government in a local currency of much lesser value is an infringement of the investors property rights in money as a medium of exchange .Especially considering that the investors would have been given assurances that their payments or savings will be paid in the initial currency transacted in .To change regulations and introduce regulations with a retrospective approach would be a violation of property rights .The scenario would have been better where fair valuation was given in the local currency and if it was a negotiated settlement and not an imposition .The asset money in this instance is arbitrarily reduced in value by the government’s actions .One of the desirable traits of property is the exclusiveness in control that it should provide the holder of the property rights .<sup>160</sup> Exclusivity of control enables asset owners to approximate future revenues to be derived from the investment and to expend money on the investment based on the future earnings the investor expects.<sup>161</sup> Giving an investor their expected earnings in a currency that is of a much lesser value gravely distorts the premise on which their investment would have been made and can lead to business closure. In some instances an investor would have incurred some USD denominated operational costs thus receiving their payment in a local currency which is hard and almost impossible to convert poses a challenge to profitability of the enterprise. To temper with the exclusiveness of control in the investment property in that manner reduces the incentive of the investor to invest as the return on investment is threatened.

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<sup>159</sup> A Rapaczynski ‘Can constitutions protect private property against governmental predation’ in E Colombatto (n 50)206.

<sup>160</sup> A Rapaczynski ‘Can constitutions protect private property against governmental predation’ in E Colombatto (n 50)206.

<sup>161</sup> A Rapaczynski ‘Can constitutions protect private property against governmental predation’ in E Colombatto (n 50)207.

#### **4.6 Tribunal awards to international investors who had their property rights infringed**

The Zimbabwean government has announced that it will start compensating white farmers that were evicted from their farms during land reform. The local white farmers will however be compensated for improvements only but not for the land. This is as per the provisions in the Constitution. The government is however facing funding challenges and the money that has been initially set aside is much less than the total estimated and will thus start with those that are in distress.<sup>162</sup> Though this is still not fully respecting property rights it is a welcome initiative and a promising signal to an improvement in property rights security. During the land reform exercise some of the white farmers who were evicted from their farms were foreign investors that were protected by bilateral treaties between Zimbabwe and their countries. The Constitution of Zimbabwe 2013 in sec 295(2) has provided for compensation for both the land and the improvements made to the land for all previously acquired treaty protected agricultural land.

The compensation for the foreign investors and how Zimbabwe will deal with the ruling of the tribunals is likely to be watched closely by the international community. The handling of the cases has the potential to influence Zimbabwe's current trajectory. Zimbabwe has maintained that it will respect the rule of law and will uphold its Constitution and a handling of the international investors will be a good signal of the sincerity of this commitment.

Border Timbers one of the companies that had its operations affected by expropriation was suspended from the Zimbabwe Stock Exchange in November 2018. The majority shareholders in the company are foreign investors and their investment was protected by Germany/Switzerland-Zimbabwe bilateral treaty. This was a conjoined case with the Bernhard von Pezold and others case. The Pezold family are the major shareholders of Border Timbers hence the convenience of conjoining the cases. The family had bought some of the farmland in 1988(after Zimbabwe's independence). Zimbabwe was found to have violated the expropriation clause; fair and equitable provision; non-impairment; full protection and security and free transfer of payments provisions of the treaty of the treaty. During the invasion some family members and employees had been kidnapped and assaulted by the settlers the tribunal thus also issued a moral damages award of \$US1 million. The expropriation was found to be

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<sup>162</sup> Compensation of farmers in Zimbabwe 16 May 2019 BBC News  
<https://www.google.co.za/m?q=compensation+of+farmers+in+Zimbabwe&client=ms-opera-mobile&channel=new&espv=1> ( accessed 11/082019).



unlawful, discriminatory and lacked due process.<sup>163</sup> ICSID decided in their favour in 2015 and issued an award where the Zimbabwe government had to pay compensation or restitution. The Zimbabwe government applied for annulment of the award. At the time of requesting that they be suspended from the bourse they were awaiting decision on the annulment and had noted that the decision would have a bearing on its share price. The company noted how publishing financial results with certainty was challenging without knowing how the award would affect the business.<sup>164</sup> Border Timber's case shows how the farm invasions directly affected the economy and how international investors have been affected by it. A company trading on the Zimbabwe Stock Exchange affects more than just one family but affects a lot of investors. This case is evidence that though a majority of the expropriations took place before 2010 the economy is still reeling from its effects. Expropriations are still affecting current business operations and this definitely influences the sentiment of potential investors when they read financial reports of public listed companies like Border Timbers. ICSID went on to dismiss the annulment and upheld its earlier ruling. Zimbabwe is still to settle the case. It is one of a number of cases involving international investment protected by treaties that Zimbabwe is still to settle. According to section 53(1) of the ICSID Convention, ICSID awards are binding on the parties and may not be appealed. Settling is important so that Zimbabwe shows a commitment to respecting contracts and treaties. It is undesirable that treaty protected investments have actually gone for this long uncompensated and from the start one should have expected the government to give them better protection during the land reform exercise.

#### **4.7 Conclusion**

From the findings in this chapter it is evident that the constitutional provisions pertaining to property rights in agriculture do not espouse the basic tenets of the Constitution of Zimbabwe. The chapter highlights the issues of non-compensation discrimination, denial of justice and lack of due process contained in the property rights provisions pertaining to agricultural land.

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<sup>163</sup> 16 May 2016 Jacob Greenberg Investment treaty news ICSID tribunal orders Zimbabwe to return expropriated farms-Investment Treaty News <https://www.iisd.org/itm/2016/05/16/icsid-tribunal-orders-zimbabwe-to-return-expropriated-farms-bernhard-von-pezold-and-others-v-zimbabwe-icsid-case-no-arb-10-15-jacob-greenberg> (accessed 12 Aug 2019) .

<sup>164</sup> Border Timbers suspended from ZSE The Herald Enacy Mapakame 13 Nov 2018 <https://www.afrcian-markets.com/en/stock-markets/zse/border-timbers-suspended-from-zse> (accessed 12 Aug 2019).

## CHAPTER FIVE

### RECOMMENDATIONS: A FRAMEWORK THAT FOSTERS INVESTOR CONFIDENCE

#### 5.1 Introduction

This chapter will focus on the recommendations of changes that need to be made to strengthen security of property rights in Zimbabwe thus attracting more foreign direct investment enabling the national prosperity envisioned in the preamble of the Constitution. Zimbabwe's legislation on property rights especially in agricultural land has to be amended to give adequate non-discriminatory security to the right holder. The three main factors that make property rights secure are: clarity in what the right contains and time period covered; certainty about who is entitled to the right and degree of their independence pertaining to control of the right and guarantee of enforcement against infringement of the rights by others.<sup>165</sup> It is the researchers opinion that section 72 of the Constitution of Zimbabwe, the other sections that inform this section and any other legislation based on this section be amended to give non-discriminatory security to all property right holders in agricultural land .The focus of the recommendations will be on section 72 as this is considered the pivotal section on property rights in agricultural land .An amendment to section 72 would pave an amendment to all other related legislation to bring them in line with the Constitution since the Constitution is the supreme law of the land. Section 72 of the Constitution does not give adequate security to a white Zimbabwean or a white foreigner's (who is not protected by a BIT) property rights vested in agricultural land. This is a hindrance to foreign direct investment in the sector.

#### 5.2 Justification for the proposed constitutional amendments

The proposed amendments proposed are meant to address provisions that violate any one or all of the following: international investment law, international law, domestic constitutional law or fundamental human rights. Issues of concern in the current section that enable discrimination, expropriation without compensation, lack of due process (administrative justice)and denial of justice should be removed .These should be replaced with non-discriminatory provisions for compensation, due process and access to justice.

##### 5.2.1 Expropriation without compensation

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<sup>165</sup> FAO (n 33) 26.

In section 72(7) the state provides that it is under no obligation to compensate and places the obligation of compensation on the former colonial power. The country's history indeed led to uneven distribution of agricultural land which required redress but for the state to then perpetuate other wrongs based on its history is an affront to both domestic and international law. The state should draft laws that are compliant with the basic structure of its Constitution, international law, international investment law and the international human rights instruments that it has ratified. Doing this and upholding these laws will facilitate Zimbabwe's re-integration initiatives and attract FDI. It will move the nation towards building a prosperous nation based on the values of equality, fairness and dignity of hard work as enshrined in the Constitution's preamble. <sup>166</sup>To promote an act that violates the essence of its Constitution and international law to achieve a conceivably noble goal is cancerous. It may lead to suffering thus impeding realisation of the benefits of land reform. Whatever reasons the state may use as justification for expropriation of agricultural land without compensation, the state has both a legal and moral obligation to compensate for any expropriation. Compensation is also necessary if Zimbabwe is to avoid continued hesitancy from investors pertaining to security of property rights. Compensation is a requirement in international law when an expropriation occurs.<sup>167</sup>It is the minimum standard of protection expected to be provided in domestic law by international law.<sup>168</sup> If Zimbabwe wants to be fully embraced by international investors it will have to respect international law and international investment law. Compensation is also enshrined in the Zimbabwean Constitution for other property and for agricultural land where the property rights infringed on are of a black Zimbabweans. This speaks to the realisation of the need to compensate one where rights are in infringed. The fact that an investor's property may be expropriated without compensation is a disincentive to invest. Compensation secures property rights by guaranteeing the enforcement of the property right against others.

### **5.2.2 Denial of justice**

To deny one access to justice defeats the purpose that the law is meant to serve. The *audi alteram partem* is a principle of natural justice which states that both sides to a case must be heard. It is based on the fact that a fair decision requires both parties to be heard. Natural justice is what society generally believes to be fair. It is based on basic human reasoning. Zimbabwe has ratified international human rights instruments in which the right to be heard is enshrined.

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<sup>166</sup> Preamble Constitution of Zimbabwe, 2013.

<sup>167</sup> Sornarajah (n 66) 82.

<sup>168</sup> Hepburn (n 69) 61.

Derogation from this right thus violates a human right. Everyone must have the right to be heard before a court or tribunal when a right is infringed.<sup>169</sup> Zimbabwe in its Constitution also enshrines this in section 69 which speaks to right to fair hearing. Zimbabwe will find it a challenge to attract investment with a Constitution that denies a right to be heard in some circumstances. To deny one this basic right may also signal a threat to many other rights if such a basic right can be denied. The right to a fair trial is enshrined in the ‘limitation of rights’ as a right to which no law may limit. This speaks to the significance of this right. The right to be heard strengthens security of property rights in that the right holder is able to bring clarity to the nature of his right, what it entails and the time period that the right applies to. The right to be heard in property rights infringement in matters pertaining to agricultural land must be enshrined in Zimbabwe’s Constitution.

### **5.2.3 Discrimination**

Zimbabwe has ratified regional and international human rights instruments which enshrine the right to equality and non-discrimination in the administration of justice. Discrimination based on race, sex, language and religion is prohibited in the Charter of the United Nations. Equality and non-discrimination is also enshrined in article 2 of the African Charter on Human and People’s Rights (ACHPR). The Constitution of Zimbabwe in section 56 enshrines equality and non-discrimination. The discriminatory nature of section 72 as discussed in the previous chapter violates domestic constitutional law and international human rights instruments. This again has a significant bearing on how Zimbabwe is perceived on the international arena. Like with any institution one needs to respect the rules of the international terrain to be accepted. Isolation of a country may be a consequence of discrimination. The prospect of being denied protection of the law based on your race or citizenship in a country you are doing business in and contributing to the welfare of the society is a disincentive to investment. Protection of the law pertaining to property rights in land should be guaranteed to everyone. Equality before the law strengthens security of property rights by bringing certainty to the fact that everyone’s property rights are protected by the law.

### **5.2.4 Due process**

Due process is enshrined in the Zimbabwean Constitution in section 68 under administrative justice. It is a legitimate expectation of an individual to receive administrative conduct that is

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<sup>169</sup> ACHPR sec 7.

procedurally fair. The Constitution provides that any person whose right, freedom or interest has been adversely affected by administrative conduct has the right to be given promptly and in writing the reasons for the conduct. There must be laid down procedure for the review of the conduct. This is a legitimate expectation of anyone living or doing business in Zimbabwe. From a foreign investors stand point this strengthens security in property rights by mitigating the element of arbitrariness in the actions of the state and strengthens long term control of resources.

The recommendations below are suggested to strengthen property rights in agricultural land and cure the porosity in the current Constitution. The state may however be faced with the challenge of populism from indigenous black people insisting that the land is rightfully theirs and hence there is no need to compensate for this land. This position may be alluring for politicians but has long term ramifications that may disrupt the nation Zimbabwe aspires to build. The nation has to be assured that going forward land will be re-distributed but in a manner that respects property rights and other human rights. Politicians and policy makers will have to communicate to the masses the importance of respecting property rights and the long term societal benefits. These recommendations besides promoting unity and upholding human rights will create an enabling environment for stimulating investment.

### **5.3 Amendments to section 72 to bring it in line with the basic structure of the Constitution**

In the researcher's opinion section 72 is out of context with the essence and basic structure of the Constitution of Zimbabwe. The preamble of the outlines the values of the Constitution which guide the provisions contained within the Constitution. A paragraph in the preamble of the Constitution reads 'We the people of Zimbabwe resolve by the tenets of this Constitution to commit ourselves to build a united ,just and prosperous nation, founded on values of transparency, equality, freedom, fairness, honesty and the dignity of hard work,...'.Section 72 must be amended to espouse the values envisaged in the preamble. The building of a united prosperous nation by fair and just means is the vision espoused in the Constitution. Constitutional provisions should be such that the government is restrained from abusing its

authority but at the same time empowered to acquire property for long term sustainable development which benefit the community.<sup>170</sup>

#### Proposed amendments to sec 72

Section 71 speaks to property rights in general. Save for the parts its states that subject to sec 72 this section is framed in a manner which respects and protects property rights fairly adequately. The Constitution should be amended by striking down the provisions of agricultural land in section 72 that propagate discriminatory security of property rights and instead align section 72 on agricultural land to the property rights provisions applicable to property rights in general in section 71. The following amendments based on provisions of section 71 would bring it in alignment with sec 71 and the basic structure of the Constitution:

- (i) The acquisition must be in terms of a law of general application. (addresses non-discrimination ,a lawful expropriation requirement);
- (ii) The acquisition must fulfil the public purpose requirement.(addresses lawful expropriation requirements );
- (iii) The law makes it a requirement to give reasonable notice of the intention to acquire the property to everyone whose interest or right in the property would be affected by the acquisition.(addresses due process, lawful expropriation requirement);
- (iv) The law makes it a requirement to pay fair and adequate compensation before acquiring the property or within reasonable time from acquisition.(cures the discriminatory non-compensation, addresses lawful expropriation requirements);
- (v) Where acquisition is contested it is mandatory for the acquiring authority to apply to a competent court within 30 days for order confirming the acquisition. (addresses due process and access to justice );
- (vi) If the court does not confirm the acquisition the person whose property has been acquired may apply to the court for prompt return of the property.( addresses due process and access to justice );
- (vii) The law entitles claimant to apply to the court for determination of: existence, nature and value of claimant's interest in the property, legality of the acquisition and the amount of compensation.( addresses due process and access to justice );

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<sup>170</sup> A Rapaczynski 'Can constitutions protect private property against governmental predation' in E Colombatto (n 50) 212.

- (viii) It provides that claimant can apply to court for order instructing prompt payment of compensation.( addresses due process and access to justice )

These provisions provide for expropriation within the stated parameters. They cure the issues that were found in violation during Zimbabwe's land reform exercise .They satisfy the requirements for lawful expropriation by providing for compensation, due process, non-discrimination and fulfilling the public purpose requirement. With regards to due process it makes it a requirement that reasonable notice of intention to acquire property is given and outlines procedure where acquisition has been contested. Pertaining to access to justice both the expropriation and the compensation may be contested .In terms of being non-discriminatory the section states that acquisition will be in terms of a law of general application it also does not give race as a ground that the acquisition cannot be contested on. It sets the condition that acquisition must be for a public purpose. This framework should inspire confidence in Zimbabwe's property rights regime. All other legislation pertaining to land reform and other property rights must be brought into alignment with the Constitution. An Act of parliament should be promulgated which makes it a criminal offence to infringe property rights in land without lawful authority.

#### **5.4 Inclusion of property rights in money in section 71**

Property rights may fall victim not only to outright confiscation but to a country's budgetary deficit or inflationary policy as has been evident in developments in Zimbabwe hence the recommendation to have property rights in money secured in the Constitution.<sup>171</sup> Section 71 on property rights should include a provision that protects the property rights in money. This provision may be worded as follows: Where a person has a vested or contingent right to the payment of an invoice in foreign currency or has bank deposits in foreign currency, a law which provides for the extinction or diminution of that right is regarded, for the purposes of subsection (3), as a law providing for the compulsory acquisition of property.

Arbitrary encroachment into people's savings or income should be avoided .Zimbabwe should realise that it operates in a global environment where the property rights in money in most countries are secure. In many other countries investors and the public do not have to consider if their savings in the banking system or outstanding invoices are safe on a daily basis .These countries compete for investors with Zimbabwe. If property rights violations in money if this

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<sup>171</sup> A Rapaczynski 'Can constitutions protect private property against governmental predation' in E Colombatto (n 50) 210.

will be key determinant of an investment decision. To stimulate foreign investment Zimbabwe has to secure property rights in money and restore trust in the banking system. Investors are in business to make money and they will avoid a country if their rights in money are not secure.

The suggested provision will have the effect of hindering the state or other parties from arbitrary decisions which enable them to expropriate foreign currency from individuals and businesses through changes in regulations. Subsection 3 of 71 requires that where there is compulsory acquisition even for public interest there must be reasonable notice given of the intention; timely payment of fair and adequate compensation, right to be heard in court to contest the action pertaining to its legality, and/or the amount of compensation .It also states a competent court maybe approached for prompt return of the property if the court does not confirm the acquisition.

## **5.5 The role of the police in enforcing property rights**

Considering that property rights have been violated on a significant scale in Zimbabwe mainly in agriculture and also in mining it is critical for the success of an initiative to strengthen property rights that the police are well trained and well versed on property rights matters .The paradigm shift in property rights needs their thorough understanding considering that in the event of an infringement they are normally the first port of call. If they do not see the significance of property rights or realise the extent to which not protecting them may affect the country or lead to other challenges then they may not value property rights as much and may not respond swiftly and effectively when a property rights violation has been reported. The researcher would recommend more specialised property rights training for the team leaders who will be responsible for property rights protection in each police district. The training should emphasize the need to uphold human rights in the process of protecting property rights. Members of the judiciary should also receive training on property rights matters. Each police district should have a senior officer who is trained and well versed in property rights matters. This officer will head the task teams that are set up whenever there is a report of property rights infringement in the district.

### **5.5.1 Minimum standards for law enforcement officers in the protection of property rights**

The police should have a charter on property rights which prescribes how they should react in the event of property rights violation. This charter should have laid down procedure for dealing



with potentially violent or violent property rights infringements. The charter may contain but not limited to some of the following points:

Entry level training and 3 year refresher courses for all law enforcement officers pertaining to the basics of property rights.

Law enforcers shall be responsive to any reports of property rights infringement. Where use of force is reported pertaining to infringement of property rights a team will be dispatched within an hour of the report or as reasonably possible

Law enforcers shall at all times fulfil the duty imposed on them by the law to safeguard property rights. They shall serve their community with the honour and responsibility expected of their profession.

Law enforcement officers shall not be corrupt in carrying out their duty of safeguarding property rights. They will fulfil this duty without fear, favour or any prejudice.

Investigations shall be prompt and thorough.

In safeguarding property rights they shall do so in a manner that respects and protects human dignity. Human rights shall be upheld in the process.

Firearms will only be used in extreme cases and only when absolutely necessary to protect the victim or the officer.

Clear records pertaining to property rights cases shall be maintained .Information pertaining to the alleged infringement, alleged infringers, nature of threat, detention, arrests, the use of force or firearms shall all be documented.

Organize community outreach programmes on property rights and human rights.

Officers shall be given immunity for disobedience of unlawful orders from superiors.

Coordinate efforts with other government agencies and civil society organisations.

Law enforcement officers who do not respond to reports of property rights infringement shall face disciplinary action.

In protecting property rights officers shall develop lawful and effective strategies.<sup>172</sup>

## **5.6 Infringement of property rights in mining**

Criminalise and have minimum jail term sentences for offences of illegally mining on private property. The necessary procedure should be followed before anyone mines on the property of another. A clear message should be sent that property rights are respected and upheld in Zimbabwe. Informal mining should be supported but regulated in a manner that ensures that that property rights of another are not infringed in the process.

## **5.7 Addressing past infringement of property rights**

The respect of the rule of law is important for Zimbabwe's re engagement initiatives .The US recently it was still concerned with Zimbabwe's property rights regime and would not repeal the ZIDERA just as yet.<sup>173</sup> Zimbabwe has made a commitment to compensate the white farmers that lost their land during land reform and announce in April 2019 they had set aside \$58million which was aimed at assisting these farmers who were in distress and needed immediate assistance.<sup>174</sup> This amount is much less than what Zimbabwe may need for compensation as some estimate it to be a few billions. Zimbabwe currently does not have the sort of money required to compensate all the farmers that were affected by land acquisition. Besides domestic funding Zimbabwe may have to look to external funding to help solve the funding gap.

Zimbabwe should re engage Britain and the IMF pertaining to funding for compensating the white farmers who were evicted from their farms during land reform. This is considering that in Sept 1998 before the launch of the land reform they had held such a funding conference but an agreement was not reached as it was alleged the then government was not comfortable with the transparency in land redistribution required by the donors for funding.<sup>175</sup> Britain had initially pledged to fund the land reform exercise but withdrew on allegations that the land was not being distributed fairly and to the targeted recipients.<sup>176</sup> Zimbabwe still enjoys sustained policy attention from Britain and was the only African country mentioned in the Conservative Party's 2015 election manifesto. Britain supported Zimbabwe's re-engagement efforts and

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<sup>172</sup> 'Human rights standards and practice for the police' United Nations (2004).

<sup>173</sup> Zimbabwe: Reformer Mnangagwa leaves U.S unsure <https://allafrica.com/stories/201907160662.html> (accessed 10 Aug 2019)).

<sup>174</sup> Zimbabwe: Africa's shame and opportunity Cato Institute policy forum live streaming. [https://youtu.be/V\\_7AdktNqEg](https://youtu.be/V_7AdktNqEg) (accessed on 15 April 2019).

<sup>175</sup> Human Rights Watch (n 121) 13.

<sup>176</sup> Zimbabwe NGO Forum (n 14) 3.

spoke on the need for the Government to respect the rule of law and human rights. <sup>177</sup>Good governance had also been a condition the donors made for providing funding for the land acquisition process.<sup>178</sup>

Concessionary loans must only be considered if all other efforts do not yield enough to carry out the compensation of the farmers. Zimbabwe is already debt ridden which would make accruing more debt not the most ideal way of settling the compensation crisis. These concessionary loans must be carefully structured so as to minimise their impact on the country's already unstable finances.

### **5.7.1 Awards to treaty protected foreign investors issued by tribunals**

Considering Zimbabwe's liquidity crisis the researcher would recommend that the government initiates a negotiated settlement with investors in whose favour the awards were issued. For instance the government can negotiate with Borders Timbers /Pezold family to pay less than the amount that was awarded by the ICSID tribunal and agree on terms and time frames for the payment. In cases where the government can give both payment and land as compensation it has the opportunity to propose this in a negotiated settlement. Considering that the company still has some business interests in Zimbabwe the possibility of a successful negotiated settlement is not farfetched and could send a signal of sincerity in protecting property rights. The government can negotiate without any mediation and if this fails they can consider using mediation.

### **5.8 Promoting a culture of property rights through a marketing communications campaign**

Social reengineering may be necessary to effectively change the attitudes of those that may not value property rights. The state must sponsor a strategic marketing communications campaign to raise awareness of property rights issues. They can use various media to carry this out. They may have posters on basics of property rights in public places such as police stations, hospitals, government offices and institutions of learning. The state may also run newspaper, radio and television infomercials with the same aims and objectives. A well run campaign will positively

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<sup>177</sup> K Chitiyo and others 'The domestic and external implications of Zimbabwe's economic reform and re-engagement agenda' (2016) *Chatham house* at 40.

<sup>178</sup> K Chitiyo and others (n177)13.

impact attitudes and awareness towards property rights. Stakeholder buy in is necessary for property rights to be effectively protected hence the public outreach.

### **5.9 International Financial Institutions (IFI's) and FDI**

IFI's should be a strategic focus of Zimbabwe's re-engagement initiatives .IFI's have the advantage that they bring wider acceptance faster since they have dealings with a wide network of countries .If Zimbabwe gains approval and acceptance from IFI's it will give it better access to foreign direct investment . IFI's such as the World Bank Group and African Development Bank can play a significant role in attracting private sector investment into developing countries. Their reputation and good credit rating gives potential investors comfort in dealing with a developing country through an IFI. If Zimbabwe amends its property rights regime it will make private investor pull through IFI's into Zimbabwe more effective. The World Bank through the Multi-Lateral Investment Guarantee Agency (MIGA) may insure investors against political risk. This will stimulate investments from those that might have an appetite for Zimbabwe investments but are still sceptical about its reforms. Other financial institutions such as European Investment Bank and IFC may invest in Zimbabwe's private sector if property rights are adequately secured .IFI's engagement Zimbabwe may improve the country's credit rating thus making borrowing for investments into Zimbabwe cheaper for the investors.<sup>179</sup> Economic reforms and reforms in the country's property rights regime will enable re-engagement.

### **5.10 Conclusion**

As presented by the recommendations given in this chapter a multi-faceted approach should be used in dealing with strengthening and recognition of property rights in Zimbabwe .There is no silver bullet to solving the porousness of property rights in Zimbabwe. The approach needed will take more than amendments to legislation but will also require changing people's views and attitude towards property rights.

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<sup>179</sup> Chitiyo and others (n 177) 23.

## CHAPTER SIX

### CONCLUSION: PREREQUISITES TO SUPPORT AN EFFECTIVE LEGAL FRAMEWORK

#### 6.1 General overview

The study explores and establishes a link between security of property rights and FDI in Zimbabwe. The research provides evidence that the inadequate security of property rights in Zimbabwe has been an impediment to stimulating foreign direct investment. Foreign direct investment into Zimbabwe has been depressed for the last twenty years since the country embarked on a land reform exercise which saw expropriation of property without compensation. Though the expropriation of farms has significantly reduced, the law that enabled the violation is still in existence and the country has not addressed past expropriations without compensation cases. This poses a challenge in stimulating investment. To break this curse the research advocates amendments to legislation pertaining to property rights in land and property rights in money. The research advocates for a legal framework which guarantees that any expropriations will meet the lawfulness that has become standard in most international investment agreements by satisfying the requirements of public purpose, compensation, due process and non-discrimination.<sup>180</sup> Compensation guarantees in legislation and BIT's serve a signalling function to say that a country's stance towards expropriation has been overhauled and that where property rights are infringed the investor shall be compensated.<sup>181</sup> A multi-faceted approach which entails amendments to the law, minimum standards for law enforcement officers in the protection of property rights, addressing past infringements, IFI engagement and raising general public awareness of property rights is proffered as a way of bringing a paradigm shift towards property rights in Zimbabwe.

#### 6.2 The role of politics

As evidenced politics played a pivotal role in enabling the violation of property rights. The ruling party parliamentarians voted in legislation that provided for expropriation without compensation and curtailed the courts' jurisdiction in property rights for agricultural land. The influence of politics in Zimbabwe's institutions and economy is far reaching .The issues

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<sup>180</sup> 'Expropriation' UNCTAD series on issues in international invest agreements (2012) at 27.

<sup>181</sup> Sornarajah (n 66) 99.

explored in the research showcase how issues of governance were influenced more by ruling party policy than by legislation and the will of the people. For instance when the people voted against constitutional amendments in the year 2000 the ruling party led parliament still made key amendments that had been voted against in the referendum. The role of politics going forward is still just as important in effectively securing property rights and stimulating FDI. Politics plays a critical role in the business environment more so in developing countries. This is because politicians may implement policies that suit their immediate agenda even though it may go against the essence of the Constitution or long term welfare of the society. The study showed that politicians can influence the role of state institutions in handling property rights matters and they can also influence the attitude of their supporters towards respecting property rights. Discrimination should not be promoted either verbally by politicians or through legislation. If Zimbabwe wants to gain traction from its “Zimbabwe is open for business mantra” it is imperative that it creates a non-discriminatory property rights regime. Non-discrimination is an important element in attracting investment<sup>182</sup>. Amended property rights legislation without the political will may still result in inadequately protected investments. Observance of the rule of law is largely determined by political will. The competing political interests and long term welfare of the economy make it desirable that the protection of property rights is enshrined in the constitution of even a democratic government.<sup>183</sup> A compensation clause in the Zimbabwean constitution will create a stumbling block if government ever considers to expropriate without compensation.<sup>184</sup> This also gives investors the comfort they need and assures them that if ever their property rights were infringed compensation would be a legal requirement that the government would need to fulfil. The judiciary should not get sucked into political agendas. There is need for all state institutions to send a clear message to all that property rights in Zimbabwe are respected and protected therefore whoever infringes the property rights of another will meet the full brunt of the law. Corruption and the rule of law also have a significant influence on the country’s attractiveness as an investment destination.<sup>185</sup> The most beautifully written and well thought out constitutions do not guarantee the security of property. This is evidenced by how property may not be as secure in countries that have property rights enshrined in their constitutions as they are in Britain which does not have a

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<sup>182</sup> OECD 2002 at 25.

<sup>183</sup> A Rapaczynski ‘Can constitutions protect private property against governmental predation’ in E Colombatto (n50) 205.

<sup>184</sup> A Rapaczynski ‘Can constitutions protect private property against governmental predation’ in E Colombatto (n50) 213.

<sup>185</sup> Keefer-Knack (n 45) 590.

written constitution.<sup>186</sup> A Constitution and legislation that protects property rights is however a good starting point. Though they provide no guarantee they are a safeguard that may be turned to in instances of Government overreach or unfair infringement of property rights.<sup>187</sup>

### **6.3 Alignment of land policy with economic policy**

An exploration of the issues suggests that land reform is in itself a policy which can promote equality through addressing the uneven land distribution from the colonial past. It has the potential to increase food production if it is implemented according to a plan which encompasses a good legal framework. Land reform has the potential to reduce poverty through increasing access of land to the poor.<sup>188</sup> As established in carrying out land reform in a least disruptive manner the government still has to uphold the rule of law, honour its contracts, respect human rights and property rights. To attract FDI the government of Zimbabwe has to find a way to align its land reform policy with its economic policy through a legal framework that enables distribution of land in a manner which respects property rights and upholds human rights. The paper shows that though land reform may be a solution to poverty alleviation it may also lead to numerous challenges if not done through a process which upholds and respects the rights of current property right holders. To compromise human rights in the process of land reform may have dire consequences for an economy. It is the state's role to bring certainty by having a clearly defined property rights regime which is non-discriminatory and provides remedies for infringement. The multiplicity of needs in a state require rules for orderly human conduct if the state is to function in a manner that achieves growth and stability.<sup>189</sup> Even as most of the agricultural land in Zimbabwe is now state land it is still imperative for the state to have a clearly defined property rights regime governing the property rights in that state land. Going forward other forms of property rights such as leasehold and rights to use will be of great significance in bringing certainty to property rights in agriculture. It is important that in framing the property rights in this state land that legislators ensure that the following factors are established: clarity in time frame of rights and content of the right; who the right holders are and independent control of the right; guarantees of enforcement against infringement.<sup>190</sup> This

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<sup>186</sup> A Rapaczynski 'Can constitutions protect private property against governmental predation' in E Colombatto (n 50) 210

<sup>187</sup> A Rapaczynski 'Can constitutions protect private property against governmental predation' in E Colombatto (n 50) 210

<sup>188</sup> M Lipton *Land reform in developing countries* (2009) 1.

<sup>189</sup> H Hoppe 'The ethics and economics of private property' in E Colombatto (ed) *The Elgar companion to the economics of property rights* (2004) 48.

<sup>190</sup> FAO (n 33) 26.

will encourage right holders to: invest in agriculture; productively and profitably sublet and enable them to use the land as collateral when borrowing from the bank. Such clear definition of rights will enable Zimbabwe to stimulate much needed domestic and foreign investment into agriculture.

#### **6.4 Lessons learnt**

Land reform may be a necessary but delicate process which should be done in a manner that upholds human rights and respects property rights. To justify violating a right based on history is not the most progressive way of achieving land redistribution. Secure property rights are an incentive to potential investors. An infringement of property rights may affect both domestic and international relations and ultimately affect enterprise. The awards against Zimbabwe in the cases that have been brought before ICSID show that compensating investors that are protected by treaties thus by international law may prove less costly than not compensating and letting the matters escalate. The study gives insight into how Zimbabwe can pursue the land reform policy in a manner that does not deviate from its policy of promoting economic growth through attracting FDI into the country.

Rebuilding trust is necessary for Zimbabwe's re-engagement and reform agenda to attract higher levels of investment in the country. Policies and legislation have to inspire confidence in international investors, IFI's and domestic investors.<sup>191</sup> Consistency of policy and legislation is essential in building trust and investor confidence. Legislation must be framed in a manner which adequately protects property rights but still upholds the government's right to regulate.<sup>192</sup> This is important so that government's legitimate public interest initiatives are not hampered by a property rights regime that is stringent to the extent of hindering community development. Justice Holmes put it well in *Coal v Mahon* (US 1922) when he stated, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change".<sup>193</sup>

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<sup>191</sup> Chitiyo and others (n173) 3.

<sup>192</sup> A Rapaczynski 'Can constitutions protect private property against governmental predation' in E Colombatto (n 50) 211.

<sup>193</sup> Anderson-Huggins (n 30) (2003) xiii.



## 6.5 Future research

An interesting future study would be how the country can effectively define property rights in the mining sector, providing a framework that enables an investor to realise profit without the country giving away ownership of the finite resource. This framework will be geared at creating an environment both parties effectively benefit, that is, the country does not feel exploited and the investor makes a profit without the threat of expropriation.

## 6.6 Moving forward

The land audit and compensation of the local white farmers that were affected by the fast track land reform are positive signs that send signals that Zimbabwe may be moving to a scenario where property rights are respected and are certain. The research however indicates that reassurances in gesture and promises are proving insufficient to stimulate FDI and a legal framework fortifying the position is necessary. As economies with weak property rights grow expropriation becomes appealing. Thus it is easy to assume that expropriation without compensation will not happen again but one may argue that such assumptions may not hold true in a booming economy with weak property rights. Protection of property rights is important for a country's economic development. As such it is important that where property rights are weak their strengthening happens simultaneously with economic reform.<sup>194</sup> Adequate protection for an investment is an important issue from the onset of an investment decision.

The study has shown that efficiency in markets requires that investors have secure long term control over the resources they deploy, that is secure property rights. Protection of property rights is thus fundamental to economic success.<sup>195</sup> The state of Zimbabwe should provide both an enabling infrastructure of market arrangements and a suitable legal framework which protects the infrastructure including private investment within the infrastructure. The law, the economy and politics are inter-connected. A change in one will affect the other. Enterprise and economies are built using assets, the protection of those assets is thus key to vibrant economies. Zimbabwe should embed respect for property rights in its culture through a well-defined property rights regime. Strengthening the property rights regime in Zimbabwe may not be the silver bullet to solve all of the country's challenges but it certainly will have a significant positive impact on the country's economic and political trajectory. The Constitution of

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<sup>194</sup> Dabla-Norris & Freeman (n 111).

<sup>195</sup> A Rapaczynski 'Can constitutions protect private property against governmental predation' in Colombatto (n 50) 205.

Zimbabwe should facilitate the creation of an enabling environment to realise a just, united and prosperous nation. The people of Zimbabwe should commit to building this prosperous nation on values of upholding fundamental human rights, rule of law, equality, and fairness, dignity of work, freedoms, democracy and accountable governance as espoused in the Constitution of the nation of Zimbabwe.

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