

*Final Papers of the 2017 National
Symposium on the Promise of the Declaration
of Rights under the Constitution of Zimbabwe*

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Final Papers of the 2017 National Symposium on the Promise of the Declaration of Rights under the Constitution of Zimbabwe

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Preface

The papers contained herein are the final papers from the 2017 National Symposium on the Promise of the Declaration of Rights under the Constitution of Zimbabwe, held at Cresta Lodge, Harare, Zimbabwe, on 8 and 9 November 2017, under the Zimbabwe Human Rights Capacity Development Programme (hereinafter ‘Zimbabwe Programme’). As to their substantive content, they analyse and expand upon the following topics: inclusive education and the rights of persons with disabilities; corporal punishment; litigating elections petitions; intellectual property rights and traditional knowledge; and foreign investment and the constitutional protection of property rights.

The overall objective of the Zimbabwe Programme is: *to contribute to enhanced enjoyment of constitutional rights in Zimbabwe, through legislation, policies, practices and decision-making being increasingly informed by international human rights standards and principles*. Its main implementing partners at the time of writing are: Raoul Wallenberg Institute of Human Rights and Humanitarian Law (hereinafter ‘RWI’) at Lund University, Sweden; Centre for Applied Legal Research (hereinafter ‘CALR’) in Harare, Zimbabwe; College of Business, Peace, Leadership and Governance at Africa University in Mutare, Zimbabwe; Faculty of Law at Midlands State University in Gweru, Zimbabwe; Herbert Chitepo School of Law at Great Zimbabwe University in Masvingo, Zimbabwe; Faculty of Law at University of Zimbabwe in Harare, Zimbabwe; Faculty of Law at Ezekiel Guti University in Bindura, Zimbabwe; and Zimbabwe Human Rights Commission. The Zimbabwe Programme is supported by Swedish development cooperation.

The national symposium is an annual event under the Zimbabwe Programme. It is co-organised by RWI together with the academic partner institutions and CALR, and is a forum where research funded and conducted during the year is packaged and presented before an audience representing diverse sectors of Zimbabwean society, thereby allowing the presenters and participants to in plenary engage in vibrant discussions around the topics at hand and together deliberate on the way forward with regard to critical human rights reform issues. The feedback and experiences shared during the national symposium also aid and feed into the preparation of final papers for publication and dissemination. In addition to the just said, the papers contained herein have undergone a peer review process with the reviewer’s feedback taken into account so as to improve their overall quality.

With that said, RWI would like to conclude by thanking the researchers for their hard work and determination, which resulted in these final papers that make up this collection. RWI would also like to thank Swedish development cooperation for supporting the research, and thereby ensuring it saw the light of day. Finally, it is RWI’s sincere wish that you, the reader, find these papers thought-provoking and informative as well as an eventual source of inspiration and guidance in your own potential efforts towards furthering the provisions contained in the 2013 Constitution of Zimbabwe and its comprehensive Declaration of Rights.

About the Raoul Wallenberg Institute:

The Raoul Wallenberg Institute, based in Lund, Sweden, is a research and academic institution with offices, programmes and convening power covering 40 countries. RWI combines evidence-based human rights research with direct engagement in close collaboration with its partners to bring about human rights change for all. The Institute is named after Raoul Wallenberg, the Swedish diplomat who saved tens of thousands of Jews and other people at risk in Hungary at the end of World War II.

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Inclusive Education, Rights of Persons with Disabilities and Policy: Mainstreaming PWDs at Africa University in Zimbabwe

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1 Background

Rising global inequalities and marginalisation are proving difficult to solve using a single lens of analysis. And education as a possible panacea for dealing with these inequalities has not been accessed by all people in society. Such a skewed distribution, access and availability of education have caused marginalisation of certain segments of society based on gender, sexuality, race, disability and class. Thus, a call for rethinking inclusive education with the view of transforming the educational systems, processes, institutions and infrastructure that promote the rights of people with disabilities is paramount in the 21st century. However, the political economy of inclusive education and policies around which to achieve the rights of persons with disabilities (PWDs) are rather elusive and uncoordinated given the complexity and contested nature of the factors that surround the realisation and implementation of inclusive education in Zimbabwe. Historically, all education systems were established under the elitist models of development which discriminated against the minority based on power, sex, gender, disability, language, sexuality, race, class and geography among other factors. Zimbabwe's education system followed the same model under the colonial rule, and the post-colonial education system took a similar fashion despite significant changes and affirmative action the government adopted to bring on board those who were historically and systematically marginalised.

In view of this, the education system that Zimbabwe inherited had its fault lines and has limited inclusivity and the pedagogy that was not inclusive to those viewed as the 'other' in society such as PWDs. The infrastructure, teaching materials and educational facilities and many other amenities for special needs education remain inaccessible in many universities in Zimbabwe. In addition, the recognition of PWDs in the United Nations Convention on the Rights of Persons with Disabilities (CRPD) in 2006 has not scored much in Zimbabwe due to a myriad of challenges including governance, as well as socio-economic difficulties facing the country for the past decade. Relevant to these is the spatial progress realised in the Millennium Development Goals (MDGs), especially the universal access to primary education, where greater emphasis was placed on access and less on equity and inclusivity. The Sustainable Development Goals of the United Nations Development Programme (UNDP, 2015) through SDG Goal #4 now emphasise inclusive and equitable quality education and

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the promotion of lifelong learning opportunities for all.¹ However, since 2000, despite remarkable progress on the goal in reaching 91 per cent in primary school enrolment rate in developing regions, access to quality higher education remains a challenge especially to students with disabilities. Given this background, many tertiary institutions in Zimbabwe remain unfriendly to PWDs and there are limited facilities and human resources to expedite the provision of inclusive education. Therefore, this study seeks to explore the prospects, challenges and opportunities of inclusive education in institutions of higher learning with the aim of mainstreaming PWDs in the learning process and education outcomes and advance the rights of PWDs. This study is expected to establish and propose policy options to accelerate inclusive education in institutions of higher education in Zimbabwe through curriculum development and affirmative action.

2 Problem Statement

The historical trajectory of disability legislation in Zimbabwe can be traced back to 1992 when the Disabled Persons Act (DPA) (Chapter 17:01) was decreed becoming one of the pioneer countries to give recognition to the plight of disabled persons. Persons with disabilities are protected under a number of legislative laws including the United Nations Convention on the Rights of Persons with Disabilities, which Zimbabwe ratified on 23 September 2013 and which takes a human rights and people-centred based approach to the conceptualisation of disability as part of “human diversity and humanity; equality of opportunity; accessibility; equality between men and women”,² and the Constitution of Zimbabwe section 83 (a–f), with sub-section (e) emphasizing provision of facilities for education and sub-section (f) focusing on the provision of state-funded education and training where needed.³ Thus, having embraced and internalized the international human rights practices and expectations in the Zimbabwe Constitution, all institutions are expected to mainstream PWDs in the educational system through policy formulation and institutional reforms. However, despite having this plethora of legislative laws, institutions of higher learning in Zimbabwe seem to be lagging behind in embracing the concept of disability and PWDs from a human-rights based approach which calls for inclusive policy planning and mainstreaming PWDs in all their curricula activities as an expression of responding to and embracing inclusive education. Several scholars have concluded that inclusive education remains at the ‘pilot project’ stage across much of sub-Saharan Africa (SSA).⁴ Of the 30 million young people who are out-of-school in SSA, it is estimated that one third are children with disabilities (CWDs).⁵ The literature indicates historical, cultural, material and other factors which pose barriers to the participation of CWDs and the realisation of inclusive education.

Africa University had small numbers of PWDs accessing higher education due to problems that span from colonial, historical and human attitudes as well as institutional weaknesses. This high level of apathy has resulted in seemingly high levels of unpreparedness to include disabled persons within many institutions of higher learning, as well as limited social infrastructure reforms which is evidenced by

¹ UN, *Transforming Our World: The 2030 Agenda for Sustainable Development*, A/RES/70/1 (2015). Sustainabledevelopment.un.org

² Article 3 of the CRPD on general principles.

³ Constitution of Zimbabwe Amendment (No. 20) Act, 2013.

⁴ C. J. Eleweke and M. Rodda, ‘The Challenge of Enhancing Inclusive Education in Developing Countries’, 6:2 *International Journal of Inclusive Education* (2002) pp. 113–126; L. Mariga, R. McConkey and H. Myezwa, *Inclusive Education in Low-Income Countries: A Resource Book for Teacher Educators, Parent Trainers and Community Development Workers* (Rondebosch, South Africa, 2014); M. Srivastava, A. de Boer and S. J. Pijl, ‘Inclusive Education in Developing Countries: A Closer Look at Its Implementation in The Last 10 Years’, 67:2 *Educational Review* (2015) pp. 179–195.

⁵ Mariga *et al.*, *ibid.*

the nature of facilities, systems, physical and functional structures. Consequently, institutions of higher learning often panic and poorly handle such students or staff members living with various disabilities when they become part of the institution's community. Institutions of higher learning are replete with practices that reinforce exclusion, one of the most common being the widely accepted but largely smoke-and-mirrors practice of psychological testing of students to determine eligibility for special needs funding and services which are non-existent most of the time.

3 Goal

The study at hand seeks to assess the processes, structures and policies of higher education institutions in Zimbabwe. The study will carry out an overall assessment of the accessibility of infrastructure by PWDs, the availability of human resources to handle PWDs, curriculum, amenities, policies and pedagogy at an institution of higher learning in Zimbabwe. This will be done to measure the levels of preparedness, ability and milestones in mainstreaming PWDs in higher education institutions. The study also seeks to examine the human rights implications of mainstreaming PWDs in higher education as a social justice responsive to the attainment of SDG Goal #4.

4 Research Objectives

The study was guided by the following objectives which were to:

1. Analyse the legal frameworks that provide for disability rights and inclusive education in Zimbabwe.
2. Assess the policies, structures, attitudes, environment and processes available to mainstream PWDs at selected institutions of higher learning in Zimbabwe
3. Suggest strategies that can be adopted to promote inclusivity of persons with disabilities in institutions of higher learning and promote equality and equity in Zimbabwe

5 Research Questions

The study was guided by the following questions:

1. In what ways does the disability legal framework provide for inclusive education in Zimbabwe?
2. What policies, structures, processes and institutions are available at Africa University which are inclusive of persons with disabilities?
3. What strategies can be adopted to promote inclusivity of persons with disabilities in institutions of higher learning in Zimbabwe?

6 Significance of Study

This study is worth conducting because:

- It will be a basis for education policy development vis-à-vis disability policy development at institutions of higher learning.
- It also informs curriculum review and possible teaching methodologies as a step towards alignment with human rights best practices.
- It advocates for human resources that are disability friendly (sensitive).

- It facilitates the achievement of equality and justice as called for by the Sustainable Development Goals.
- The protection and promotion of fundamental human rights needs to be reflected in the approach taken with persons with disabilities.
- It shall further influence inclusive education at all levels of formal education in Zimbabwe.

7 Assumptions of the study

The study is premised on the assumptions that:

- At every recruitment process, institutions of higher learning receive applications from PWDs.
- Institutions of higher learning have not been adequately prepared to receive PWDs as both students and staff.

8 Conceptual Framework

This study will dwell on the United Nations Convention on the Rights of Persons with Disabilities of 2006 and the various legal frameworks available in the Zimbabwe Constitution that seek to promote the rights of PWDs. Inclusive education falls under the human rights framework inasmuch as it also reflects good governance. A human rights based approach will be adopted as a theoretical framework in this study as well as participation as it is reflected in good governance indicators. The study will also draw scholarly debates on inclusive education in higher education from global and regional experiences, and compare them to the Zimbabwean context.

9 Conceptualising Inclusive Education

Inclusive education is a contested multidimensional concept which can be seen as a process of strengthening the capacity of an education system to reach out to all learners. As a contested concept it is shrouded with the underlying practices and meanings varying from region to region. As highlighted by Deppeler, Loreman and Smith, “educational jurisdictions around the world have adopted the vocabulary of inclusive education and invested significant resources ... into making schools more inclusive ... however, exclusion remains a real and present danger.”⁶ UNESCO contends that it is “an overall principle that should guide all educational policies and practices, starting from the belief that education is a fundamental human right and the foundation for a more just society”.⁷ While this is a comprehensive definition, other views from global institutions such as the UNCRPD take inclusive education as a rights-based approach to education which appreciates diversity among learners and their unique educational needs. Inclusive education centres its efforts on learners who are vulnerable and prone to exclusion and marginalisation.

⁶ J. Deppeler, T. Loreman and R. Smith, ‘Teaching and Learning for All’, in J. Deppeler, T. Loreman, R. Smith and L. Florian (eds.), *Inclusive Pedagogy Across the Curriculum. International Perspectives on Inclusive Education* (Emerald Group Publishing, London) vol. 7, pp. 1–10.

⁷ *Assessing Inclusive Education in Practice in Namibia, Challenges and opportunities in leaving no child behind*, p. ii, <https://www.moe.gov.na/files/downloads/99e_InclusiveEducationImplementationReport.pdf>.

10 Inclusive Education: Global Legal Framework

International law recognises the rights of PWDs through the CRPD which is a global treaty that addresses disability. It recognised formally the globalisation of disability rights under the human rights movement in 2006.⁸ Historical evidence shows that disability was once approached from a social welfare and epidemiological perspective where it carried images of sick and needy persons and not impairment. Therefore, the CRPD's thrust is that of a human rights based approach where issues of social and economic justice are at the centre of disability rights, with inclusive education anchoring social justice and equity. PWDs are therefore entitled to their fundamental rights, and in the context of inclusive education issues of access, affordability and distribution of services in higher education are invaluable tools that will make Zimbabwe and other African states live to the billings of international disability rights. The CRPD has enshrined provisions that call for equality, and Article 1 clearly states that the purpose of the Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.⁹ In addition, the CRPD through Article 24 requires state parties to recognise the right to education for disabled children, and imposes the obligation to make reasonable accommodations¹⁰. Therefore, state parties have the obligation to hold universities to account for discrimination against PWDs in higher education.

Another right enshrined in the CRPD is the right to accommodation which is a very important aspect of securing inclusive education. The CRPD requires 1) an immediate non-discrimination guarantee, and 2) imposes an obligation of progressive realisation with respect to providing collective accommodations so as to incrementally transform classrooms into inclusive learning environments. With respect to disability-based discrimination in education, the failure to make a reasonable and effective accommodation is an act of discrimination. In view of the above, it is important to draw from the General Comment No. 4 on Article 24 that the CRPD places emphasis on the role of governments in terms of providing inclusive education, across all levels of the education system, for all learners.¹¹ This entails a comprehensive analysis of disability issues, and it offers a human rights dimension, replacing the medical model with the social model of disability.¹² General Comment No. 4 on Article 24 has promoted the right to inclusive education for children with disabilities, stating that they should be able to be included in the general education system. Therefore, there are good grounds for progressive state parties, institutions and all stakeholders to respect and implement initiatives that will further entrench values of disability rights in line with the CRPD.

11 African Protocol on Persons with Disabilities and Inclusive Education

The African Protocol on Persons with Disabilities recognises disability rights¹³. For example, Article 16 recognises the right to education. Article 16 states that:

⁸ The CRPD was adopted on 13 December 2006 at the United Nations Headquarters in New York, and was opened for signature on 30 March 2007.

⁹ Under Article 1 of the CRPD, other forms of disability include mental, intellectual and sensory impairments.

¹⁰ Article 24 of the CRPD contains the first legal enshrinement of the right to inclusive education for people with disabilities.

¹¹ G. de Beco, 'The Right to Inclusive Education According to Article 24 of the UN Convention on the Rights of Persons with Disabilities: Background, Requirements and (Remaining) Questions', 32 *Netherlands Quarterly of Human Rights* (2014) pp. 263–287.

¹² R. Kayess, and P. French, 'Out of the Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities', 8:1 *Human Rights Law Review* (2008) pp. 1-34.

¹³ African Protocol on the Rights of Persons with Disabilities.

1. Every person with a disability has the right to education.
2. States Parties shall ensure to persons with disabilities the right to education on an equal basis with others.
3. States Parties shall take, reasonable, appropriate and effective measures to ensure that inclusive quality education and skills training for persons with disabilities is realized fully, including by:
 - a) Ensuring that persons with disabilities can access free, quality and compulsory basic and secondary education;
 - b) Ensuring that persons with disabilities are able to access general tertiary education, vocational training, adult education and lifelong learning without discrimination and on an equal basis with others, including by ensuring the literacy of persons with disabilities above compulsory school age;
 - c) Ensuring reasonable accommodation of the individual's requirements is provided, and that persons with disabilities receive the support required to facilitate their effective education;
 - d) Providing reasonable, progressive and effective individualized support measures in environments that maximise academic and social development, consistent with the goal of full inclusion;
 - e) Ensuring appropriate schooling choices are available to persons with disabilities who may prefer to learn in particular environments;
 - f) Ensuring that persons with disabilities learn life and social development skills to facilitate their full and equal participation in education and as members of the community;
 - g) Ensuring that multi-disciplinary assessments are undertaken to determine appropriate reasonable accommodation and support measures for learners with disabilities, early intervention, regular assessments and certification for learners are undertaken regardless of their disabilities;
 - h) Ensuring educational institutions are equipped with the teaching aids, materials and equipment to support the education of students with disabilities and their specific needs;
 - i) Training education professionals, including persons with disabilities, on how to educate and interact with children with specific learning needs; and
 - j) Facilitating respect, recognition, promotion, preservation and development of sign languages.

In the spirit of the Article 16, there are good grounds for any progressive learning environment to craft policies that provide for an all-inclusive society and observe the rights of PWDs.

The African Protocol for PWDs further recognizes the right to education of PWDs through Article 15 that observes the issues of accessibility such as:

1. Every person with a disability has the right to barrier free access to the physical environment, transportation, information, including communications technologies and systems, and other facilities and services open or provided to the public. 2. States Parties shall take reasonable and progressive step measures to facilitate full enjoyment by persons with disabilities of this right, and such measures shall, among others, apply to:
 - a) Rural and urban settings and shall take account of population diversities;
 - b) Buildings, roads, transportation and other indoor and outdoor facilities, including schools, housing, medical facilities and workplaces;
 - c) Information, communications, sign languages and tactile interpretation services, braille, audio and other services, including electronic services and emergency services.

Therefore, there are good grounds for institutions of higher learning to mainstream PWDs inasmuch as they are not bound by the law to implement disability rights. In any event, if these institutions are found to discriminate PWDs, there can be litigation initiated by the person being discriminated using the available national laws.

12 Marrakesh Treaty and Inclusive Education

The Marrakesh Treaty is an international treaty adopted in 2013 by member states of the World Intellectual Property Organization (WIPO), a specialised agency of the United Nations¹⁴. The full title is The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled. It is the first copyright treaty with human rights principles at its core, with specific references to the Universal Declaration of Human Rights and the UN Convention on the Rights of Persons with Disabilities. The impetus of the Marrakesh Treaty is on its landmark provisions such as that it created an international legal framework that allows the making and distribution of accessible format copies for people with print disabilities, and the sharing of accessible books across national borders. Under the Marrakesh Treaty, people with print disabilities include those who are blind, those who have a visual impairment or a perceptual or reading disability and those who are unable to focus the eyes or to hold or manipulate a book. Thus, this Treaty is a giant step towards improving the right of PWDs in learning environments to have access to print literature by removing stringent copyright measures for PWDs. All libraries in the world have their obligations to provide for PWDs and ensure that the university is an all-inclusive learning environment for PWDs.

13 Research Methodology

The study adopted a qualitative research method which assisted us to explore Africa University's preparedness, responsiveness and policies to PWDs and aggregate data on populations of PWDs in the University over a five-year period (2011 to 2016), level of inclusivity in the curriculum and described experiences, perceptions, prospects and challenges faced in the promotion of inclusive education.

14 Population

The population of the study was Africa University with an average student body of 2100 students for both conventional and continuing education. The population of this study was drawn from key position holders in the University. This study conducted key informant interviews mainly with the deans of three colleges namely the College of Business, Peace, Leadership and Governance, College of Social Sciences, Theology, Humanities and Education and the College of Health, Agriculture and Natural Sciences. In addition, the Director of Continuing Education Office, the library staff, warden, the Student Representative Council, the Student Affairs Department, the lecturers (mainly HODs) and the Office of the Deputy Vice Chancellor as well as the Registrar's offices were consulted during this study.

15 Scope of the Study

The study focused on:

- Four forms of disabilities which are visual impairments, hearing impairment, speech dysfunctions and physical disabilities
- Infrastructure which is limited to systems and structures

¹⁴ The Marrakesh Treaty is an international treaty adopted in 2013 by member states of the World Intellectual Property Organization (WIPO), a specialised agency of the United Nations

- A private institution of higher learning
- Curriculum
- Pedagogy
- Human resources
- Culture of inclusivity
- Policy and governance
- Population of PWDs

16 Sample Size and Sampling Methods

A sample for this study comprised students, academic and support staff of the selected institution of higher learning. The targeted sample size was composed of four (enrolled or former) male and female students living with either visual impairments, hearing impairment, speech dysfunctions or any other physical disabilities from the institution. Sixteen key informants shall also be identified from among the transport departments, Student Representative Council, human resources offices, dean of students' offices, resource centres/libraries, sports departments, hostel wardens, registry departments and the ICT/web management departments. Both students and key informants were selected using purposive sampling.

17 Data Collection Methods

Data for this study was collected using semi-structured questionnaires and key informant interviews and observations. Students participated through questionnaires while key informant interviews were conducted with key informants from deans of colleges, librarian, ICT department, student body, Office of the Deputy Vice Chancellor and other relevant officers. Observations were made around the halls of residence, dining halls/canteens, bathrooms/restrooms, classrooms, library facilities/resource centres, playgrounds and the common rooms. While observing, attention was given to available special facilities that are needed by PWDs.

18 Data analysis

Thematic data analysis was used to group responses and analyse data using a narrative approach. This allowed us to interpret how Africa University upholds the rights of PWDs, describe the perceptions of the University towards inclusive education and analyse the processes and initiative underway to improve inclusive education.

19 Ethical considerations

The nature of this study required strong observance of ethical issues. Since there was engagement of persons with disabilities, the wording of the questionnaires and interview questions were very disability friendly and sensitive. Again, other critical issues such as consent, confidentiality, voluntary participation and withdrawal were observed.

20 Findings

20.1 Introduction

This study administered key informant interviews which constituted the bulk of the data which we analysed. The Office of the Deputy Vice Chancellor, the Dean of Students, the registrar and lecturers among others were part of the sample which contributed to data sources.

20.2 Provisions of the Zimbabwe Disabled Persons Act and the 2013 Constitution

The Zimbabwe Disabled Persons Act (Chapter 17:01) was promulgated in 1992, making the Zimbabwe one of the first states to adopt a disability related legislation.¹⁵ Having taken this step, it would have been assumed that Zimbabwe would ratify the Convention on the Rights of Persons with Disabilities when it came into force in 2007. The Convention places obligation on states to ensure that persons with disabilities realize their rights and fundamental freedoms without any form of discrimination. However, it took Zimbabwe more than five years to ratify the convention in September 2013.

This international instrument was domesticated through the Constitution of 2013, which recognises the rights of persons with both physical and mental disabilities. Section 22(2) of the Zimbabwe Constitution clearly indicate the state's obligation to, "*within the limits of the resources ... assist persons with physical or mental disabilities to achieve their full potential and to minimize the disadvantages faced by them*". The Constitution further prescribes in section 3 that all institutions and government agencies 'must':

- a) Develop programmes for the welfare of persons with physical or mental disabilities, especially work programmes consistent with their capabilities and acceptable to them or their legal representatives.
- b) Consider the specific requirements of persons with all forms of disability as one of the priorities in development plans
- c) Encourage the use and development of forms of communication suitable for persons with physical or mental disability

However, critical analysis of this constitutional commitment has revealed the implications of a claw back clause in section 22(2) which continues to dilute and undermine the rights of PWDs. Despite this, the Constitution remains a confirmation of how much the state is committed to promote and protect the rights of PWDs. Section 83 shows further dedication towards alleviation of the predicament faced by PWDs in Zimbabwe. This has demonstrated how much Zimbabwe has embraced the human rights based approach in a bid to internalise the framework into its legislation. Whilst this section is dedicated to ensure that the rights of PWDs are observed and respected, there seems to be no guarantee that the state shall fulfil the obligation since full realisation of the rights remains subject to availability of resources. In that regard, Mandipa submits that section 83 should have stated that the state has a duty to progressively realize the rights of PWDs.¹⁶

These shortcomings have failed to cover up for the gaps observed in the Disabled Persons Act which has also been criticised for inadequately addressing the human rights of PWDs. The major drawback

¹⁵ P. Manatsa, 'Are Disability Laws in Zimbabwe Compatible with the Provisions of the United Nations Convention on the Rights of Persons with Disabilities (CRPD)?', *International Journal of Humanities and Social Science Invention* (2015) pp. 25–34.

¹⁶ See E. Mandipa, 'New Constitution Disability Friendly', *Chronicle*, 30 January 2014, available at <<http://www.chronicle.co.zw/new-constitution-disability-friendly>>

of this Act is that it follows an outdated medical model of disability which locates disability within the person and views PWDs not as rights holders but as objects for clinical intervention.¹⁷ This has contributed to PWDs losing confidence in themselves as influential agents of positive change.

Having realised the implication of this shortfall, government ministries have made efforts to embrace human rights concepts so as to improve inclusiveness of PWDs in all programming. This has also seen the Ministry of Higher and Tertiary Education urging disability friendly pedagogy and infrastructure as a means towards achieving its goal to ensure that education is received by all who have the capacity despite physical makeup.

20.3 Disability-Friendly Policies and Infrastructure

Having been established 25 years ago, Africa University has no disability policy that is specifically designed to ensure inclusivity of both students and staff with disabilities. This is a gap that has been overlooked and thus continues to cause panic when a PWD shows up after being admitted on campus. An informal chat with one of the student alumnus with physical disability revealed the seemingly panic and discomfort expressed by both staff and students upon realising that the student was physically disabled.

This supposed confusion stands as a clear sign of unpreparedness to receive and render services to PWDs in general. To confirm this assumption, the study went further to assess the nature of buildings on campus to verify whether they were designed with PWDs in mind. Twelve buildings that are critical to students and staff were assessed to see how accessible they are to PWDs. All college buildings, the library, ICT building, one hall of residence (because the set-up of all hostels is the same), the student union building, chapel, dining hall and the administrative building were assessed.

20.4 Public Buildings Accessibility

Of the 12 buildings, none of them has a clearly designated parking space for disabled badge holders. All buildings have a designated parking space, including a space specifically set aside for students to park their vehicles. However, there is no building with a specifically set-aside parking space for PWDs. This could be understood that PWDs are not recognized as in need of some special need especially considering that they may not be able to withstand possible pressures in order to have equal access to some resources. Unavailability of a designated parking space further translates to PWDs having to walk a long distance from the parking area to the nearest building.

The assessment also found that the main entrances of some of the buildings are either flat levelled, ramped or have staircases. It was observed that only two of the 12 observed public buildings had both a ramp and a staircase, that is, the IPLG building and the chapel. Five buildings are flat-levelled, four have staircases (without ramps) and only one has a ramp (and no staircase) on the main entrance. Among the flat levelled buildings are the male and female hostels. This means wheelchair users and crutch and cane users cannot access the second floors of all halls of residence. As a measure, all students with such disabilities have always been allocated rooms that are on the ground floor; something which does not grant all students the same opportunity to enjoy the halls of residence in the same manner.

¹⁷ E. Mandipa, 'A Critical Analysis of the Legal and Institutional Frameworks for the Realisation of the Rights of Persons with Disabilities in Zimbabwe', *African Disability Rights Yearbook* (2013) pp. 81–96.

The same observation was made with the administration building in which critical offices are located. While the main entrance is flat-levelled, the ramp is available but located on the other side of the building. This means wheelchair and crutch and cane users can only access the second floor of the building using a separate entrance point. It was also observed that the engineering building is completely inaccessible to wheelchair users although it may be accessible to crutch and cane users but with some difficulties. An almost similar arrangement exists in the health science building in which one may access the ground floor through the main entrance but cannot access the second floor through the main entrance as there are no internal ramps. In this same building, a ramp is situated on the other side of the building, and it leads into the second floor such that if one wishes to get to the ground floor, they have to move outside the building and go through the flat-levelled main entrance.

Another critical public space that PWDs have no access to is the university dining hall. This is because the entrance has two staircases with an average of nine stairs in each staircase. There is no other way that can be used to reach the dining hall which is on the second floor.

It is also important to note that while some building entrances are easily accessible to PWDs, the distance travelled from the halls of residence to get to the entrance are long because they have to go around the University using the main route which is used by vehicles. This applies to the IPLG and health science buildings which are situated furthest from most of the buildings. The distance from the nearest hostel to these buildings can be approximated to 500 meters while one would need to travel an extra 100 meters if they are residing in the furthest hostel.

20.5 Public Buildings User-Friendliness

While some buildings are accessible the facilities are not disability-friendly. For example, while all classrooms are accessible to the blind, there are no braille printers and keyboards available, neither does the University have devices that use speech recognition and dictation software to cater for the blind. This implies that a blind student will have to rely on his/her aide to take notes and read to them afterwards. In the past, examinations for a student who was blind have been printed at the University, taken to the University of Zimbabwe for translation into braille format and then the student would write the exam. However, the University could not provide a machine for the student, and hence had to use his personal machine. Afterwards, the answer script would be taken back to the University of Zimbabwe for translation into word format to allow the examiners to assess the work. This kind of arrangement has not only been time-consuming but had financial implications on the University. Further, the absence of personnel that is skilled in both word and braille text almost implies limited commitment towards the inclusive agenda.

The same has been true for all front desks around campus. The administration building is designed in a manner that a wheelchair user is not visible behind the counter. The same was observed in all offices on campus in which no wheelchair user friendly desk is available. This was also observed in the University library's book circulation points which do not allow someone sitting in wheelchair to access the attendant behind the desk because of the height of the desk. This would also imply that any person sitting in a wheelchair will need an aide. However, this challenge also stretches even in accessing the books on the open library stacks. All the book shelves are approximately two metres from the ground, allowing the library user to only access books that are shelved on the first two stacks. All those materials shelved on the rest of the stacks are not easily accessible to wheelchair users on campus. Further, the

library has no personnel that carries the responsibility to offer both technical and physical support to PWDs on campus.

Another observation was that the University ICT and library facilities cannot offer adequate services to persons who are colour-blind. This finding was made upon observing the types of keyboards available in these two public areas. The University currently can provide the usual black and white coloured keyboards for all the public machines.

20.6 Doors and Door Handle Types

The research found that no single door across the University campus was automatic. All classroom, hostel and office doors are manual, requiring one to either push or pull. A wheelchair user student is therefore required to be in the company of someone in order to access the classroom or hostel room. This was even complicated in instances considering that doors open inwards.

20.7 Separate Internal Facilities for PWDs

The research established through observation that most of the University public buildings do have a few separate internal facilitators for PWDs. All the buildings do have restrooms specifically set aside for PWDs. The library is the only public building that has an internal elevator which is capable of moving students with disabilities and staff up and down the library.

20.8 Support Services and Attitude Towards PWDs

It was established that some of the support service facilities are not accessible to PWDs particularly the visually impaired and wheelchair users. These include the fleet and facility services, which is responsible for providing transport to both staff and students, and laundry services.

With regard to the fleet and facility services, while the buses that ferry both students and staff are available, they are not accessible to wheelchair users, cane users as well as crutch users on campus. The entrance to the buses have a staircase, thereby limiting persons with specific disabilities. Further inquiries revealed that there is no wheelchair van available specifically designed for the transportation of wheelchair users. From past incidences, a wheelchair user is hand lifted by a colleague and the wheelchair is folded and placed in the bus. However, the buses have no space for ferrying the wheelchairs while the user is on board. An inquiry with a former female student who used a wheelchair revealed that this kind of arrangement did not only bring discomfort to her when every other bus users had to stand aside so that she had to be lifted in and out of the bus but it made her feel that she had become more of a burden to her colleagues who had taken the responsibility to provide such kind of support to her.

The study also found out that the University has no human resources that have the capacity to communicate with persons with speech dysfunctions and hearing impairments. This is because none among the currently present staff members can communicate in sign language. This does not only affect students but even staff who may want to join the University community. The current situation is such that the University cannot provide a conducive working environment for someone who relies on sign language as the study revealed that there is no staff member with a qualification in sign language.

Although the support services are not adequately designed to include PWDs, there is a positive attitude towards PWDs from both staff and students. This has been evidenced by the nature and magnitude of assistance rendered to fellow students living with physical disabilities. The study further revealed that the attitude from administrative staff has also positively changed upon realising that PWDs only have special needs and are very cooperative. However, it was revealed that the state of preparedness often induces shock and results in fear of uncertainties on potential challenges which in many cases do not occur.

20.9 Pedagogy

Pedagogy is about how lecturers teach and how learners learn, and is a fundamental ingredient in any successful inclusive approach. Without effective pedagogy we have no operative method of education and, without purposeful and effective inclusive pedagogy, we have no basis for meaningful inclusion. Research evidence revealed that Africa University uses conventional methods of teaching and the style is rather for persons who are not disabled. Despite the existence of different patches of undocumented policy documents as enshrined in the mission and vision of Africa University which states inclusivity and equality, it is important to note that the preparedness of Africa University in transforming its pedagogy to meet the needs of PWDs is limited. An interview with the director of the Department of Continuing Education at Africa University indicated that the e-learning platform for example does not cater for the needs of those with hearing and visual impairments. He noted that the University has a deliberate effort to promote equality and this has been shown in other areas where gender equality was achieved as evidenced by the 51 to 49 per cent female-to-male ratios, respectively.

However, on disability, our teaching and mode of delivery with regards to e-learning and Moodle does not meet the needs of PWDs.¹⁸ In addition, an interview with one of the former students from Africa University who is now the director of the umbrella body of all disability organizations in Zimbabwe pointed out that the teaching methods and delivery system in the University is not disability friendly. He noted that he personally had challenges when he was a student at Africa University studying for a Master's in Public Policy and Governance where lecturers continued to use PowerPoint presentations, and yet he was visually impaired.¹⁹ The former student shared an experience where he had a misunderstanding with the lecturer when the lecturer kept on using phrases such as "as you can see in the slide show" and he reminded the lecturer that he cannot see and appealed to him to explain. The lecturer felt disrespected and had a bad relationship with the student which in his view affected the learning process and co-learning. From the views shared by the former student, it reveals that the pedagogy at Africa University is not yet fine-tuned towards embracing PWDs and their special needs.

The Office of the Deputy Vice Chancellor which is responsible for all academic issues was approached to give its views on the pedagogy and PWDs at Africa University. The deputy vice chancellor first reiterated the strategic direction of the University as a world-class university and all-encompassing one that does not discriminate based on disability. The DVC further explained that as part of the curriculum development and academic programming the University has a Master's in Human Rights, Peace and Development which is an anchor programme that entrenches disability rights issues.²⁰ Therefore, the DVC expressed that the environment is ready to promote equality and equity as

¹⁸ Key informant interview with the Distance Education Director at Africa University, 5 June 2017.

¹⁹ In-depth interview with the late Mr. Tsarai Mungoni a former student in the Master in Public Policy and Governance and the former national director at NASCOH, 3 June 2017.

²⁰ Key informant interview with the Office of the Deputy Vice Chancellor which is responsible for all academic programming in the University, 1 June 2017.

evidenced by educational programmes in the University. Apart from academic programmes which exist in the University, there is also a deliberate effort to enrol students with disabilities and offer them scholarships which is one giant step towards inclusivity, equality and equity in higher education.²¹ However, the DVC also lamented the limited knowledge and skills gap in the University to propel a full-fledged inclusive education. There are gaps in the human resources, knowledge development and teaching techniques which suit students with disabilities and the technologies available may not fully support their needs. In addition, pedagogy is not only related to the lecturer's delivery model and techniques to the students but also the medium through which students are able to co-learn with other students with disabilities as well as the lecturer learning from across all students despite their disability. As a way of testing the preparedness and depth of understanding of pedagogy for persons with disabilities, we interviewed one lecturer who teaches in the Master in Public Policy and Governance. The Institute of Peace, Leadership and Governance has enrolled students with disabilities in the last five years, and we were interested in hearing the experiences of the lecturer when he conducted his classes with students who had disabilities. Two of the students had physical disabilities and one was visually impaired. From the lecturer's experience, it was easy to teach students with physical disabilities compared to the one with visual impairment. According to the lecturer, he used PowerPoint presentations and highlighted certain issues using pointers and that further discriminated the visually impaired student. In an effort to deal with the matter and cater for the student, the lecturer usually sent the student some PowerPoint presentations to be read from his computer. However, in his view teaching persons with different needs require special training as one can easily exclude them from the learning process.²²

21 Strategies for Mainstreaming PWDs in Higher Education: Towards Equality and Equity in Zimbabwe

Having found out the realities associated with localising the provisions of the Disabled Persons Act and the Constitution, there are a number of strategies that the study recommends as a means towards promoting inclusivity of PWDs in Zimbabwe's institutions of higher learning with particular focus on Africa University. These strategies include but are not limited to:

- **Sensitisation trainings:** Drawing from the findings, there was evidence of academic registry department staff unpreparedness when the first PWDs were enrolled on campus in 2015. There is need to hold sensitisation trainings for both students and staff at institutions of higher learning to raise the level of preparedness so that there is no panic and confusion upon reception of either staff members or students living with physical disabilities. Africa University has been facilitating workshops in partnership with others on mainstreaming the rights of PWDs in higher education. This can be up scaled and more local trainings introduced with the view of ensuring increased awareness of disability rights.
- **Institutional Reform and Structuring:** Africa University needs a disability resource centre and disability desk which will champion development of policies and academic programmes as well as outreach with particular emphasis on pedagogy, extracurricular activities, infrastructure and other support mechanisms. This can be done in partnership with the Office of the Deputy Vice Chancellor, the Director of Continuing Education, the registrar and Dean of Students who are there to oversee academic programming and the welfare of the students.

²¹ *Ibid.*

²² In-depth interview with a lecturer in the Master in Public Policy and Governance, 5 June 2017.

- **Basic training on sign language:** Having found out that there is lack of basic knowledge on sign language among University staff, the study recommends basic training for staff and students. This will not only be a sign of inclusivity but a mechanism for the domestication and implementation of the provisions of the Zimbabwe 2013 Constitution.
- **Infrastructure development:** All the buildings at Africa University must be accessible by persons with disabilities and the research established that very few buildings actually are accessible. Therefore, we recommend that the buildings be restructured to be accessible by PWDs. Furthermore, all new buildings must pass the test of disability friendliness at the planning stage.
- **Pedagogy review:** The research findings highlighted that inclusive pedagogy for PWDs draws attention to the idea that a single “one size fits all”²³ pedagogy is not helpful when trying to meet the needs of a diverse range of learners, and that attention needs to be paid to individuals as opposed to a purely theoretical class of learners in which no form of significant diversity exists. In this respect, institutions of higher education in Zimbabwe including Africa University need to take the issue of pedagogical review seriously. In recognition of this, pedagogies aimed at addressing the needs of all learners that minimise or eliminate the singling out of individuals for special teaching have been developed.²⁴ The most familiar of these approaches include: Universal Design for Learning (UDL) which is based on three principles that include: (a) multiple means of engagement, (b) multiple means of representation, and (c) multiple means of action and expression; Differentiated Instruction (DI) which refers to “pedagogical techniques used in the classroom to deliver the appropriately designed curriculum to a wide range of learners”;²⁵ and the Inclusive Pedagogical Approach in Action (IPAA) popularised by Florian and Spratt,²⁶ whose goal is to promote the full participation of all students in the classroom by acknowledging individual differences as an essential aspect of human development in any conceptualisation of learning. Of significance, IPAA rejects deterministic views of ability and the idea that the presence of some children will impede the progress of other children, and teachers are encouraged to continually develop creative and novel ways of working with children with different abilities.

What these approaches have in common is that they are not prescriptive but are based on principles and strategies that the teacher must adopt and adapt to the situation. Pedagogical review also requires a critical lens which ensures that approaches that perpetuate segregation do not find their way in settings by focusing on inclusive teaching and learning. Such pedagogical approaches can be deconstructed through a process of critical discourse analysis whose central aim is to examine how different texts reproduce power and inequalities in society. Using critical analysis to examine inclusive pedagogy helps in finding answers to the following questions:

²³ P. Mittler, *Overcoming Exclusion, Social Justice through Education* (Routledge, Abington, UK, 2012).

²⁴ C. Forlin *et al.*, *Inclusive Education for Students with Disabilities: A Review of Best Evidence in Relation to Theory and Practice*, Report to the Australian Government Department of Education, Canberra, 2013.

²⁵ T. Loreman, J. M. Deppeler and D. H. Harvey, *Inclusive Education: Supporting Diversity in the Classroom* (Allen & Unwin, Sydney, 2010).

²⁶ L. Florian and J. Spratt, ‘Enacting Inclusion: A Framework for Interrogating Inclusive Practice’, 28:2 *European Journal of Special Needs Education* (2013) pp. 199–135.

- a) What is being taken for granted in the pedagogical approach under consideration?
- b) What is missing from the approach?
- c) What assumptions and beliefs form the basis of any pedagogical approach?
- d) In what ways is the pedagogical approach influenced by the traditional classroom of teaching and learning?
- e) What are the roles of the teachers and learners?
- f) Does the approach adequately respect culture, religion and other areas of diversity and allow children to express their particular orientation?
- g) What impact might each approach have on the identity of the disabled learner?²⁷

It can be argued that asking these and similar questions with respect to inclusive pedagogy can assist educators to evaluate the merits and suitability of an approach with respect to their context and personal views. This can also be effective if done in collaboration with teaching colleagues so that the various issues can be explored from a range of viewpoints through dialogical process.

- **Improve support services:** With regards to improving support services aimed at enhancing inclusive education this study can be informed by McGhie-Richmond and de Bruin²⁸ who highlighted the links between technology-assisted pedagogy and the IPPA through which the processes of multiple means of engagement, representation and action and expression can be mediated. McGhie-Richmond and de Bruin highlight the value of technology in mediating and supporting self-directed learning with research evidence that demonstrates that students use their various devices and web-based applications in very different and individualised ways and that the inherent flexibility in terms of the pacing, content and “on-demand” nature of web-based learning environments can result in a rich, personalized learning experiences.²⁹ As such, Africa University needs to come to realisation that digital technologies afford students opportunities to collaborate in conceptualising problems, designing solutions and co-constructing artefacts or narratives collaboratively with others as well as foster individual learning as part of broader inclusive education policy agenda.

22 Conclusion

The research findings revealed that inclusive pedagogy is about providing for meaningful participation of all learners where diversity is taken as a human rights issue and must be accounted for so as to ensure an elimination of learners on the margins. This then requires that Africa University takes serious the idea of developing a comprehensive policy on inclusive education with clear strategies for its operationalisation. The study explored some inclusive pedagogical approaches that may be useful and that have been shown to be adaptable regardless of context. The study showed that the underlying fundamentals of good teaching are the basis of inclusive education pedagogy. Hence all elements of what are currently acknowledged as being important to good teaching should be visible in each of the inclusive pedagogical models adopted by Africa University. Of significance, the study revealed that the

²⁷ Deppeler *et al.*, *supra* note 6.

²⁸ D. McGhie-Richmond and C. de Bruin, ‘Tablets, Tweets, and Taking Texts: The Role of Technology in Inclusive Pedagogy’, in Deppeler *et al.*, *supra* note 6, vol. 7, pp. 211–234.

²⁹ D. Sampson and P. Zervas, ‘Context-Aware Adaptive and Personalized Mobile Learning Systems’, in D. G. Sampson *et al.* (eds), *Ubiquitous and Mobile Learning in the Digital Age* (pp. 3–17) (Springer, New York, 2013).

adoption of inclusive pedagogy requires humility: a recognition that if a student is not learning it may be the teaching that is the problem rather than the learner.

Therefore, when lecturers reflect and come to these conclusions, they are in a better position to move forward and truly adopt inclusive ways of teaching which guarantee student success. From this premise, the decision to embrace inclusive education pedagogy can serve to relieve job-related stress for lecturers and enhance their feelings of self-efficacy along with improving job satisfaction. The negative impact on lecturers in terms of stress and workload has been one of the objections raised to the employment of some inclusive pedagogies, but whether or not one is sympathetic to this point of view, it must be acknowledged that the adoption of inclusive pedagogical approach does represent new ways of working for lecturers, and requires the adoption of different points of view. Finally, the study revealed how technology-assisted instruction provides students with a highly flexible, accessible and collaborative yet at the same time individualized model of delivery. Hence the need for more training for both students and staff to sensitise them about the importance of inclusive education as a human rights issue enshrined in the Zimbabwean Constitution. To achieve these digitalisation transformations Africa University should invest in restructuring its infrastructural design of buildings and classroom equipment and furnishings to align with the educational trends and realities of making higher education highly flexible and accessible to all students paying special attention to students living with different forms of disabilities.

(Il)limitable and Non-Derogable Rights, Judicially Sanctioned Whipping and the Future of Punishment in All Setting in Zimbabwe

*Admark Moyo**

1 Introduction

The central legal problem which this article seeks to investigate relates to the constitutionality of pieces of legislation permitting corporal punishment in different settings. At the heart of this inquiry is the question whether corporal punishment remains constitutional, especially in light of Zimbabwe's obligations at international and domestic law. To begin with, Zimbabwe is a state party to international human rights instruments that have been interpreted to require the abolition of corporal punishment in all settings. In addition, the Constitution of Zimbabwe Amendment (No 20) Act, 2013 (Constitution) entrenches illimitable rights that protect everyone against corporal punishment in the criminal justice system, the schools and the family home. Nonetheless, corporal punishment remains rampant in all settings and in the criminal justice system is even explicitly sanctioned and implemented by the state machinery.

Against this background, the article analyses the scope of Zimbabwe's legal obligations in relation to corporal punishment under international and domestic law. With regards to legal obligations at the domestic level, the article argues that corporal punishment can be categorised in one of two ways and each categorisation carries different consequences for the future of the practice in Zimbabwe. First, corporal punishment may be viewed as a violation of the illimitable and non-derogable rights to human dignity and the freedom from torture or cruel, inhuman or degrading treatment or punishment. If this categorisation is correct, then corporal punishment has to be abolished in all settings as required by the Constitution. To determine the correctness of this approach, it is necessary to track down the history of the abolition of corporal punishment in Zimbabwe and the extent to which it should inform current approaches to the practice.

The second categorisation of corporal or physical punishment only kicks in if the first one is rejected by the courts or considered to be an extreme way of analysing the legality and constitutionality of the practice. Accordingly, corporal punishment can be categorised as a violation of the child's rights to freedom from violence (from public and private sources) and freedom from abuse or maltreatment. These rights are limitable and can be limited by a law of general application permitting corporal punishment and serving a legitimate government purpose in various settings. For corporal punishment to be viewed as a reasonable, necessary and justifiable limitation of the right to freedom from violence or abuse, it is necessary to engage in limitations analysis under section 86(1)-(2) of the Constitution. Relying on international law and the jurisprudence of treaty monitoring bodies, this article starts with an analysis of the term 'corporal punishment' and argues that much of the debate around the practice arises from the lack of conceptual clarity on what is meant by this term.

Afterwards, the article tracks down the history of judicially sanctioned whipping in Zimbabwe and demonstrates that domestic courts have always classified it as a violation of the constitutional prohibition of torture or cruel, inhuman or degrading treatment or punishment. More recently,

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the Constitutional Court of Zimbabwe, in *S v. Chokuramba*,¹ characterised judicially sanctioned whipping as a violation of illimitable and non-derogable rights to human dignity and freedom from inhuman or degrading treatment. The Court also partly relied on the child's right to freedom from all forms of violence from private and public sources. The holding of the Court and the rights upon which it was premised are discussed in some detail in section 4 of the article. In section 5, the article analyses the implications of both the judgment and other recent developments for the total abolition of corporal punishment in the education sector. This includes an engagement with the provisions of the Education Amendment Bill, which seeks to completely abolish the administration of corporal punishment on primary and secondary school learners.

The abolition of corporal punishment raises considerations that are fundamentally different from those that feature in our analysis of the practice in the judicial and education systems. Parents, for instance, have the rights to freedom of religion, culture and beliefs. These rights are both individual and collective in nature. As part of the associational dimension of these rights, parents are allowed to guide and direct their children in the way they see fit and this may include the use of corporal punishment as a correctional method on children. Further, the article analyses the implications of these parental rights and responsibilities for the abolition of corporal punishment in the family home, foster homes, day care institutions and other similar settings. Section 6 concludes the discussion and recommends that corporal punishment should be abolished in all settings in Zimbabwe in light of the state's legal obligations and the recommendations it has accepted from both treaty monitoring bodies and the Universal Periodic Review.

2 Conceptualising Corporal Punishment: Lessons from Developments at the International Plan

The psychological images created when reference is made to the term 'corporal' or 'physical' punishment vary from one person, society or culture to another. As such, many of the arguments for or against the practice could be addressed if there is a conceptual or practical clarity about what is meant by the term 'corporal punishment'. This definitional problem has stood in the way of progress or law reform. The Committee on the Rights of the Child (CRC Committee), in its General Comment 8, extensively defined 'corporal' or 'physical' punishment as:

any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light. Most involves hitting ("smacking", "slapping", "spanking") children, with the hand or with an implement - a whip, stick, belt, shoe, wooden spoon, etc. But it can also involve, for example, kicking, shaking or throwing children, scratching, pinching, biting, pulling hair or boxing ears, forcing children to stay in uncomfortable positions, burning, scalding or forced ingestion (for example, washing children's mouths out with soap or forcing them to swallow hot spices). In the view of the Committee, corporal punishment is invariably degrading. In addition, there are other non-physical forms of punishment that are also cruel and degrading and thus incompatible with the Convention. These include, for example, punishment which belittles, humiliates, denigrates, scapegoats, threatens, scares or ridicules the child.²

The presence of physical force calculated to cause some degree of pain or discomfort, however slight, is an essential ingredient of corporal punishment. In a sense, corporal punishment is narrower than the term 'physical violence'. The latter term includes, among other things, fatal and non-fatal physical violence. In the view of the CRC Committee, "physical violence includes: (a) *all corporal punishment* and all other forms of torture, cruel, inhuman or degrading treatment or punishment; (b) physical bullying and hazing by adults and by other children; (c) forced

¹ CCZ 10/19 (Justice for Children Trust and Zimbabwe Lawyers for Human Rights as *amicus curiae*)

² CRC Committee General Comment No. 8 (2006), The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment, para. 11. *See also* General comment No. 13 (2011), The Right of the Child to Freedom from All Forms of Violence, para. 24.

sterilization, particularly for girls; (d) violence in the guise of *treatment* and (e) deliberate infliction of disabilities on children for the purpose of exploiting them for begging in the streets or elsewhere”.³ Though the Convention on the Rights of the Child, 1989 (CRC)⁴ does not specifically mention ‘corporal punishment’, at the international level, corporal punishment is a particular form of physical violence which falls under the broad category of treatment that is viewed as cruel, inhuman and degrading.

First, there is no universal definition of the nature of beatings that constitute legitimate forms of corporal punishment and those that do not. When we talk about ‘corporal punishment’, what are we referring to? Apart from the usual beatings to which children are subjected daily, there are such practices as pulling the child’s ears or hair (wherever located); letting the child ‘stay’ in a drum full of cold or hot water; using one’s hands to physically and seriously assault the child; stepping on the child’s head or neck or any part of the body as the child lies face up or down on the ground; throwing the child in mid-air and letting them drop on the ground; letting the child either run until they collapse or carry heavy objects for long spells of time; applying painful products such as chili on the child’s genitals or pulling such genitals (especially in the case of a male child); severely twisting any part of the child’s body; and many more.

The multiple manifestations of physical punishment referred to above are intended to demonstrate that the mental pictures that are created by reference to the phrase ‘corporal punishment’ are as many as the manifestations of the practice themselves. This definitional problem poses serious challenges at the practical level. Even if the state were to define, with mathematical precision, what it means by ‘corporal punishment’ or ‘moderate and reasonable chastisement’, it would have to assume an additional burden of monitoring whether each parent, guardian or school teacher is administering the correct version or measure of corporal punishment and even then whether its administration is being done proportionally. These difficulties alone may justify a universal departure from the use of corporal punishment to ensure that there is no debate on what is moderate and what is not; what versions of violence are reasonable and what are not; whose standards are applied; and who determines penal severity in the context of the schools and the family.

Under international law, states assume important obligations that have implications for the protection of children from multiple forms of violence. This is particularly evident from Article 19(1) of the CRC, among other provisions, which requires states “to take all legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, or maltreatment while in the care of parents”. In the recommendations following the second day of general discussion, the CRC Committee encouraged states parties to “enact or repeal, as a matter of urgency, legislation in order to prohibit all forms of violence, however light, within the family and in schools, *including as a form of discipline*, as required by the provisions of the Convention”.⁵ This suggests the total abolition of corporal punishment in all settings – the family home, day care or such other institutions, the school and the courts.

One of the questions that emerge is whether corporal punishment constitutes violence? According to the CRC Committee, the duty “to protect the child from all forms of physical or

³ General Comment No. 13, *supra* note 2, para. 22.

⁴ Adopted by the United Nations General Assembly (Resolution 44/25) 20 November 1989 and entered into force on 2 September 1990 in accordance with Article 49.

⁵ CRC Committee, Day of general discussion on violence against children within the family and in schools, Report on the twenty-eighth session, September/October 2001, CRC/C/111, paras. 701–745. *See also* General Comment No. 8, *supra* note 2, paras. 7, 8 and 18.

mental violence ... does not leave room for any level of legalised violence against children. Corporal punishment and other cruel or degrading forms of punishment are forms of violence and States must take all appropriate... measures to eliminate them”.⁶ Article 37 of the CRC also imposes on states parties the duty to ensure that “no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment”. In its General Comment No. 1, the CRC Committee observed that corporal punishment is incompatible with the CRC as it undermines the need to provide to the child education in a manner that is consistent with their inherent dignity.⁷

The CRC Committee characterised corporal punishment as a violation of the child’s right to freedom from cruel, inhuman and degrading treatment or punishment.⁸ To the CRC Committee, national laws should “in no way erode the child’s absolute right to human dignity and physical and psychological integrity by describing some forms of violence as legally or socially acceptable”.⁹ This caveat applies to all forms of violence and does not leave room for any level of legalised violence against children no matter how less severe and no matter what context. On the whole, corporal punishment has been conceptualised as a violation of the non-derogable and illimitable rights to human dignity and freedom from violence in international law. From an African perspective, the African Charter on the Rights and Welfare of the Child, 1990 (African Children’s Charter)¹⁰ requires state parties to eliminate harmful social and cultural practices affecting the dignity of the child, for instance the use corporal punishment in homes.¹¹

In its Concluding Observations on Zimbabwe,¹² the CRC Committee expressed deep concern that corporal punishment remains legal and widely practised in the family, in schools and in other settings.¹³ It recommended, in line with its initial concluding observations,¹⁴ that the government should to take practical measures to reform legislative provisions and policies that allow the administration of ‘reasonable’ or ‘moderate’ corporal punishment; and urging the state party to: “(a) repeal or amend, as necessary, all legislation and administrative regulations to explicitly prohibit corporal punishment as a correctional or disciplinary measure in all settings; (b) sensitize and educate parents, guardians and professionals working with and for children, particularly teachers, on the harmful effects of corporal punishment and the need to end the culture of silence on cases of violence against children; and (c) promote positive, non-violent and participatory forms of child-rearing and discipline in all settings, including through providing teachers and parents with training on alternative disciplinary measures”.¹⁵ During the Universal Period Review, the same sentiments were expressed with recommendations for the abolition of corporal punishment in all settings in full compliance with international human rights obligations.¹⁶ However, it is noted from the discussion below that since the late 1980s, though, the Zimbabwean apex Court appears to have inclined towards compliance with international

⁶ General Comment No. 8, *supra* note 2, para. 18.

⁷ CRC Committee General Comment No. 1, *The aims of education* (17 April 2001, CRC/GC/2001/1), para. 8. *See also* General Comment No. 8, *supra* note 2, para. 7.

⁸ General Comment No. 8, *supra* note 2, paras. 7, 12 and 18.

⁹ General Comment No. 13, *supra* note 2, para. 17.

¹⁰ Adopted by the Organisation of African Union (OAU) now the African Union (AU) (OAU Doc. CAB/LEG/24.9/49) in 1990 and entered into force on 29 November 1999 in terms of Article 47.

¹¹ Article 21(1) of the African Children’s Charter.

¹² CRC Committee Concluding observations on the second periodic report of Zimbabwe (7 March 2016) CRC/C/ZWE/CO/2 (hereinafter Concluding Observations 2).

¹³ *Ibid.*, para 42.

¹⁴ Concluding observations of the Committee on the Rights of the Child: Zimbabwe (7 June 1996) CRC/C/15/Add.55 (hereinafter Concluding Observations 1), para. 31.

¹⁵ Concluding Observations 2, *supra* note 13, para. 43.

¹⁶ UN General Assembly, Human Rights Council, Report of the Working Group on the Universal Periodic Review to Zimbabwe (28 December 2016) A/HRC/34/8, para. 132.81.

standards and human rights obligations.

3 The History of Corporal Punishment in Zimbabwe

Historically, our courts classified corporal punishment as a violation of the constitutional prohibition of torture or cruel, inhuman or degrading treatment or punishment. The Zimbabwean Supreme Court in *S v. Ncube*¹⁷ and *S v. Ndblovu*¹⁸ declared the practice of judicial whipping on adults to be ‘inhuman and degrading’, and the conclusion was reached in a separate case that dealt with judicially sanctioned whipping in *S v. A Juvenile*, where Gubbay JA described it as “an antiquated and inhuman punishment which blocks the way to understanding the pathology of crime”.¹⁹ In *S v. Juvenile*,²⁰ the Supreme Court sitting as a Constitutional Court held by a majority of three to two justices that corporal punishment inflicted upon male juvenile offenders in terms of the Criminal Procedure and Evidence Act was inconsistent with the prohibition of torture or cruel, inhuman or degrading treatment or punishment under section 15(1) of the old Constitution. Gubbay CJ registered the Court’s abhorrence of corporal punishment in the following terms:

[J]udicial whipping in any form must inevitably tend to brutalise and debase both the punished and the punisher alike. It causes the latter, and through him society, to stoop to the level of the offender. *It marks a total lack of respect for a fellow human, be he adult or juvenile. It treats members of the human race as non-humans. By its very nature it is extremely humiliating to the recipient ... [J]udicial whipping, no matter the nature of the instrument used and the manner of execution, is a punishment inherently brutal and cruel; for its infliction is attended by acute physical pain ...* Irrespective of any precautionary conditions which may be imposed, it is a procedure subject to ready abuse in the hands of a sadistic or overzealous official appointed to administer it. It is within his power to determine the force of the beating. *In short, whipping, which invades the integrity of the human body, is an antiquated and inhuman punishment which blocks the way to understanding the pathology of crime.* It has been abolished in very many countries of the world as being incompatible with contemporary concepts of humanity, decency and fundamental fairness. The main categories of exception appear to be some former British colonies and some States where *shari’a* (Islamic law) is practised.²¹

In the same judgment, Khosa JA, concurring, had the following remarks to make:

Speaking for myself, I think any law which compels a person, against his will, to expose his posterior to the gaze of total strangers while blindfolded and strapped to a wooden bench degrades and debases that person, and if this is done for the sole purpose of subjecting him to whipping, then it also dehumanises him. *Even if corporal punishment were to be administered without the victim taking his clothes off, the mere idea of inflicting physical pain as a form of punishment corresponds, in my view with torture and the lex talionis – an eye for an eye, a tooth for a tooth, a life for a life – all of which have been condemned because they represent an inhuman approach to punishment.*²²

After these powerful remarks and the undiplomatic judicial abhorrence of corporal punishment they demonstrated, Parliament intervened to make corporal punishment ‘lawful’ through a 1990 amendment to the Constitution. The amendment, which became section 15(3) of the Lancaster House Constitution (LHC), provided that no moderate corporal punishment administered by prison officials, parents or those acting in *loco parentis*, shall be held to be in contravention of the right to freedom from torture or cruel, inhuman or degrading treatment or punishment as provided for in section 15(1) of the same Constitution.²³ Section 15(3)(b) of the LHC provided that “[n]o moderate corporal punishment inflicted in execution of the judgment or order of a

¹⁷ 1987 (2) ZLR 263 (S). The Court further held that “whipping ... [is] a punishment which in its very nature is both inhuman and degrading”.

¹⁸ 1988 (2) SA 702 (ZSC).

¹⁹ 1990 (4) SA 151 (ZS) 168-169B.

²⁰ 1989 (2) ZLR 61 (SC).

²¹ 90G-91C, emphasis added.

²² *Ibid.*, at 101E-G, emphasis added.

²³ See section 15(3)(a) and (b) of the Constitution.

court, upon a male person under the age of eighteen years as a penalty for breach of any law; shall be held to be in contravention of subsection (1) on the ground that it is inhuman or degrading”. The effect of the amendment was to nullify the judgments that had abolished corporal punishment in the criminal justice system and to ensure that the practice continued to be used as a sentencing option for crimes committed by male children.

4 Conceptualising Corporal Punishment and Illimitable Rights under the ‘New’ Constitution

It is imperative to emphasise, from the onset, that the rights to dignity and freedom from cruel, inhuman or degrading treatment are absolute and when violated do not require an enquiry into whether the violation is necessary, reasonable, fair or justifiable in an open and democratic society.²⁴ Section 86(3)(b)-(c) provides that no law may limit and no person may violate the rights to human dignity and the freedom from torture or cruel, inhuman and degrading treatment. Accordingly, the only outstanding question is whether corporal punishment violates the child’s rights to human dignity or to freedom from degrading treatment. When delineating the scope of illimitable rights, it is not necessary in the event of a violation of such rights to determine whether or not the violation is justifiable or reasonable. As Bekker CJ would have it:

[O]nce one has arrived at the conclusion that corporal punishment *per se* is impairing the dignity of the recipient or subjects him to degrading treatment or even to cruel or inhuman treatment or punishment, it does not in principle matter to what extent such corporal punishment is made subject to restrictions and limiting parameters, even of a substantial kind — even if very moderately applied and subject to very strict controls, *the fact remains that any type of corporal punishment results in some impairment of dignity and degrading treatment.*²⁵

The rights to human dignity and the freedom from cruel or inhuman or degrading treatment are illimitable. If corporal punishment has historically been characterised as violating these rights, it is impermissible to now depart from this characterisation just because the rights in issue are said to be illimitable and non-derogable. Given that the “new Constitution has dropped the amendment to the old Constitution that permitted the meting out of corporal punishment upon male juveniles, and has gone on to strengthen certain provisions of the Declaration of Rights, for instance, by promulgating s 86(3)(c) that says that no law may permit violations of the right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment”,²⁶ there is little doubt that the Constitution outlaws corporal punishment. This finding is further supported by provisions guaranteeing freedom from all forms of violence from public or private sources and equal treatment of all persons regardless of, among others, sex or age.

In *S v. Chakuramba*, a 15 year old juvenile appeared before a magistrates court on the charge of rape. The juvenile entered the plea of not guilty where after he was tried and convicted of the crime of rape in accordance with section 65 of the Criminal Law (Codification and Reform) Act.²⁷ In mitigating the sentence, regard was had to the age of the accused and the fact that he was still a school pupil. The magistrates court imposed a sentence of corporal punishment in terms of section 353(1) of the Criminal Procedure and Evidence Amendment Act (CPEA). On review by the High Court, Justice Muremba declared the provisions of the section unconstitutional in light of section 53 of the Constitution of Zimbabwe which provides for the right not to be tortured or to be subjected to cruel, inhuman or degrading treatment or punishment. Section 167(3) provides that the Constitutional Court “must confirm any order of

²⁴ For the criteria used to determine whether corporal punishment is a necessary, fair, reasonable and justifiable limitation of constitutional rights, *see* section 86(2) of the Constitution.

²⁵ *Ex parte Attorney General, Namibia*, at 97C-E.

²⁶ Mafusire J in *S v. Mufema and Others* HH409-15, 7.

²⁷ Chapter 9:23 of the Laws of Zimbabwe.

invalidity made by another court before that order has any force". This should be read with section 175(1) of the Constitution which provides that "[w]here a court makes an order concerning the constitutional invalidity of any law, the order has no force unless it is confirmed by the Constitutional Court". As a result of these provisions, the High Court had to refer the matter to the Constitutional Court for confirmation.

In *S v. Chokuramba*,²⁸ the Constitutional Court of Zimbabwe had to decide whether or not judicial corporal punishment imposed on male juvenile offenders is consistent with the Constitution. The matter came before the Constitutional Court as an application for the confirmation of the High Court's decision that judicial corporal punishment inflicted on male children in execution of a sentence for any offence amounts to cruel, inhuman and degrading punishment within the meaning of section 53 of the Constitution. The applicant had approached the court *a quo* arguing that section 353(1) of the CPEA²⁹ unconstitutionally violated his section 53 right. Section 353(1) provides that "[w]here a male person under the age of eighteen years is convicted of any offence the court which imposes sentence upon him may ... sentence him to receive moderate corporal punishment, not exceeding six strokes". The holding of the apex Court was mainly premised on the rights to human dignity and the freedom from torture or cruel, inhuman or degrading treatment or punishment. Its findings on each of the stipulated rights are discussed below.

4.1 Corporal Punishment and Human Dignity

In its analysis of the relationship between corporal punishment and inhuman or degrading treatment, the Constitutional Court emphasised the importance of human dignity, both as a founding value and an illimitable right of the child offender.³⁰ From the onset, it emphasised that the reason behind the constitutional prohibition of torture or inhuman or degrading punishment is to ensure the protection human dignity, and bodily and psychological integrity, which are some of the most important values of the new constitutional order.³¹ The Constitutional Court underlined that the protection of human dignity and bodily and psychological integrity remain central to the definition of inhuman or degrading treatment or punishment. This meant that courts had to rely on human dignity when interpreting legislation, especially given that the Constitution unequivocally super-entrenches human dignity as a founding value.³²

In the context of crime and punishment, the protection of human dignity imposes particular obligations on the state with regards to the nature and purpose of sentences imposed on all offenders. Thus, the fact that human dignity is inherent implies that "a person must be punished as a person" and cannot be punished as if they are non-human.³³ Correspondingly, the state bears an obligation to avoid prescribing or imposing punishments which, by nature, purpose and effect, "constitute a humiliating assault on the inherent dignity of the person being punished".³⁴ The constitutional duties to respect and protect every individual's right to dignity means that persons who commit crimes should not be sentenced in a manner that impairs their sense of self-worth.³⁵

²⁸ Constitutional Court Application No. CCZ 29/15, Judgment No. CCZ 10/19.

²⁹ Chapter 9:07.

³⁰ To this end, the Constitutional Court started by making reference to *S v. Ncube and Others* 1987 (2) ZLR 246 (S) at 267B-D, where it was held as follows: "The *raison d'être* underlying section 15(1) is nothing less than the dignity of man. It is a provision that embodies broad and idealistic notions of dignity, humanity, and decency, against which penal measures should be evaluated. It guarantees that the power of the State to punish is exercised within the limits of civilised standards. Punishments which are incompatible with the evolving standards of decency that mark the progress of a maturing society or which involve the unnecessary and wanton infliction of pain are repugnant."

³¹ *S v. Chokuramba*, at 13.

³² *Ibid.*, at 18.

³³ *Ibid.*, at 20.

³⁴ *Ibid.*

³⁵ *Ibid.*, at 21.

Malaba DCJ, for the Court, emphasised the centrality of dignity in sentencing in the following terms:

The fundamental principle is that a person does not lose his or her human dignity on account of the gravity of an offence he or she commits. Even the vilest criminal remains a human being with inherent dignity meriting equal respect and protection (per BRENNAN J in *Furman v Georgia* 408 US 238 (1972) at 273). The fact that he or she has committed a crime of a serious nature does not mean that he or she has lost the capacity to act with self-respect and respect for others in the future ... He or she remains entitled to the equal respect of his or her dignity as a human being, regardless of the gravity of the crime he or she committed. A humane penal system is one that is based on the principle that a human being must not be treated only as a means but always as an end for the purposes of punishment.³⁶

In the final analysis, the Constitutional Court was at pains to underscore the idea that the manner in which corporal punishment is administered is “inherently degrading to the victim’s human dignity”.³⁷ In the Court’s view, “[j]udicial corporal punishment does not respect the inherent dignity of the male juvenile offender”. For purposes of this article, it is important to reiterate that the Court read the right to dignity together with the right to freedom from inhuman or degrading treatment, thereby underlining the significance of an analytical approach that avoids treating rights as if they are discrete silos. In terms of this approach, the interpretation of all rights, including the prohibition of inhuman or degrading treatment, should be consistent with human dignity, both as a right and a value.

4.2 Corporal Punishment and Freedom from Torture or Cruel, Inhuman or Degrading Treatment or Punishment

The Constitutional Court commenced the analysis by observing that the right to freedom from torture or cruel, inhuman or degrading treatment is not subject to any limitation. In other words, the current Constitution does not have any provision that is similar to section 15(3)(b) of the former Constitution. As shown above, this provision stipulated that corporal punishment was an exception to the right to freedom from torture or cruel, inhuman or degrading treatment or punishment and allowed courts, parents or teachers to administer corporal punishment on male children. To the Court, the fact that corporal punishment is not explicitly mentioned in the Constitution as a limitation or exception to the section 53 right meant that courts can review the legislation that authorises it to determine whether or not moderate corporal punishment imposed in terms of section 353 of the Act on male juveniles convicted of any offence amounts to inhuman or degrading punishment within the meaning of section 53 of the Constitution. In the Court’s view, the current Constitution bestows on “courts the sacred trust of protecting fundamental human rights and freedoms by declaring whether or not any punishment ... is inhuman or degrading to assist the Legislature in passing laws that are just and humane”.³⁸ In a way, the Court emphasised that while Parliament has the sole prerogative to make, amend and repeal laws, questions relating to the determination of the constitutionality of such laws have to be answered by the judiciary.

Malaba DCJ (as he then was) held that section 53 of the Constitution is not only aimed at punishments that are cruel, inhuman or degrading but also those that are grossly disproportionate to the seriousness of the offence.³⁹ To be inconsistent with section 53, the punishment should be so disproportionate “that no-one could possibly have thought that the particular offence would

³⁶ *Ibid.*, at 23–24.

³⁷ *Ibid.*, at 26–27.

³⁸ *S v. Chokuramba*, at 12. See also *S v. A Juvenile* at 101B-C.

³⁹ *Ibid.*, at 22.

have attracted such a penalty – the punishment being so excessive as to shock or outrage contemporary standards of decency”.⁴⁰ In deciding whether corporal punishment constitutes degrading treatment, the Constitutional Court relied mainly on the manner in which the punishment is administered. It held that “[f]orcibly subjecting one person to the total control of another for the purposes of beating him or her is inherently degrading to the victim’s human dignity”.⁴¹

Given that judicial corporal punishment involves blindfolding the child offender and “strapping his body to the bench to ensure that he remains motionless and helpless when he is caned on the buttocks”, this practice humiliates and degrades the offender.⁴² In the Malaba DCJ’s view, “[t]he mere anticipation of a stroke is within the parameters of the inhuman and degrading elements of judicial corporal punishment. Corporal punishment is not simply about the actual pain and humiliation of a caning, but also about the mental suffering that is generated by anticipating each stroke”.⁴³ Subjecting male child offenders to corporal punishment in the manner stipulated in section 353 of the CPEA treats them as if they are non-humans and makes them mere objects of state action.⁴⁴ Against this background, corporal punishment was adjudged to be inherently (that is by nature, intent and effect) inhuman and degrading to the child offender.⁴⁵ The fact that it violates the non-derogable and illimitable rights to dignity and to freedom from inhuman or degrading treatment means that precautionary measures that accompany its administration does not detract from its nature, purpose and effect.⁴⁶ This approach is arguably correct because it is not necessary, when delineating the scope of illimitable rights, for the courts to determine whether or not the violation of such rights is justifiable or reasonable.

4.2 Corporal Punishment and Freedom from Violence

In *S v. Chokuramba*, the Constitutional Court made compelling remarks about the linkages that exist between human dignity, the right to freedom from inhuman or degrading treatment and the right to bodily and psychological integrity, particularly the sub-right to freedom from all forms of violence from private and public sources. Section 52(a) of the Constitution provides that “[e]very person has the right to bodily and psychological integrity, which includes the right to freedom from all forms of violence all forms of violence from public or private sources”. The Court began by emphasising that the interpretation of the right to dignity and the freedom from violence has a bearing on the meaning and reach of the right to freedom from inhuman or degrading punishment.⁴⁷ Malaba DCJ, as he then was, emphasised that judicially sanctioned whipping constituted violence in the following terms:

Judicial corporal punishment by nature involves the use of physical and mental violence against the person being punished. Direct application of acts of violence on the body of a person would naturally cause physical and mental pain and suffering to the victim. In the case of a punishment for crime, the infliction of the pain and suffering is intended to be severe to achieve the purposes of the punishment. The infliction of the punishment

⁴⁰ *Ibid.*, at 22. The Court was following the test applied in *S v Ncube and Others* at 265C.

⁴¹ *S v. Chokuramba*.

⁴² *Ibid.*, at 26–27. See also Korsah JA in *S v. A Juvenile*, at 101F, holding that any law which allows a person to be blindfolded and strapped to a wooden bench degraded and debased that person, and, if it is meant o that the person is subjected to a beating, is also dehumanises him.

⁴³ *Ibid.*, at 27.

⁴⁴ *Ibid.*, at 27. For comparative jurisprudence, see *S v Williams*, para. 90.

⁴⁵ *Ibid.*, at 28.

⁴⁶ *Ibid.*, at 28. See also *S v. A Juvenile* at 91A where Gubbay JA held that “[i]rrespective of any precautionary conditions which may be imposed, it is a procedure subject to ready abuse in the hands of a sadistic or overzealous official appointed to administer it. It is within his power to determine the force of the beating”.

⁴⁷ *S v. Chokuramba*, at 14.

in the circumstances would inevitably involve one human being assaulting another human being under the authority and protection of the law. Forcibly subjecting one person to the total control of another for the purposes of beating him or her is inherently degrading to the victim's human dignity.⁴⁸

At a very general level, the Court insisted that it is a matter of principle “that violence must not be used to enforce moral values or to correct behaviour. Section 52(a) of the Constitution prohibits the use of any form of violence as a means of achieving the objectives of punishment of a person convicted of an offence.⁴⁹ Highlighting the interconnectedness between the constitutional prohibition of violence and freedom from inhuman or degrading punishment, the Court observed that “[a]ny punishment which involves the infliction of physical and mental violence on the person being punished to cause him or her pain and suffering in execution of a sentence for an offence is an inhuman and degrading punishment”.⁵⁰ In its analysis, the Court referred to foreign jurisprudence in which courts largely characterised corporal punishment as institutionalised violence permitted by the law. The Court extensively referred to *Tyrer v. United Kingdom*,⁵¹ a decision in which the European Court of Human Rights held that “the institutionalised character of the violence was further compounded by the whole aura of official procedure attending the punishment and by the fact that those inflicting it were total strangers to the offender”.⁵² At the domestic level, the Court predominantly relied on *S v. A Juvenile* where Chidyausiku CJ made the following compelling remarks about corporal punishment as institutionalised violence:

It is a type of institutionalised violence inflicted on one human being by another. The only difference between it and street violence is that the inflictor assaults another human being under the protection of law. He might, during the execution of the punishment, vent his anger in a similar manner on his victims as the street fighter does. But, as I have pointed out above, the degree of force he elects to use is of his own choosing. Because this institutionalised violence is meted out to him, the victim's personal dignity and physical integrity are assailed. In the result the victim is degraded and dehumanised. In a street fight he can run away from his assailant or he can defend himself. The juvenile offender cannot because he is tied down to the bench.⁵³

More importantly, the Court insisted that the Constitution imposes on the state the duty to protect the right to bodily and psychological integrity from all forms of violence from public and private sources. The Court insisted, wrongly in my view, that the right to freedom from all forms of violence “does not leave room for any level of legalised violence against male juveniles convicted of offences”. In the Court's ‘mind’, it is not possible for the state to enforce the prohibition of violence and perform its duty to protect the rights to physical integrity and human dignity of the male child offender when the same state “inflicts pain and suffering on the juvenile through corporal punishment”.⁵⁴ There is a conceptual challenge associated with this claim. It is that the right to freedom from violence is not an absolute right and can be limited by a law of general application that serves a legitimate government purpose.⁵⁵ Accordingly, it was incorrect for the Court to hold that it is not possible for the state to justify limitations of the right to freedom from physical and psychological violence while at the same time sanctioning the imposition of corporal punishment on male child offenders convicted of certain crimes.

That corporal punishment amounts to violence appears to be beyond question, especially because of the clear jurisprudence from foreign courts and treaty monitoring bodies. The unavoidable

⁴⁸ *Ibid.*, at 26.

⁴⁹ *Ibid.*, at 27.

⁵⁰ *Ibid.*, at 28.

⁵¹ [1978] EHRR 1.

⁵² See *S v. Chokuramba*, at 30.

⁵³ *S v. A Juvenile* at 73F-G.

⁵⁴ *S v. Chokuramba*, at 38.

⁵⁵ Section 52(a) read with section 86(2) of the Constitution.

question here is whether corporal punishment achieves its objective of instilling discipline in children. Behavioural scientists have argued that “anyone who attempts to modify a young person’s behaviour by inflicting severe physical punishment is providing an aggressive model from which the individual may learn aggressive means of responding in interpersonal situations. Although because of fear of retaliation the individual may not display aggression at the time of punishment, he may model his behaviour on that of the punisher when he wishes to cope with or control the behaviour of others.”⁵⁶ In one of their studies, Naker and Sekitoleko found that corporal punishment has behavioural consequences whereby many children who experience it bully other children, or as adults use domestic violence as the use of corporal punishment teaches them that violence is an acceptable way of imposing their views on someone less powerful than themselves.⁵⁷

5 The Future of Corporal Punishment in All Settings in Zimbabwe

At a very general level, the abolition of judicial corporal punishment raises issues about the legitimacy or justifiability of the practice in such other settings as the schools, day care institutions and the family home. Even if the Court made the decision in a completely different setting, the judgment has resuscitated the discussion over the necessity of corporal punishment and acts as a pressure device for the state to consider revising its approach to the practice. One of the main issues that arise from the judgment is whether the Constitutional Court’s interpretation of corporal punishment as a violation of illimitable and non-derogable rights to dignity and freedom from inhuman or degrading punishment also applies to the use of corporal punishment in other settings. If it does, then the Court’s holding acts as a ray of hope that the practice will soon be abolished in all settings to ensure that children fully enjoy their right to be protected from inhuman or degrading punishment. Accordingly, whilst the judgment is not related to the education sector, it is likely to have far reaching implications for the use of corporal punishment to instil discipline in learners at primary and secondary schools.

5.1 *Envisioning the Abolition of Corporal Punishment in Schools and Other Similar Settings*

The partial reliance, by the Constitutional Court, on the manner in which judicial corporal punishment is administered to justify its abolition raises questions on whether the courts will also hold that corporal punishment in the schools is administered in an inhuman or degrading manner as well. Courts in other jurisdictions in the sub-region have held that using corporal punishment to instil discipline in students violates the constitutional prohibition of cruel, inhuman or degrading treatment or punishment. Describing the nature of corporal punishment in the school setting, Mohammed AJA held that even if its use is well regulated, it “remains an invasion on the dignity of the students sought to be punished. .. It is also equally degrading to the student sought to be punished, notwithstanding the fact that the head of the school who would ordinarily impose the punishment might be less of a stranger to the student concerned than a prison official who administers strokes upon a juvenile offender pursuant to a sentence imposed by a Court.”⁵⁸ Closer to home, the issue of whether corporal punishment is inhuman or degrading was touched upon by the Constitutional Court of South Africa in *S v. Williams*.⁵⁹ Langa J, as he then was,

⁵⁶ D. van Zyl Smit and L. Offen. ‘Corporal Punishment: Joining Issue’, 8 *SACC* (1984) 69, at 72–73.

⁵⁷ See generally D. Naker and D. Sekitoleko, ‘Creating a Good School Without Corporal Punishment, *Raising Voices* (2009) 9–13. See also UNICEF Uganda, *Creating Safer Schools: Alternatives to Corporal Punishment* (2008) 5 available at: <https://www.unicef.org/uganda/Alternatives_to_VAC_160812.pdf>.

⁵⁸ *Ex parte Attorney-General, Namibia: In re Corporal Punishment by Organs of State* 1991 (3) SA 76 (NmSC) at 93H-I. See also *Campbell and Cosans v. United Kingdom* (1980) 3 E.H.R.R. 531 at 556.

⁵⁹ 1995 (3) SA 632 (CC).

observed that “the issue of corporal punishment [in] schools is by no means free of controversy” and that “the practice has inevitably come in for strong criticism”. In his world, the “culture of authority which legitimates the use of violence is inconsistent with the values for which the Constitution stands”.⁶⁰ These foundational values include human dignity, equality and the protection of fundamental human rights and freedoms. As stipulated in the Constitution,⁶¹ Zimbabwean courts can partly draw inspiration from these and other foreign judgments to abolish corporal punishment in the education sector on the basis that it violates illimitable and non-derogable rights.

At the domestic level, the High Court has already abolished, without explaining the constitutional basis of its holding, corporal punishment in the schools and the family home. In *Pfungwa and Another v. Headmistress Belvedere Junior Primary School and Others*,⁶² the applicants filed for a declaratory order on the basis of the right to dignity (section 51 of the Constitution) and freedom from torture or inhuman or degrading punishment (section 53 of the Constitution), claiming that corporal punishment in schools and in the home was constitutionally impermissible. They launched proceedings on the basis of section 85(1)(d) of the Constitution which allows public interest litigation. The application revolved around a teacher employed by the first respondent’s school, who had used a thick rubber pipe to assault a seven year-old child for her mother’s failure sign her reading homework. The child suffered deep red bruises on her back, and was so traumatised that she refused to go to school the following day.

The applicants argued that no one, whether a school, a teacher or a parent at home should inflict corporal punishment on children. They argued that corporal punishment constituted physical abuse of children and that the practice caused physical trauma or injury to children. In part, they also claimed that corporal punishment in school was dangerous in that it was administered indiscriminately without any measure or control over the teachers.⁶³ The High Court held that the applicants’ case was sustained and it had a lot of substance, especially in light of the extensive reference the court made to the Constitution; case law from Zimbabwe and the region; expert evidence; and regional and international human rights instruments to which Zimbabwe is a party.⁶⁴ In addition, the Court held that the applicants’ argument was so convincing that it “was left with no option but to lean in their favour”.⁶⁵ Finally, the Court held that it was “satisfied that the application was not without merit” and referred the matter to the Constitutional Court for confirmation.⁶⁶ Unfortunately, the judgment is so short and very thin on the law that it is difficult to understand the legal reasons behind the High Court’s holding. At the moment, there is no final word on the abolition of corporal punishment in the schools and the family home, especially given that the Constitutional Court has not confirmed the order of the High Court to this effect.

In addition to relying on legislation permitting the use of corporal punishment,⁶⁷ primary and secondary schools have drawn authority to whip delinquent male children from Ministerial Circular P35. The Circular outlines the circumstances in which corporal punishment can be resorted to, from insubordination to indecency and many others. Nonetheless, even the Circular indicates that the Ministry is moving towards total abolition and calls on school heads and superintendents or housemasters, in the case of boarding schools, to “strive to cultivate a school

⁶⁰ *Ibid.*, para. 52.

⁶¹ Section 46(1)(e) of the Constitution provides that “[w]hen interpreting this Chapter, a court, tribunal, forum or body ... may consider relevant foreign law”.

⁶² High Court Harare (unreported case HH 148-17, HC 6029/16) [2017] ZWHHC 148 (03 March 2017).

⁶³ *Ibid.*, at 2.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*, at 3.

⁶⁶ *Ibid.*

⁶⁷ See section 241 of the Criminal Law (Codification and Reform) Act and section 68 of the Education Act.

climate where pupils will/can develop internal discipline which is not initiated by fear of punishment”. In Ministerial Circular P35, the Ministry of Education likened corporal punishment to a physical fight in which the pupil is not allowed to fight back. The child has to endure the agony, pain and deprivation of human dignity in silence. This emerging direction is followed up in the Education Amendment Bill. The preambular part of the Education Amendment Bill provides that its purpose is to amend the Education Act⁶⁸ to achieve various objectives that include, among others, the right to human dignity (section 51 of the Constitution); the right to freedom from physical or psychological torture or cruel or inhuman and degrading treatment or punishment (section 53 of the Constitution); and the right to equality and non-discrimination (section 56 of the Constitution). The Bill further provides that it is intended to amend certain provisions of the Education Act so that it complies with various provisions of the Constitution.

From a law reform perspective, the legislative reference to the illimitable and non-derogable rights to human dignity and freedom from torture or inhuman or degrading punishment, the very rights that have been historically relied upon by the Courts to justify the abolition of corporal punishment in other settings, clearly indicates that law makers wish to bring to an end the practice of corporal punishment in the education sector. This line of thought is confirmed in the substantive provisions of the Education Amendment Bill. Clause 15 of the Bill inserts section 68A into the Education Act and empowers the responsible minister to make regulations governing the discipline of pupils. Section 68A provides that the “regulations and any disciplinary policy shall not permit any treatment which (i) does not respect the human dignity of a pupil or amounts to physical or psychological torture, or to cruel, inhuman or degrading treatment or punishment”.⁶⁹ It further provides that the regulations and any disciplinary policy of a school should clearly stipulate the way in which any punishment may be administered.⁷⁰

The Education Amendment Bill also seeks to ensure that disciplinary measures are “moderate, reasonable and proportionate in the light of the conduct, age, sex, health and circumstances of the pupil concerned and the best interests of the child shall be paramount”.⁷¹ Apart from emphasising aspects of clarity, proportionality, reasonableness and the best interests of the child in implementing disciplinary measures, the Bill also explicitly provides that “under no circumstance is a teacher allowed to beat a child”.⁷² If the Bill ultimately becomes law, this provision will announce an end to the practice of corporal punishment in the education sector. This will signify the end of an era for one of the practices that have divided lawyers, educators, the general public and state functionaries. More importantly, however, the impending reforms are squarely anchored on the illimitable and non-derogable rights to human dignity and freedom from inhuman or degrading treatment of punishment. To this end, the Bill is framed in absolute language to ensure that there is no room for the administration of corporal punishment under any circumstances. This puts away possibilities for debate on whether or not one version of corporal punishment is moderate, reasonable and proportionate to the offence for which the child is charged.

5.2 Envisioning the Abolition of Corporal Punishment in the Family Home, Day Care Institutions, Foster Homes and Other Similar Settings

The abolition of corporal punishment in the family home and other settings raises different considerations and much of the analysis concerning human dignity and inhuman or degrading

⁶⁸ Act [Chapter 25:04].

⁶⁹ Draft section 68(A)(2)(a)(i) and (ii) of the Education Act.

⁷⁰ Draft section 68(A)(2)(b) of the Education Act.

⁷¹ Draft section 68A(3) of the Education Act.

⁷² Draft section 68A(5) of the Education Act.

punishment may not necessarily apply. For instance, there are no state functionaries present during the administration of corporal punishment and the person administering it is less of a stranger to the child than in the criminal justice system. It may also be safe to assume that a great majority of parents worldwide do not administer corporal punishment in a manner that matches the manner in which it is administered by correctional officers. In addition, the entire atmosphere of official procedure that attends the punishment in the criminal justice system is evidently absent in the family context, and the majority of parents presumably administer it with what they consider to be a genuine desire to redeem children from delinquent paths and life courses. These considerations may raise questions about whether or not whipping children in the family context amounts to an invasion of the rights to human dignity and freedom from inhuman or degrading punishment.

To begin with, it may be necessary to recall that parents have the right to freedom of conscience as protected in the Constitution. Section 60(1) (a) provides that “[e]very person has the right to freedom of conscience, which includes freedom of thought, opinion, religion or belief”. In addition, section 60(3) of the Constitution provides as follows:

Parents and guardians of minor children have the right to determine, in accordance with their beliefs, the moral and religious upbringing of their children, provided they do not prejudice the rights to which they are entitled under this Constitution, including their rights to education, health, safety and welfare.

This provision, it is arguable, imposes on parents the duty to spank wayward children to nurture them into a right direction which is sharply opposite to dehumanising and degrading treatment or punishment. The Constitution guarantees the parents the right to participate in a religious life of their choice (which may include the duty not to spare the rod or spoil the child), and section 60(3) provides that in upbringing their children according to their religious precepts provided that they do not infringe certain rights of the child. It is also arguable that if the law prevents parents from raising their children according to their religious practices they adhere to, it would have failed in fulfilling one of its purposes which is to serve the people and to meet their legitimate aspirations which, in this case, is to prevent children from misbehaving.

Similarly the Constitution entitles everyone to practice the cultural life of their choice as set out in section 63 of the Constitution. Generally, Zimbabwean cultures and traditions prescribe that a wayward child should be spanked in order for them to grow up rightfully as disciplined members of society. This line of thought supposes that corporal punishment should be meted out on juveniles to enable them to grow into adults who fit into their society as opposed to nurturing criminals and delinquents.

Courts in other jurisdictions have had occasion to analyse the relationship between parents’ cultural and religious identity rights and children’s right to freedom from violence. In *Christian Education South Africa v. Minister of Education*,⁷³ the Constitutional Court of South Africa found the law prohibiting corporal punishment in schools to be a reasonable and justifiable infringement of parents’ right to religious freedom. Parents with children learning at a private boarding school had argued that their right to religious freedom allows them to authorise school authorities to chastise them in light of their Christian values. A unanimous Constitutional Court held as follows:

It should be observed, further, that special care has been taken in the text expressly to acknowledge the supremacy of the Constitution and the Bill of Rights. Section 31(2) ensures that the concept of rights of members of communities that associate on the basis of language, culture and religion, cannot be used to shield practices which offend the Bill of Rights. These explicit qualifications may be seen as serving a double purpose.

⁷³ 2000 (4) SA 757 (CC).

The first is to prevent protected associational rights of members of communities from being used to “privatise” constitutionally offensive group practices and thereby immunise them from external legislative regulation or judicial control. This would be particularly important in relation to practices previously associated with the abuse of the notion of pluralism to achieve exclusivity, privilege and domination. The second relates to oppressive features of internal relationships primarily within the communities concerned, where section 8, which regulates the horizontal application of the Bill of Rights, might be specially relevant’ ... *Prohibiting the parent’s right to freedom of religion and culture is not the primary, but secondary object of prohibiting corporal punishment. It is an incidental result of a general application of the child’s right not to be subjected to violence from private sources.*⁷⁴

The prohibition of violence is a very useful instrument in determining the approach to be adopted by the courts with regards to corporal punishment administered by private and public bodies, especially given the emphatic protection it accords to every child’s right to bodily and psychological integrity. Internationally corporal punishment is regarded as violence against children and as a breach of children’s fundamental human rights and freedoms. Arbour, the United Nations High Commissioner for Human Rights, places corporal punishment within the meaning of violence against children. She argues that “[v]iolence against children is a violation of their human rights, a disturbing reality of our societies. It can never be justified whether for disciplinary reasons or cultural tradition. No such thing as a ‘reasonable’ level of violence is acceptable. Legalised violence against children in one context risks tolerance of violence against children generally.”⁷⁵ This approach is consistent with that adopted by international treaty bodies such as the Committee on the Rights of the Child.

Perhaps the most compelling arguments against corporal punishment have been made by the Committee on the Rights of the Child. The Committee highlights that the right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (Articles 19, 18, 37) and imposes on states parties the obligation to move quickly to prohibit and eliminate corporal punishment and underlines the importance of legislative and other awareness raising and educational measures that promote the use of non-violent forms of raising children.⁷⁶ Apart from being an obligation under the CRC, addressing and eliminating corporal punishment of children is identified as a key strategy for reducing and preventing all forms of violence in societies.⁷⁷ The Committee has reiterated that there are no exceptions to be made when interpreting the phrase ‘all forms of violence’:

The Committee has consistently maintained the position that all forms of violence against children, *however light*, are unacceptable. ‘All forms of physical or mental violence’ does not leave room for any level of legalised violence against children. Frequently, the severity of harm and intent to harm are not prerequisites for the definition of violence. States parties may refer to such factors in intervention strategies in order to allow proportional responses in the best interests of the child, but definitions must in no way erode the child’s absolute right to human dignity and physical and psychological integrity by describing some forms of violence as legally and or socially acceptable.⁷⁸

More importantly, the Committee characterises corporal punishment as an infringement of both the right to freedom from violence and the illimitable right to dignity, an interpretation that was followed by the apex Court in *S v. Chokuramba*. In the context of corporal punishment, the concept of state intervention in the private family arises from two strands. First, it arises from the need to protect children against the unreasonable exercise of the rights responsibilities and powers that attach to the office of parenthood. The abuse of these responsibilities and powers may be perpetrated by parents, guardians, caregivers, family members or anyone exercising

⁷⁴ *Christian Education South Africa*, paras. 26–27.

⁷⁵ United Nations Human Rights Office of the High Commissioner, ‘Violence against children’, available at <<http://www.ohchr.org/EN/NewsEvents/Pages/ViolenceAgainstChildren.aspx>>.

⁷⁶ General Comment No. 8, *supra* note 2, para. 2.

⁷⁷ General Comment No. 8, *supra* note 2, para. 3.

⁷⁸ General Comment No. 13, *supra* note 2, para 13. *See also* General Comment No. 8, *supra* note 2, para. 18.

responsibilities and rights. Thus, state intervention is primarily intended to ensure that the state protects and promotes children's rights at the family level. When it comes to corporal punishment, the prohibition of violence implies that the state, not parents or caregivers, generally has the ultimate power and duty to draw the boundary between justifiable corporal punishment that constitutes 'moderate chastisement' and abusive corporal punishment that constitutes violence which cannot be constitutionally justified.

More importantly, and this is the second strand, state intervention in violence related issues arises from the recognition that family relations are characterised by gross inequality and it is therefore necessary for the state to intervene in order to promote the rights and interests of vulnerable persons, whether women or children. In the main, this strand also challenges the traditional distinction between that which belongs to the state (the public sphere) and that which belongs to the family (the private sphere).⁷⁹ To this end, the drafters of the Constitution recognised that the public/private dichotomy and family privacy marginalises children's rights as these concepts construct the family as an institution outside both the state and public law.⁸⁰ As Montgomery would have it, this constitutes a realisation that family privacy has operated to "perpetuate structures of disadvantage by hiding them from public scrutiny", and this demonstrates why it is important to draw "lines of intervention" to protect the rights and interests of defenceless members of the family.⁸¹ Families should merely have as much privacy and parents just as much autonomy as the state, through the law, confers on them.

The inclusion of the phrase 'private sources' in section 52(a) renders it compelling with regards to violence in the family home. In the case of *S v. Baloyi*,⁸² the Constitutional Court of South Africa held in respect of domestic violence that "the specific inclusion of private sources emphasises that serious threats to security of the person arise from private sources ... and has to be understood as obliging the state directly to protect the right of everyone to be free from private or domestic violence".⁸³ Sachs J stated that the prohibition of violence obliges the state to take appropriate steps to reduce violence in public and private life and that, coupled with the special duty to protect children, it represents "a powerful requirement on the state to act".⁸⁴ He further observed that what distinguishes family violence from other kinds of crime "is its hidden, repetitive character and its immeasurable ripple effects on our society and, in particular, on family life. It cuts across class, race, culture and geography, and is all the more pernicious because it is so often concealed and so frequently goes unpunished".⁸⁵ These remarks are mainly applicable to children, who are victims of ongoing corporal punishment in the family home, day care institutions and other similar settings. It would not be difficult to show that corporal punishment harms children as "[t]he physical, emotional and psychological scars of violence can have severe implications for a child's development, health and ability to learn".⁸⁶

⁷⁹ For a detailed discussion of the public/private distinction and the need to adopt a more guarded approach, see A. Boniface, *Revolutionary Changes to the Parent-Child Relationship in South Africa, with Specific Reference to Guardianship, Care and Contact*, thesis submitted in partial fulfilment of the degree of Doctor Legum in the Faculty of Law, University of Pretoria (2007) 393–397.

⁸⁰ J. Goldstein, A. Freud and A. Solnit, *Before the Best Interests of the Child* (1980) 4.

⁸¹ See J. Montgomery, 'Children as Property', *Modern Law Review* (1988) 323, at 332. At 328, the author argues in the following terms: "Clearly there must be a safety net, and no non-interventionist stance can be absolute. Children must be protected against parents who fail to consider their interests but the definition of their interests is not to be given by the state in all cases. In a liberal democracy, the thresholds which justify state intervention should be defined by those interests which the children of that society have in common, not by a relatively narrow paradigm of the family created by part of that society only."

⁸² 2002 (2) SA 425 (CC) para. 11.

⁸³ *S v. Baloyi* (Minister of Justice and Another Intervening) 2002 (2) SA 425 (CC) para. 11.

⁸⁴ *Ibid.*, para. 47.

⁸⁵ *Ibid.*

⁸⁶ United Nations Human Rights Office of the High Commissioner, *supra* note 75.

Perhaps the strongest argument in favour of finally banning the use of physical punishment entirely is that social attitudes have been changing radically over the last century. As such, it is now difficult to justify the law protecting adults from assaulting each other, whilst allowing adults to assault their smaller and more vulnerable offspring. Children, especially boys, are the only persons in the country whose right to physical and psychological integrity and to protection from all forms of inter-personal violence is not yet supported by the law and cultural practices.⁸⁷ Furthermore, research shows that physical punishment is less effective than other forms of discipline, but also that its use is associated with long-term negative psychological effects.⁸⁸

When parents use physical punishment as a form of discipline, they indicate to their children that violent and aggressive behaviour is an acceptable method of dealing with stressful situations, thereby reinforcing violent behaviour in society.⁸⁹ Arguably, the law should “send out a clear message about what behaviour is unacceptable in families or what we, as a society, feel about violence”.⁹⁰ Unfortunately, and especially in the African context, the use of corporal punishment is often justified on the basis of the right to culture and references to biblical values, thereby building a culture of violence that we should be moving away from. The practice of corporal punishment continues to subsist regardless of the fact that it is inconsistent with numerous fundamental rights enshrined in international and domestic human rights instruments.

6 Conclusion

Generally, corporal punishment can be characterised as a violation of the illimitable and non-derogable rights to human dignity and freedom from inhuman and degrading treatment. The Zimbabwean Constitution makes no specific mention of corporal punishment as an exception to the rights to dignity and freedom from torture or cruel, inhuman or degrading treatment or punishment. In light of this deliberate omission of corporal punishment as an exception to these absolute rights and regional or international human rights instruments that have characterised corporal punishment as a violation of human dignity, physical integrity and self-esteem, it is difficult within the wording of the Constitution to justify the continued use of corporal punishment against children. In the criminal justice context, the courts have already held that judicially sanctioned whipping is unconstitutional because it violates the illimitable rights to human dignity and freedom from inhuman or degrading punishment.

It remains to be seen whether the Constitutional Court will also extend its reasoning to corporal punishment in other settings. If it does, it would have followed the path prescribed by international human rights instruments and decisions of courts in other jurisdictions. In Israel, for instance, the Supreme Court, in *Plonit v. Attorney General*,⁹¹ handed down a decision prohibiting all forms of corporal punishment of children and eliminating the defence of reasonable force. The Court found that corporal punishment as an educational method not only fails to achieve its goals, it also causes physical and emotional damage to the child which may leave their mark on him or her in adulthood.⁹² The Court concluded that any type of corporal punishment “distances us from our goal of a society free of violence”. In Namibia, Berker CJ, dissenting, also once

⁸⁷ Cf. with the views of the United Kingdom Commission on Children and Violence in its 1995 report, at 15, available at <<https://gulbenkian.pt/uk-branch/publication/children-and-violence/>>.

⁸⁸ E. Gershoff, *Corporal Punishment by Parent and Associated Child Behaviour and Experience: A Meta-Analytic and Theoretical Review* (2002) 544.

⁸⁹ *Supra* note 87, 46–55.

⁹⁰ Northern Ireland Office of Law Reform (2001), 42.

⁹¹ 54 (1) PD 145 (Criminal Appeal 4596/98).

⁹² *Ibid.*, para. 6.

observed that even if very moderately applied the fact remains that any type of corporal punishment results in some impairment of dignity and degrading treatment.⁹³

Apart from the illimitable rights to dignity and freedom from inhuman or degrading punishment, the right to freedom from violence is a central element of calls for total abolition of corporal punishment in all settings. At the heart of this approach is the fact that the Constitution anticipates parents and the state to protect children from all forms of punishment that are degrading and indignifying. The central values of human dignity and freedom do not seem to anticipate or require the use of physical force to achieve scholarly correction, the rehabilitation of the offender or children's respect for their parents. Accordingly, the unconstitutionality of the punishment does not lie in the severity or size of the stick with which it is administered, but strictly in its inconsistency with the scope of the applicable constitutional rights. In addition, it matters not whether or not corporal punishment is administered in the family home or the school or the prison. The debate should not be about the place where the crime is committed, it should be about the wrongfulness and unconstitutionality of the crime itself, wherever and however committed.

There are other compelling practical arguments against the use of corporal punishment in the family home, the education sector and other similar settings. The first is the availability of alternatives to 'treating' and 'redeeming' children from delinquent paths by putting them on the other end of the 'stick'. There are other ways to enforce discipline, motivate a child and condition behaviour than to resort to violence and the infliction of physical pain. Using a whip constitutes violence and may send wrong signals about the acceptability of force and assault as methods for resolving differences. Every child has a right to be and to feel to be safe in all environments, including the schools and the family home. It is important for society to step up efforts to ensure safe school and home environments for children, especially given that many violations take place in the private sphere and that the Declaration of Rights also directly governs private relationships.⁹⁴

Another argument relates to the lack of guidelines on the extent of permissible force teachers and parents should use when inflicting corporal punishment. Without these guidelines, it is difficult to distinguish between unrestrained assault on children and moderate chastisement to encourage respect for instructions given by adults. Besides, parents and teachers are not trained on the permissible level of restraint to be exercised when inflicting physical punishment. To make matters worse, there is no standard instrument to be used to administer corporal punishment in the schools and the family home. Even if the state were to produce a standard instrument, the instrument will necessarily be lifted to different levels and be used with different degrees of force, thereby subjecting children to different levels of punishment even if the number of 'strokes' the child receives is the same. Assuming that it is possible to address these differences, the state will still have to monitor whether every teacher or parent administers corporal punishment in the manner prescribed in the legislation and the relevant regulations. Abolishing corporal punishment in all settings will address all of these challenges.

The final question we may need to ask is whether corporal punishment in the schools and the family achieves its intended purposes. Arguably, corporal punishment is not effective in the long run as hurting children does not alter their underlying attitudes, values and beliefs. It may turn out that positive parenting achieves better results than subjecting the child to excruciating pain in the

⁹³ *Ex Parte Attorney General* 1991 (3) SA 76 (NmSc) para. 90.

⁹⁴ Section 45(2) of the Constitution.

hope that the child will heed the advice given during after the whipping. As Mushohwe would have it:

Children merely need discipline which refers to teaching them self-control, how to consider alternatives for behaving in a particular manner, motivation for acting differently, understanding the consequences of wrongful behaviour and developing an awareness of what they ought to be doing right. Discipline as opposed to corporal punishment ideally should emphasize positive reinforcing of good behaviour and positive/negative reprimanding of bad behaviour without using physical punishment. Such child discipline should also be done in addition to an ongoing process of trying to solve the root causes of children engaging in unwanted behaviour, such as stressful or abusive family situations and poverty among others.⁹⁵

Furthermore, the focus of the analysis should be on the potential effect of the practice on the child, from physical injury to psychological suffering and the culture of violence that the practice appears to promote. More importantly, the legitimacy of the practice should be interrogated from the lens of the rights of the child not to be subjected to abuse or degrading treatment and to have his or her best interests protected in all settings. Once this approach to the practice is adopted, it becomes imperative to shelve all contestations based on the parent's or guardian's right to religion or culture as our focal point becomes the rights of the child who is invariably 'on the other end of the stick' and not on the rights of the person or institution administering corporal punishment.

⁹⁵ B. Mushohwe, 'A Ray of Hope for the Outlawing of Corporal Punishment in Zimbabwe: A Review of Recent Developments', 3 *University of Zimbabwe Student Law Review Journal* (2017) 1, at 10.

An Overview of the Practice and Procedure When Litigating Election Petitions in Zimbabwe

*Tarisai Mutangi**

1 Introduction

For as way back as elections existed, disgruntled candidates have always sought to reverse the result of an election they thought they had won.¹ The manner and form taken by these challenges have changed and evolved over time depending on jurisdictions. For instance, in England, “jurisdiction over disputed elections was exercised by the Monarch personally, then by the courts, and then by Parliament until finally, in the 1860s, Parliament ceded its power to the courts in the form of the election petitions jurisdiction”.² By the time Britain colonized Zimbabwe, it appears jurisdiction over elections was already exclusively a judicial issue. Electoral petitions in Zimbabwe appear to have been the domain of courts of law, which continues to be the case today.

In contemporary electoral systems, the ‘free, fair, and regular elections’ matrix has become entrenched in many constitutions as the yardstick for a functioning representative democracy. In this sense, assumption of public office is based on the ballot as opposed to discretionary political appointments or unconstitutional changes of government. The matrix above speaks to the existence of the possibility that elections may not be free, fair, regular or credible. Once this status quo obtains, the law invariably provides for procedures and institutions mandated to deal with disputes arising from the conduct of elections. These disputes are known as ‘electoral disputes’ or ‘electoral challenges’.

As is the case with elections, electoral disputes fall into three distinct but corollary phases, namely, the pre-election, election and post-election phases. Every general election goes through a pre-election phase, the actual election phase as well as the environment that follows the aftermath of polling. Electoral disputes are associated with the phase during which they occur thereby prefixing them with ‘pre’ or ‘post’ election identity. Needless to state that electoral disputes manifest in different forms and species depending on the phase during which they arise. This paper deals with the post-election period and in particular with the resolution of disputes that evolve around electoral returns or results.

Once disputes have manifested, procedures are kick-started through which these disputes are resolved. In Zimbabwe, Section 93 of the Constitution provides for election petitions that deal with the election to the office of the president and vice president. On its part, the Electoral Act³ establishes the Electoral Court, a specialist division of the High Court,⁴ which exclusively presides over all manner of electoral disputes in the country. Presumably in a bid to efficiently regulate

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¹ C. Morris, ‘From “Arms, Malice, and Menacing” to the Courts’, 32:2 *Legal Studies* (2012) p. 226.

² *Ibid.*

³ Electoral Act [Chapter 2:03].

⁴ See section 161 of the Electoral Act, which provides that the Electoral Court is a division of the High Court, departing from the earlier position that it was a specialised court with jurisdiction as provided in the Act.

these processes, the Electoral Court Rules of 1995 (hereinafter ‘Electoral Court Rules’) were promulgated and remain in force to this day to regulate the conduct of election petitions before this Court. The Constitution, Electoral Act, Electoral Court Rules and the Constitutional Court Rules⁵ read together constitute a compass that guides the Electoral Court and the Constitutional Court in relation to procedure in electoral petitions before these Courts, the form which the petitions themselves must adopt as well as the miscellany incidental to the prosecution of an election petition in Zimbabwe.

2 The Place of Elections in a Democracy

While free, fair and regular elections have largely become the yardstick for measuring state performance in terms of consolidating democratic values within its borders, elections generally promote democracy in a number of ways. First, elections are a vehicle by which the general public vests state power to govern in an elected government. In other words, through this representation, the electorate governs through elected representatives. It must be noted that in an election, the public expresses itself in terms of selecting representatives to advance their interests in government by voting them into public offices, while part of that public, over and above selecting office bearers, makes itself available to be voted into public office by offering candidature.

However, as Hatchard *et al.* argue, “the fact that elected members of parliament are *representatives* of the people does not mean that they are necessarily *representative* of the people”.⁶ This means that the possibility always exists for those elected to run the democratic and constitutional errands of the electorate to abandon the mandate and pursue self-serving agendas. In many cases political party preferences trump upon electorate preferences especially in systems where ‘whipping’ of representatives is allowed. On its part, the electorate may lack effective measures to hold their agents accountable to them, and to rein them in for going on a frolic of their own. This is because the same persons elected to represent the people often pursue a legislative policy that continues to whittle down the electorate’s power to recall or withdraw mandate.

The problem of hijacking representative democracy has led to some states adopting strategies to restore this representation as much as possible. One of the strategies include the inclusion of representatives of special groups such as people living with disabilities, minorities, youth and women who have largely become beneficiaries of the quota system strategy.⁷ Nonetheless, there are guarantees that such specialised assigned individuals will not divert from the mission. However, where true representative democracy remains, elections guarantee institutionalisation of transparency, accountability and participatory democracy especially in Africa where states continue to emerge from the scourge of colonisation.

Second, elections are a way to ensure constitutional and peaceful change of governments the world over. It has been argued that there is need to entrench a “political culture of change of power based on holding of regular, free, fair and transparent elections conducted by competent,

⁵ Published as Statutory Instrument 61 of 2016.

⁶ J. Hatchers *et al.*, *Comparative Constitutionalism and Good Governance in the Commonwealth: An Eastern and Southern African Perspective* (2004) p. 124.

⁷ The gender-based quota system in legislatures has been introduced many African states with a view to encouraging and guaranteeing the participation of women in decision-making and politics in light of the adversities they have to confront on account of male dominance in most legislatures.

independent and impartial national electoral bodies” in Africa.⁸ Unconstitutional changes of government have been identified as the key drivers of insecurity, instability and violent conflict in Africa. In fact the African Union Assembly of Heads of State and Government (hereinafter ‘AU Assembly’) has recently criminalised unconstitutional change of government upon adopting the Protocol on the Amendments to the Statute of the African Court of Justice on Human Rights (hereinafter ‘Malabo Protocol’).⁹ This development buttresses the proposition that unconstitutional change of government is inimical to democracy. To that end, free, fair and regular elections are regarded as the ultimate antidote to the pandemic of *coups de tat* as they serve to refresh the mandate to rule over people.

Third, elections that are regular, free and fair confirm legitimacy on the elected government as having the mandate to govern. At its core, democracy insists that the power of a government to exercise its power is driven from the people. This power is bequeathed by way of elections after which any government could claim that it exercises governmental power at the instance and or behalf of the people. In fact all arms of state such as the executive,¹⁰ judiciary¹¹ and legislature¹² derive their legitimacy from the people although the judiciary suffers from contrary claims more than its two counterparts do. Without elections as a way to establish a government, any authority is divested of governmental credentials. So is the government that assumes power by way of a contested election. It often resorts to tyranny and rule by law in order to ‘mobilise’ legitimacy and recognition by the electorate.

Similarly, the election dispute resolution mechanism must be of unquestionable integrity and fairness so that the outcome of that process could be accepted as fair and justice otherwise questions of illegitimacy will always linger throughout the lifetime of a particular political administration.

2.1 International Legal Framework on Elections Relevant to Zimbabwe

This sub-section deals with the international framework on elections with relevance to Zimbabwe. As is trite law now, the consensual nature of international law follows that only those legal obligations a state has accepted by way of ratification or any other method of acceptance will bind that state. Accordingly, this discussion will only involve legal obligations whose source Zimbabwe has accepted as legally binding. It is not an open-ended discussion on international human rights law pertaining to elections.

It is unfortunate to note that electoral law is a discipline of law international law has very little to say or regulate. This branch of law is predominantly regulated through constitutional law and attendant institutions such constitutions establish. In all this, international law and supervisory

⁸ Preamble to the African Charter on Democracy, Elections and Governance (2007). A copy is available in C. Heyns and M. Killander (eds.), *Compendium of key Human Rights Documents of the African Union* (2010) pp. 131–142.

⁹ Article 28E of the Statute of the African Court of Justice and Human Rights provides for the crime of unconstitutional change of government as prosecutable before the future African Court of Justice and Human and Peoples’ Rights subject to the ratifications of the Malabo protocol to trigger its coming into force and operationalisation of the court it creates.

¹⁰ Section 88(1) of the Constitution provides that: “Executive authority derives from the people of Zimbabwe and must be exercised in accordance with this Constitution.”

¹¹ Section 162 of the Constitution of Zimbabwe provides that: “Judicial authority derives from the people of Zimbabwe and is vested in the courts ...”

¹² See section 117(1) of the Constitution which provides that “legislative authority is derived from the people and is vested in and exercised in accordance with this Constitution by the Legislature”.

institutions have always ‘deferred’ to national authorities to adopt a political system that fits their respective context, albeit with a proviso that whatever system is adopted it must be compatible with a state’s international legal obligations engaged by the electoral law.¹³

The International Covenant on Civil and Political Rights (hereinafter ‘ICCPR’) provides in Article 25 as follows:¹⁴

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.

...

On its part, Article 13 of the African Charter on Human and Peoples’ Rights (hereinafter ‘African Charter’) vests in every citizen “the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law”.

The United Human Rights Committee (hereinafter ‘UN Human Rights Committee’), the treaty body that oversees the implementation of the ICCPR, adopted General Comment No. 25 on Participation in the public affairs and the right to vote¹⁵ (hereinafter ‘General Comment 25’). By their nature, general comments or recommendations by treaty-bodies serve as authoritative interpretations of treaties by institutions so established to oversee implementation.¹⁶ The UN Human Rights Committee commented that “citizens participate directly in the conduct of public affairs when they exercise power as members of legislative bodies or by holding executive office”,¹⁷ or during the constitution making process when they adopt same by way of referendum or election.¹⁸ However, participation through representatives is by way of elections and such representatives are expected to only exercise power as has been conferred upon them in accordance with constitutional provisions.¹⁹ Further, “genuine periodic elections ... are essential to ensure the accountability of representatives for the exercise of the legislative or executive powers vested in them”.²⁰

General Comment 25 then goes on to deal with processes inherent to elections such as registration of voters, the need for voters to express themselves and associate freely for purposes of effective participation. However, the underlying principle is that all measures expected to be adopted by states are designed to ensure effective participation, directly or otherwise, by citizens in the public affairs of the state.

¹³ UN Human Rights Committee General Comment No. 25, para. 21.

¹⁴ The International Covenant on Civil and Political Rights (1969).

¹⁵ United Nations, *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies* HRI/GEN/1/Rev.8, 8 May 2006, p. 207.

¹⁶ The ICJ has stressed that interpretations by institutions established to do so must be given deference over any other interpretations.

¹⁷ UN Human Rights Committee General Comment No. 25, para. 6.

¹⁸ *Ibid.*

¹⁹ UN Human Rights Committee General Comment No. 25, para. 7.

²⁰ *Ibid.*, para. 8.

Whereas the African Commission on Human and Peoples' Rights²¹ [hereinafter 'African Commission') is yet to have an occasion to issue a general comment on the African perspective of the right to participate in the public affairs of a state and right to vote, it has rendered a number of decisions in which the right was contested as having been violated by state parties to the African Charter. In *Jawara v. The Gambia*, the banning of certain individuals from standing for political office was found to be a violation of Article 13 of the African Charter.²² *Lawyers for Human Rights v. Swaziland*²³ was a case in which a proclamation banning political parties in Swaziland was declared contrary to the African Charter, while in *Gorji-Dinka v. Cameroon* a unilateral act of removing voters from the voter's register was also found by the UN Human Rights Committee to be a violation of Article 25 of the ICCPR.²⁴

Though not binding, the African Union Declaration on the Principles Governing Democratic Elections in Africa (hereinafter 'AU Declaration') set the tone in Africa in terms of the increasing importance of holding free, fair and regular elections.²⁵ As regards election petitions, it provides in Part III that states must:

Establish impartial, all-inclusive, competent and accountable national electoral bodies staffed by qualified personnel, as well as *competent legal entities including effective constitutional courts to arbitrate in the event of disputes arising from the conduct of elections* (emphasis added)

The above provision was quoted verbatim in subsequent regional and sub-regional principles on the conduct of elections and election observation. Article 7.3 of the SADC Principles and Guidelines Governing Democratic Elections and paragraph 1 of the Guidelines for African Union Electoral Observation and Monitoring Missions have restated the principle verbatim.²⁶

On its part, the African Charter on Democracy, Elections and Governance (hereinafter 'African Charter on Democracy') introduces a new dimension to the need to establish competent institutions to deal with election disputes. In Article 17(2), this Charter provides for an obligation for states to "establish and strengthen national mechanisms that redress election related disputes in a timely manner". The new aspects added to the element of dispute resolution are the need to 'strengthen' these mechanisms as well as ensuring that these institutions determine election-related disputes 'timely'. It then follows that it is not sufficient to establish special courts to deal with election-related disputes while the rules of procedure thereof do not emphasise on the need for urgency in resolving such disputes.

The cumulative principle enshrined in the text of treaties and consequent interpretations in general comments and case law is that effective participation is the only way that justifies exercise of governmental power by elected representatives in society including voters themselves. It also justifies exercise of executive and legislative power in accordance with the constitution, which in turn is also adopted by a process in which citizens effectively participate. Governance is largely predicated on the electoral processes; hence we argue here that contestations of election results are fundamental processes that go beyond the interests of the candidate involved, but represent

²¹ This is an 11 member treaty body that oversees the implementation of the African Charter, a treaty that establishes the institution in terms of Part 111 thereof.

²² *Jawara v. The Gambia* (2000) AHRLR 107 (ACHPR 2000) paras. 70 and 75. See also *Modise v. Botswana* (2000) AHRLR 25 (ACHPR 1997).

²³ *Lawyers for Human Rights v. Swaziland* (2005) AHRLR 66 (ACHPR 2005).

²⁴ *Gorji-Dinka v. Cameroon* (2005) AHRLR 18 (HRC 2005) para. 5.6.

²⁵ AHG/Decl.1 (XXXVIII), 2002.

²⁶ EX.CL/91 (V) Annex II.

the aggregated interest of voters who voted for or against the candidate and whose preference is threatened by the electoral dispute.

3 Election Petitions and Fundamental Rights

In view of the revelations above on the international legal framework vis-à-vis rights to public participation and vote, we have made a case for the link between election petitions and human rights. Much as general comments and case law did not specifically address the issue of election petitions, it is common cause that petitioning election results is a process that affects the outcome of voters' freedom of expression exercised by way of the ballot; hence it is fundamental to both direct and indirect participation in public affairs and to voting. The ICCPR reiterates that any election system in place in a given state "must be compatible with the rights protected by article 25 and must guarantee and give effect to the free expression of the will of the electors".²⁷

Therefore it must follow that, first, where an electoral malpractice has had the effect of defeating the outcome of voters' free expression, then the electoral dispute resolution in place must be of such a nature that it preserves the actual outcome of the voting process. This objective is dependent on the procedure as well as the integrity of the institutions that handle the disputes. It is submitted here that in the result electoral dispute resolution is an integral part of exercising the rights to public participation, right to vote and freedom of expression in the context of electing representatives or adopting a constitution by way of a referendum.

Second, election petitions, which are predominantly of a civil nature, are part of legal proceedings anticipated in the context of the right to a fair hearing.²⁸ Thus, once a candidate has well-founded grounds that an electoral fraud or any other malpractice was deployed by the 'winning' candidate leading to his or her defeat in that election, the law must provide for a procedure to approach courts of law or any other equally impartial and competent forum to enable the exercise of rights. Accordingly, the election petition procedure is for all intents and purposes inextricably linked to the exercise or enjoyment of fundamental rights and any law that regulates such process is subject to interpretation during which the constitution is the ultimate benchmark.

4 Election Petitions in Zimbabwe – The Legal Framework and Brief Historical Perspective

Historically, elections in Zimbabwe were regulated by a number of pieces of legislation as a result of the dichotomy between local government, parliamentary and presidential elections being maintained prior to the adoption of the 2013 Constitution.²⁹ Section 158 of the Constitution now provides that "general elections to local authorities must take place concurrently with presidential and parliamentary general elections". It follows that it is no longer a possibility for any one of the three levels of election to be held at a different time from the other two unless in the case of by-elections to fill vacant seats. Yet on their part, election petitions have been regulated by consistent pieces of legislation such as the Electoral Act and much later the Electoral Court Rules

²⁷ UN Human Rights Committee General Comment No. 25, para. 21.

²⁸ See Article 14(1) of the ICCPR and Article 7(1) of the African Charter. Both instruments provide that the right to fair trial includes legal proceedings for the determination of civil rights between parties. The contention is that an election petition is a civil proceeding that seeks to determine the rights of the petitioner regarding the outcome of an election and that aspect alone links it to fundamental rights.

²⁹ Statutory Instrument 155A of 1985; Urban Councils (Election) Regulations, 1987 (SI 210 of 1987); the Presidential Powers (Temporary Measures) (Urban Councils) Regulations 1995 (SI 148A of 1995) were promulgated in terms of the Presidential Powers (Temporary Measures) Act [Chapter 10:20]; The Electoral Act, 1979.

(1995), and Constitutional Court Rules were enacted and added to the substantive legal framework.

Election results have always been contested before courts of law in Zimbabwe, be they local authority, parliamentary or presidential. The first reported case was that of *Pio v. Smith*,³⁰ which involved a challenge to a parliamentary election result of elections held on 27 June 1985. It is intriguing to note that the grounds of contesting the election result were more or less similar to the bases of petitions in recent years, as will be demonstrated in this contribution. In other words the courts are continually called upon to interpret the same provisions over and over again. This study will reveal whether courts have been consistent in their interpretation and the basis upon which they found such interpretation. While the number of petitions was in drips and drabs in the 1980s, they reached influx levels at the turn of the millennium. It is submitted here that the Zimbabwean political landscape was dominated by one political party to the extent of being akin to a one-party state although the legal framework was receptive to multi-party democracy.

The proliferation of political parties on the political landscape resulted in meaningful contestation during election and the temptation to win at all costs gathered momentum one election after another. The political paradigm shifted in the late 1990s with the arrival of the Movement for Democratic Change (MDC) in 1999. It posed realistic challenges to ZANU-PF establishment beginning with the 2000 and 2002 parliamentary and presidential elections, respectively, which saw ZANU-PF losing its two thirds majority in parliament for the first time since 1980.³¹ Thereafter, the number of election petitions soared in every general election. The reason could be that winning elections is becoming more and more challenging with more players entering the fray. In some instances players have even resorted to election-related violence which reached catastrophic levels in the 2008 harmonised elections. In terms of numbers, in all probability the 2013 general election produced the greatest number of petitions.³² At least 100 electoral petitions were filed to challenge parliamentary results. A presidential election petition was also filed and later withdrawn before it could be determined by the Constitutional Court of Zimbabwe (hereinafter 'CCZ').³³

4.1 *The 2013 Constitution and Electoral Petitions*

Before venturing into the specific constitutional provisions on electoral petitions, it is necessary to make brief comments on provisions on the right to vote. Section 67 of the 2013 Constitution provides for political rights. This is the section that largely deals with the right to vote as well as freedom of association and expression in relation to participation in political party activities related to the right to vote. The framers of the 2013 Constitution clearly took into account the circumstances in which the Constitution was adopted. Prior to its adoption, there had been widespread incidences of people forced to attend political meetings against their will and inability to freely take part in the political activities and causes of their parties. Harassment of opposition political parties was widespread and in many cases they were prevented from holding political

³⁰ 1986 (3) SA 145 (ZH).

³¹ MDC won 57 seats, ZANU PF 62 and one for independent candidate.

³² The MDC filed 95 petitions challenging parliamentary election results, a single presidential election petition while ZANU PF filed six petitions to challenge parliamentary election results. Therefore, a total of 101 election petitions were filed in the aftermath of the 2013 harmonised elections.

³³ *Tsvangirayi v. Robert Mugabe and Others*, Application No. CC/13. The petitioner resolved to withdraw the petition upon failing to obtain an order in the Electoral Act that would have enabled him to access voting information contained on sealed ballot boxes. He argued that such information would have enabled him to better prosecute the petition by relying on official information from the voting process.

meetings to strategize for on-coming elections. Therefore, the Constitution being a largely politically negotiated document, it became critical that section 67(2) thereof restates some aspects associated with the full exercise of the right to vote.

Section 93 of the Constitution deals with the ‘challenge to presidential election’. In other words it is the primary provision regarding the manner in which the challenge must be processed and prosecuted. A presidential election challenge is initiated by “lodging a petition or application with the Constitutional Court within seven days after the date of the declaration of the results of the election”.³⁴ Once a challenge is lodged the CCZ must dispose of it within 14 days after the petition or application was lodged, and the Court’s decision is final.³⁵ On determining the challenge, the CCZ is empowered to make an order from a wide range. Section 93(4) empowers it to declare a winner, nullify the election and trigger a fresh election within 60 days, or “make any other order it considers just and appropriate”. As to the form the pleadings must take, such is governed by Rule 23 of the CCZ Rules. In essence, therefore, section 93 of the Constitution must be read together with the relevant CCZ Rules to get a full picture of the principles and procedure to be followed in dealing with a presidential petition.

On a more general note, section 155 of the Constitution provides for ‘principles of the electoral system’. By and large the provision restates the need for a system that facilitates free, fair and regular election as provided for in section 67. It goes further to underscore the need for participation by the electorate including special groups such as people with disabilities.³⁶ Candidates and political parties contesting an election are entitled to access voting materials as well as private and public media on equal basis. Regarding election dispute resolution, section 155(2)(e) imposes an obligation on the state to take all necessary measures to “ensure the timely resolution of electoral disputes”.

To conclude a few remarks on the legislative, historical and political context to section 155 of the Constitution are warranted. The call to government to ensure speedy resolution of electoral disputes resonates well with Article 17(2) of the African Charter on Democracy. However, from a national and historical perspective that informs the inclusion of these provisions in the Constitution, the objective was to confront and address a pandemic of overly protracted electoral petition proceedings in Zimbabwe. It may sound unrealistic to state as a matter of fact that there are electoral petitions lodged in the aftermath of the 2008 general election that still await determination to this day. Such delay unduly limits the right “to a fair, speedy and public hearing within a reasonable time” protected by section 69(2) which applies to determination of civil rights.

A period of ten years without courts determining a dispute is a practice that does not belong to modern consciousness of justice delivery. In fact, a delay that encroaches into another election period defeats the whole essence of an electoral dispute resolution framework. It might be argued that the petitioners did not prosecute their petitions to finality. Or it might be that they have abandoned these lawsuits having realised that the remedy would be empty and lacking effectiveness taking into account the lapse of time. It is such exposure of the situation to speculation that must nudge the courts need to ‘clear their name’ by ensuring that, one way or the other, a process that would trigger the finalisation of such pending lawsuits is adopted even at the instance of the courts. For as long as the petitions remain unresolved, public confidence in the

³⁴ Section 93(1) of the Constitution.

³⁵ See Section 93(3) of the Constitution.

³⁶ See Section 155(2)(b) of the Constitution.

ability of the courts to independently and decisively deal with electoral petitions continues to tumble on a free fall.

Another issue is that of access by candidates and political parties to voting materials including the voters' roll. Before the 2013 Constitution, preparation and custody of the voters' roll has been a prerogative of the registrar general. This is a public official on whom the constitutional responsibility to prepare and keep this important document was vested. However, in sheer disregard of the principles of equality and fairness of candidates, access to the voters' roll used to be so unduly restricted such that opposition political party candidates had to approach courts of law to access the voters' roll. Such unreasonable and unlawful administrative conduct produced numerous and needless lawsuits before the Electoral Court. It therefore came with no surprise that a provision, not only reinforcing the right of access to voters' roll, but now vesting in the Zimbabwe Electoral Commission (hereinafter 'ZEC') the stewardship of this document, was included in the Constitution clearly as a political concession.

In the circumstances, a constitutional requirement in section 155 that a law must provide for accelerated dispute resolution process is a positive development. However, noble as the proposition could be on the face of it, a period of two weeks to resolve a challenge to a presidential election is unrealistic on account of the national nature of information required to prosecute such claims. One must also take into account the level of difficulty there is to gather information in Zimbabwe. In *Makamure v. Mutongwiza & Ors*, Devitte J (as then he was) made the following observations

As the citizens of this country begin to exercise their democratic rights in the arena of electoral law, it is more than likely that there will be a dramatic increase in the number of election petitions. They will require, for their just resolution, the holding of election trials *spanning several days and even weeks and to be heard expeditiously*.³⁷

4.2 The Electoral Act and Challenges for Petitioners³⁸

We have already made reference to sections 67, 69, 93 and 155 of the Constitution to the extent that these provisions cumulatively provide for the principles of Zimbabwe's electoral system as well as the procedure for dealing with election petitions. Section 155 enjoins the state to adopt measures including legislative to give effect to the principles including the one on speedy resolution of electoral disputes. The Electoral Act must, therefore, be the law to provide for the principles.

The Electoral Act almost exclusively provides for the electoral legal framework in Zimbabwe. It provides for every aspect of the exercise of the right to vote. It is the implementation framework for constitutional provisions on the electoral system. It is no wonder that its elaborate legislative objective as captured in the long title provides as follows:

to provide for the terms of office, conditions of service, qualifications and vacation of office of members of the Zimbabwe Electoral Commission, the procedure at meetings of the Zimbabwe Electoral Commission and the appointment of the Chief Elections Officer; to make provision for the registration of voters and for the lodging of objections thereto; to provide for the preparation, compilation and maintenance of voters rolls; to prescribe

³⁷ 1998 (2) ZLR 154 (H). Emphasis added.

³⁸ The current version of the Electoral Act incorporates the amendments made by the General Laws Amendment Act (No. 3 of 2016) the Electoral Amendment Act (No. 6 of 2014) and the National Prosecuting Authority Act (No. 5 of 2014) as well as amendments previously made by the Electoral Laws Amendment Act, 2007 (No. 17 of 2007), the Local Government Laws Amendment Act, 2008 (No. 1 of 2008) and the Electoral Amendment Act, 2012 (No. 3 of 2012).

the residence qualifications of voters and the procedure for the nomination and election of candidates to and the filling in of vacancies in Parliament; to provide for elections to the office of the President; to provide for local authority elections; to provide for offences and penalties, and for the prevention of electoral malpractices in connection with elections; *to establish the Electoral Court and provide for its functions; to make provision for the hearing and determination of election petitions*; and to provide for matters connected with or incidental to the foregoing (emphasis added).

As the focus of this paper is election petitions, it should be noted that Part XXII establishes and provides for the Electoral Court as one of “exclusive jurisdiction to hear appeals, applications and petitions in terms of this Act”.³⁹ Of interests in this Part is section 165 that provides for ‘Rules of the Electoral Court’. In essence this provision anticipates the adoption of rules that will govern the conduct of proceedings in this Court, and until such a time that the rules are adopted, the High Court Rules apply.⁴⁰ It must be noted that this section was introduced after 1995 (adoption of the Electoral Court Rules)

On its part, section 193 of the Electoral Act provides for ‘saving provisions’. It provides in subsection 3, paragraph (d) that ‘any ... rule ... immediately before the fixed date, had or was capable of acquiring legal effect shall continue to have or to be capable of acquiring legal effect’ as if it had been made in terms of the Electoral Act.

In essence sections 165 and 193 of the Act pitch the possibility of a conflict or at least confusion as to validity of the 1995 Electoral Court Rules. Such confusion confronted to Electoral Court in *Mutinbiri v. Chivetu*.⁴¹ This was an election petition proceeding. The Court entertained the idea that the Rules could have been repealed and therefore invalid, or at least there was need to clarify the potential conflict between sections 165 and 193 of the Act. The Court, per Bhunu J, noted that “the two sections given their natural and grammatical meanings are clearly in conflict and repugnant to each other”.

The Court went on to state that:

It is however, not strange or unusual through inadvertence or lack of attention to detail, for Parliament or its draughtsman to enact two contradictory sections in the same enactment as appears to have happened here. When that happens, it is left to the Court to resolve the contradiction through time honoured legal interpretation techniques meant to suppress the mischief and advance the remedy for which the law was intended.⁴²

In the end, relying on Sir Rupert Cross, *Statutory Interpretation* (1976), the Court adopted the ‘last resort’ approach to statutory interpretation which effectively provides that where provisions of the same statute are in conflict, these could be harmonised by enforcing the last or latter provision. The rationale is that when the legislature enacted the latter provision, it must be accepted that it was aware of the former conflicting provision, and hence enacting the latter provision with such knowledge clearly means that it intended to contradict the former and rest on the latter.

³⁹ See Section 161(1) of the Electoral Act. This designation has triggered debate as to whether the Electoral Court is in fact an independent court or a specialized division of the High Court since its judges and registrar, before the adoption of the 2013 Constitution, were drawn from the pool of High Court judges.

⁴⁰ Section 165(4) of the Electoral Act.

⁴¹ *Mutinbiri v. Chivetu, Makanyaire v. Mliswa* EC 32/13.

⁴² *Mutinbiri* judgment, p. 3.

5 Provisions on Electoral Petitions

Part XXIII of the Electoral Act exclusively deals with election petitions. As briefly discussed in the beginning, an election petition is a dispute that arises in the context of the exercise of the right to vote, whether before or after the actual polling day. Ironically this Part does not define what an ‘election petition’ is. The only definition in this Part is that of a ‘respondent’ who is restrictively defined as the president, a Member of Parliament or councilor whose election or qualification for holding the office is complained of in an election petition.

The import of the definition is to list persons who may carry the title of ‘respondent’ during the adjudication of an election petition. To that end the definition accords with section 155 of the Constitution to the extent that both provisions envisage three tiers of election in Zimbabwe, namely, presidential, parliamentary and local government elections, hence reference to president, member of parliament and councilor.

In practice however, this provision has caused untold difficulty in litigating election petitions challenging the result of an election. Petitioners have often complained about the unjustified departure from the common law principle often resorted to when choosing respondents in an action. The principle is generally stated; thus any person from whom some conduct or action to give effect to the relief given by the court must be joined as a respondent in legal proceedings. Such citation accords the respondent an opportunity to defend oneself from the allegations adumbrated in the petition.

In the several petitions filed to challenge parliamentary results after the 2013 general elections, many of the petitioners had to withdraw citation of ZEC based on the definition of a respondent in the Electoral Act. This was notwithstanding the clear fact that certain relief and allegations made in the petitions, especially those to do with prejudicial management of elections, which fall within exclusive responsibility of ZEC, would have required ZEC to appear and respond to the same.

A close analysis only shows evidence of oversight of the law by legal practitioners involved in those cases. Had it been not for the urgency under which petitions are filed, such negligent oversight was so costly on petitioners so as to deserve costs *de bonis*. The issue of ZEC as a respondent to election petitions seems to have been resolved with finality in *Muzenda v. Kombayi & Anor*.⁴³

However, ZEC could be properly cited as a respondent in respect of pre-polling petitions especially in respect of actions only ZEC may execute. Part XXIII only applies to petitions challenging election results. The Act provides thus:

petition complaining of an undue return or an undue election of a member of Parliament by reason of want of qualification, disqualification, electoral malpractice, irregularity or any other cause whatsoever ...⁴⁴

Unsurprisingly, section 167 only makes reference to “undue return or undue election of a member of Parliament”. By so doing, it dispenses with the custom of referring to the three tiers of elections in Zimbabwe. It appears as if, in terms of this provision, it follows that a petition may only be filed in respect of a parliamentary election. This is clearly the position because

⁴³ *Muzenda v. Nkombayi and Anor* (EP 119/08) [2008] ZWHHC 47 (9 June 2008).

⁴⁴ See section 167 of the Electoral Act.

presidential election petitions are governed by Part XVII of the Electoral Act, and in particular section 111, which essentially reproduced section 93 of the Constitution verbatim.

5.1 Locus standi to File a Petition

Generally stated, the *locus standi* rule provides that only persons with ‘direct and substantial interest’ in the outcome of legal proceedings have the right to bring such action before a court of law.⁴⁵ This proposition has become trite in Zimbabwean jurisprudence. However, the advent of the 2013 Constitution has revolutionised this principle when it comes to enforcing the Declaration of Rights. It is imperative that we briefly discuss this provision to the extent that election petitions are a human rights issue, and are in the public interest.

Section 85(1) of the Constitution now vests standing in at least five categories of persons:

First, any person acting on their own behalf. This is clearly a restatement of the common law understanding of *locus standi*. Such a person must in the least demonstrate personal injury as a result of a violation (including potential injury where violation is regarded as imminent).⁴⁶

Second, a person acting on behalf of another⁴⁷ has standing to do so upon demonstrating a number of issues such as identity of the injured person; authority to represent them; direct and substantial interest in respect of the person unable to appear; and probably the cause of inability to appear in person. This could be due to incarceration, hospitalization, deportation or any other analogous ground.

Third, a person “acting as a member, or in the interests, of a group or class of persons” may enforce the bill of rights. This ground needs to be read in the context of the Class Actions Act,⁴⁸ which provides for the procedure to be followed when one intends to file a class action. Even though the Class Actions Act could be regarded as the implementation framework of section 85(1)(c), it appears manifestly inconsistent with the Constitution to the extent that it unduly restricts access to courts by a person acting on behalf of a class of persons. For instance section 6 envisages the possibility that the High Court may order security for costs. Further, section 22 regards the Act ‘as additional to’ to any other law under which a person may bring action on behalf of another. Taken cumulatively, such provisions would impose unreasonable and therefore unjustifiable restrictions on the exercise of rights in the Constitution.

Fourth, a person acting in public interest may approach a court of law to enforce the bill of rights. Perhaps to date, the case of *Mudzuru & Another v. Minister of Justice & Ors* represents the most elaborate judicial pronouncement on the ‘public interest’ as a ground to approach courts of law in the aftermath of the adoption of the 2013 Constitution.⁴⁹ In that judgment the CCZ per Malaba CJ went into detail, quoting South African jurisprudence in approval, on the requirements to be met for a person to rely on the ground of public interest. The Court was alive to the difficulty inherent in proving a matter to be in public interest or that the public has interest in an

⁴⁵ See section 85(1)(a) of the Constitution on requirements that need to be satisfied when a person is lodging a complaint with the court alleging violation of human rights and or freedoms including political rights contained in section 67 of the Constitution.

⁴⁶ See *Zimbabwe Teachers Association v. Minister of Education and Culture*, 1990 (2) ZLR 48 (HC) at 52-3; *Amalgamated Engineering Union v. Minister of Labour*, 1949 (3) SA 637 (A) at 659.

⁴⁷ Section 85(1)(b) of the Constitution.

⁴⁸ Class Actions Act [Chapter 8:17].

⁴⁹ CCZ 12/2015.

issue. It is interesting to note that our courts have, as far back as the mid-1980s, made a link between election petitions and public interest. In *Pio v. Smith*,⁵⁰ the Court held that:

This is in the public interest because the institution and determination of election petitions, with their potential for disrupting the business and changing the composition of one of the chief organs of State, ie Parliament, can hardly be anything else. Hence any provisions designed to speed up the process, as the limitation of time is, must be in the public interest requiring strict compliance.

However, it does not necessarily follow that the interest the public has in the ‘institution and determination’ of election petitions for the reasons given by the Court above would vest in any person the competence to file cases as envisaged in section 85(1)(d). The only effect there is to ensure that whoever is involved in prosecuting an election petition must comply with the law regulating the process in such a way that the process is expedited. This is where public interest lies.

Fifth, any “association acting in the interest of its members” has standing to enforce the bill of rights. In *Zimbabwe Teachers Association v. Minister of Education & Culture*, the Court had little difficulty in accepting that a teachers association had direct and substantial interest in pursuing the interest of teachers (its members) who had been summarily dismissed. At a basic level, the person must demonstrate that the applicant is an association and that the proceedings seek to vindicate the common interest of the members of the association.

As regards election petitions, section 167 is clear on persons with standing to bring such action to the Electoral Court. It provides that “[a] petition complaining of an undue return or an undue election” may be filed “by any candidate at such election”. This prescription needs no further interpretation. Only a person who stood in the election the result of which is being challenged could file a petition challenging the election of another person. Persons who were not candidates clearly lack standing. However, it is lawful for more than one candidate to file a single petition challenging an election result or undue election.⁵¹

5.2 The Form of an Election Petition

In Zimbabwe, legal proceedings to determine the private rights of parties may take one of the two forms, namely, action or application (motion) proceedings. The former is depicted in the form of a summons commencing action, which process eventually matures into a court sitting to conduct a trial wherein evidence is proffered through verbal testimony of witnesses and other forms of evidence. On the other hand, action or motion proceedings are commenced by filing a court application usually on notice (served on the respondent) to which testimony is in the form of an affidavit sworn under oath to which supporting documents (evidence) may be attached. In these proceedings, all evidence must be sworn to and documents attached because there is no other opportunity for a party to present evidence other than through affidavits. To this end, application proceedings suit lawsuits that do not carry serious dispute of facts which cannot be resolved on papers filed of record.⁵² Courts are required to take a robust approach to any factual dispute that may arise, failing which such proceedings are invariably referred to the action procedure.

⁵⁰ 1986 (3) SA 145 (ZH).

⁵¹ Section 168(1)(b) of the Electoral Act.

⁵² See the following cases on the point of serious dispute of facts: *Masukusa v. National Foods Ltd & Another*, 1983 (1) ZLR 232 (S) at 235A; *Zimbabwe Bonded Fibreglass v. Peech*, 1987(2) ZLR 338 (S) at 339C-D; *Ex-Combatants Security Co. v Midlands State University*, 2006 (1) ZLR 531 (H) at 534E-F.

It is important though to note that the two procedures are not mutually exclusive of each other. This assertion is based on the fact that application procedures may follow action proceedings, especially where a litigant needs to seek a court order authorising them to take certain measures incidental to the action proceedings underway, thereby becoming facilitator in nature. Such requests include authority to depart from the usual procedure for service of summons, application to require the other party to produce a document; application for a quick determination of action proceedings where the defendant has no plausible defence, among other things.

5.3 *The Form of a Presidential Petition*

As already discussed, the key legal framework for this petition are sections 93 and 94 of the Constitution, CCZ Rules and section 111 of the Electoral Act (this provision essentially copies verbatim section 93 of the Constitution) and provisions of Part XXIII of the Electoral Act that are not excluded from application by section 111(4) of the same Act. As is the norm, the Constitution defers to implementing legislation to responsibility to provide for form. Section 93(1) of the Constitution provides that a presidential result may be challenged “by lodging a petition or application with the Constitutional Court”. As is the case with the Electoral Act, there is no definition of a ‘petition’ in the Constitution. Presumably, such should be found in the implementing legislation including the CCZ Rules.

Rule 23(1) of the CCZ Rules decisively settles the debate as to the nature of court proceedings to challenge a result in a presidential election. It provides that the “application where the election of a President or Vice President is in dispute shall be by way of court application”. A court application takes the form of CCZ1Form. This form resembles an ordinary court application on notice. Rule 23 does not deal with the form of a ‘petition’ or defines what a petition is.

Once filed, the court application (petition) has to abide by the timelines enjoined by the Constitution, namely, that the petition must be filed within seven days of the election result, any notice to oppose the relief being sought must be filed and served by the respondent (winning presidential candidate) within three days,⁵³ within the same period of time the petitioner may file answering affidavit together with heads of argument,⁵⁴ again within three days the respondent files own heads of argument, thereafter the matter must be set down for hearing so that it is determined within 14 days required by the Constitution. Notwithstanding that the petition must be a court application, the Electoral Act anticipates that a presidential election is ‘tried’ as opposed to being heard.⁵⁵ A finding that the president was not lawfully elected shall not have a retrospective effect. Anything already done by that person in the capacity of president shall be allowed to stand as if he or she had been lawfully elected.⁵⁶

5.4 *Form of Other Petitions*

The key provisions regarding the form of other petitions is the Electoral Act and Electoral Court Rules. The Act does not specify the form of a petition. The best it does is to require it to be

⁵³ Rule 23(3) of the CCZ Rules.

⁵⁴ Rules 23(4) of the CCZ Rules.

⁵⁵ Section 111(2) of the Electoral Act.

⁵⁶ Section 111(3) of the Electoral Act.

“signed by the petitioner or all of the petitioners if more than one”.⁵⁷ Further still, the Act does not specify where the petitioner must sign the petition. Rule 21 of the Electoral Court Rules provides that “an election petition shall be generally in the form of a court application”. This prescription seems to auger with Rule 23(1) of the CCZ Rules which also envisages a court application as the form in which a presidential petition must take.

Simple as it may sound, the practice has always been to file petitions as court applications. However, the bone of contention has been the requirement that the ‘petitioner signs the petition’. This is not a simple problem as the majority of petitions filed in the aftermath of the 2013 parliamentary elections were dismissed by the Electoral Court citing the reason that the petitioner did not sign the petition.

Neither the Electoral Act nor the Rules stipulate with precision the part of the petition where the signature must be appended. Unlike the CCZ Rules, both these instruments do not provide for a list of prescribed forms, which petitioners must use as a template. This aspect alone speaks to the outdatedness of Electoral Court Rules thereby making them absolutely unsuitable to regulate important processes such as election petitions. Court rules in Zimbabwe always have schedules which provide for a list of prescribed forms so that there be no doubt as to the form a particular pleading must take thereby justifying penalization for non-compliance.

However, what we see in Zimbabwean electoral jurisprudence is judicial obsession with strict-compliance approach when dealing with election petitions. There is no basis in law or fact that a petitioner, as the Electoral Court dealt with post 2013 election petitions, must sign on the front page of the petition. There is no provision requiring such conduct. In any event, all the dismissed petitions had valid affidavits appended to them, which affidavits, by practice, were sworn to and signed by each petitioner. Therefore, if what the mischief section 168(1)(b) of the Electoral Act seeks to address is preventing people other than the petitioner from filing petitions without the knowledge of the actual losing candidate, then such fears are decisively allayed once the petitioner swears to an affidavit appended to the petition. Not in a single occasion was the authenticity of the affidavits, and therefore the petition itself, ever challenged. In final analysis, dismissal of petitions based on non-compliance with section 168(1)(b) is and remains bad law that undermines the exercise of the right to vote in terms of section 67 and the right to losing candidates to be heard in terms of section 69 of the Constitution.

5.5 Other Requirements

Further and above to being signed, Rule 21 requires, again without stating with precision as to where in the court application this must be located, that the petitioner must assert their right to lodge an application in terms of section 167 of the Act.⁵⁸ The dates on which polling took place and the result was announced in the election concerned, including the constituency, must be indicated. This detail is clearly critical to assist the respondent in opposing the petition and the court in determining whether the petition was filed within the prescribed time. Further, Rule 21(e) specifically demands that the ‘grounds’ upon which the petitioner relies to ‘sustain the petition’ must be given. These grounds are provided for in Part XVIII (intimidatory practices), XIX (corrupt practices), XX (illegal practices), and XI (further provisions on illegal and corrupt

⁵⁷ Section 168(1)(b) of the Electoral Act.

⁵⁸ However, the Rules still make reference to the repealed section 125 of the Electoral Act. This again shows the extent to which these Rules, which are extensively used during election time, have remained outdated while the principal act has gone through several amendments.

practices) of the Electoral Act. Such grounds must be clearly stated as they have a bearing on the nature of evidence required to prosecute the petition.

With similar force, the petitioner must state the ‘exact relief’ they are seeking.⁵⁹ Invariably though, the essence of an election petition challenging the result of an election logically prays for a declaration that the malpractice concerned had the effect of inducing a wrong result and therefore the ‘winner’ must be declared unduly elected. Depending on circumstances, the petitioner may pray to court that they instead be declared the winner, or that a re-election be ordered to give effect to the true expression of the electorate.

Again the issue of where grounds for the petition and relief being sought must be located in a petition suffers in obscurity. One would expect that, the petition being an application, the relief being sought must be incorporated into the draft order. In the same vein, it would appear acceptable that grounds for the petition be stated and elaborated in the founding affidavit of the petitioner since this is a matter of facts that must be presented under oath.

Finally, Rule 21(f) of the Electoral Court Rules requires that in instances where a petition is based on grounds of corrupt or illegal practices (Parts XIX and XX of the Electoral Act), the “full name and address, if known, of every person whom the petitioner alleges was guilty of such practice” must be provided in the petition. This does not mean that they are to be joined as parties, but that they be notified and given a chance to defend themselves. The rationale of this requirement was stated by the Court in the *Mutinhiri* case as follows:

that the *audi alteram partem* rule, that is to say, the need to be heard before anyone can be condemned is paramount and the bedrock upon which our justice system is founded. Thus, in enacting r 21 (f) Parliament intended that such people like ... and ... would not be condemned of threatening to throw people into ... dam and of stabbing others without being given a chance to be heard. It would therefore be anomalous and unjust for the petitioners to assert their right to be heard while actively denying others the same right by omission.⁶⁰

While the mischief to be eliminated by the identification requirement is clear and plausible, the problem is that it appears that the courts expect in all cases and take for granted that petitioners may not genuinely be aware of the full names and addresses of the perpetrators. This requirement is further complicated where several persons are implicated in corrupt or illegal practices. Surely the legislature would not have intended to saddle petitioners with such onerous onus to provide addresses of such multitudes. We submit here that provision of names and addresses is conditional to the petitioner having knowledge of such detail also taking into account restrictive timelines within which petitions have to be filed once an election result has been announced.

5.6 Service of Petitions

This is another aspect that has drawn controversy in prosecuting petitions. Service of a presidential petition attracts few difficulties due to the fact that only a single person to be elected to this office at any given election. Accordingly, their whereabouts or place of residence or business is common knowledge. However, the problem arises when dealing with parliamentary and or other election petitions.

Section 60 of the Electoral Act provides thus:

⁵⁹ See Rule 21(g) of the Electoral Court Rules.

⁶⁰ *Mutinhiri* judgment, p. 7.

Notice in writing of the presentation of a petition and of the names and addresses of the proposed sureties, accompanied by a copy of the petition, shall, within ten days after the presentation of the petition, *be served by the petitioner on the respondent either personally or by leaving the same at his or her usual or last known dwelling or place of business.*⁶¹

Two issues have dominated service of a petition. The first issue is whether or not the ten-day service period maybe extended in exceptional circumstances, and second is the question as to which places fall into the category of “usual or last known dwelling or place of business”. Notwithstanding the painful timelines within which petitions have to be immaculately prepared and filed in compliance with statutory provisions discussed above, the courts have insisted that the service period may not be extended in any circumstances. In fact the courts have declared that departure from statutory requirements is not possible.

It would appear the *locus classicus* in terms of compliance with statutory provisions in electoral disputes is the *Pio* case. It dealt with the issue of whether a petitioner who files notice of petition out of time becomes non-suited. The Court reviewed numerous case law from several jurisdictions including England and South Africa with comparable statutory provisions. In final analysis, the Court departed from the traditional approach of interpreting peremptory provisions as such, and adopted the substantial compliance approach even in electoral law.⁶² In the words of the Court:

The part of s 141 dealing with the limitation of time is peremptory and must be complied with either exactly or so substantially that the act could stand on its own, as would be the case, for instance, in a situation where the notice was served within 10 days but without the list of proposed sureties; in other words defects in the notice would not invalidate it.⁶³

In that case the petitioner had served the petition outside of the ten-day period, among other forms of non-compliance with several provisions of the then Electoral Act. This case law triggered a series of similar pronouncements confirming and restating the various findings of the *Pio* judgment especially with the proliferation of election petitions since 2000. Probably the most telling judgment to review and revive the ground breaking findings of the *Pio* judgment is that of *Chabvamuperu & Ors v. Jacob & Ors*.⁶⁴

The *Chabvamuperu* judgment was a consolidation of five petitions for administrative convenience as they all dealt with more or less the same issues, namely, the effect of service of notice of petition outside of the ten-day period as well as serving such notice at respondent’s political party headquarters. Among other things the judgment restated the proper approach to interpretation as held in the *Pio* judgment – the substantial compliance approach.⁶⁵

This judgment is important in that it added a level to statutory interpretation in electoral cases. The Court incorporated the four stage approach to interpreting peremptory statutes guided by the Supreme Court decision in *MDC and Another v. Mudede and Others*.⁶⁶ The test essentially

⁶¹ Emphasis added.

⁶² *Pio* judgment, p. 156. See also *Shalala v. Klerksdorp Town Council and Another*, 1969 (1) SA 582 (T) and *Zantsi and Others v. Odendaal and Others; Mtoba and Others v. Sebe and Others*, 1974 (4) SA 173 (E) on this proposition.

⁶³ *Pio* judgment, p. 165.

⁶⁴ Electoral Petition No. 78/2008.

⁶⁵ *Chabvamuperu* judgment, p. 6. Per Makarau J citing with approval *Quinell v. Minister of Lands, Agriculture and Rural Resettlement*, SC 47/04; *MDC and Another v. Mudede and Others*, 2000 (2) ZLR 152 (SC); *Sterling Products International Ltd v. Zulu*, 1988 (2) ZLR 293 (S); *Kutama v. Town Clerk Kwekwe*, 1993 (2) ZLR 137 (S); *Chitungo v. Munyoro and Another*, 1990 1 (ZLR) 52 (HC).

⁶⁶ 2000 (2) ZLR 152 (SC).

requires the court sitting to determine whether a provision requires strict compliance or substantial compliance would suffice. The Court held thus:

that the approach necessitates that I first establish what had to be done in terms of section 169 and secondly, the object of the section. In the third step, I have to establish what was actually done and finally, assess whether what was actually done can stand alone and be objectively viewed as amounting to substantial compliance with the requirements of the section. In the event that I find substantial compliance, I then have to consider whether there was any prejudice as a result of the non-compliance.

With due respect to the Court in the *Chabvamuperu* case, it appears that the test was better articulated by Kudya J in *Muzenda v. Nkombayi & Another*.⁶⁷ The Court gleaned the test from the *Pio* and *Mudedede* judgment and articulated the test as follows:

Step 1: The relevant legislation

Step 2: What actually happened

Step 3: Whether the provisions of the relevant legislation were substantially complied with

Step 4: Whether there was any prejudice as a result of non-compliance.⁶⁸

Needless to add that the Court found non-compliance with service of notice of petition 11 days after the due date, and that service at respondent political party headquarters was in violation of section 169 of the Electoral Act mainly because non-compliance in both instances resulted in significant prejudice on the respondent in that he was prevented from promptly preparing his defence in view of the speedy resolution of the petition as required by public interest.⁶⁹

5.7 Service of Proof of Costs

The same provision, section 169 of the Electoral Act, requires that the “[n]otice in writing of the presentation of a petition and of the names and addresses of the proposed sureties, accompanied by a copy of the petition ...” must be served on the respondent within ten days of presentation or filing of the petition. The issue as to whether the notice and list of names and addresses of sureties must be peremptorily served together in terms of the provision has found itself standing for determination by the Electoral Court. The Court expressed a view on this in the *Pio* and *Chabvamuperu* judgments.

In the former judgment, the Court interpreted the provision in such a way that it split the two aspects (service of notice and service of names and addresses of sureties) as peremptory and directory, respectively.⁷⁰ In essence the finding was service of notice of presentation of petition was peremptory admitting no derogation while names and addresses of sureties could be done after the ten-day period. The *Chabvamuperu* Court held as follows:

⁶⁷ See *supra* note 43.

⁶⁸ *Ibid.*, p. 4.

⁶⁹ Later in *Gore v. Chimankire* HH 47/2008, the Court held as follows: “The electoral law sets out in specific and clear language the proper manner of serving election petitions. Service has to be personal or at the residence or place of business of the first respondent. In the view of this court, service of the petition at the party headquarters of the first respondent, does not constitute service at any of the places contemplated by s 169 of the Act. This court sitting as an Electoral Court has no powers to condone any breach of the requirements as to time frames or as to manner of service that are stipulated in the Act.” See also *Nath v. Singh and Ors*, [1954] SCR 892; *Kunju v. Unni*, 1984 (3) SCR 162; *Robinson v. Minister of Lands and Anor*, 1994 (2) ZLR 171 at 175 A-C; *Barrows and Anor v. Chimphonda*, 1999 (1) ZLR 58 (S) at 62G-63A; and *Mthinkbulu v. Nkivane and Anor*, S-136-01 at 3.

⁷⁰ *Pio* judgment.

It appears to me that the petitioners have erroneously interpreted section 169 to intrinsically link the furnishing of security with the presentation of the petition such that one cannot exist without the other. It is clear that the presentation of the petition, a thing in the exclusive domain of the petitioner has no direct link to the furnishing of security for the costs of the respondent, the fixing of which is under the control of persons other than the petitioner, save that the law requires the two to be served together. The fact that the two are to be served at the same time does not make them so intrinsically linked one to the other that service of one could not be effected in the absence of the other.

The reasoning of the Court was that service of details of sureties could be done later. It admits of substantial compliance where it is served as soon as it becomes available. The other grounds were that such knowledge is not a critical to the preparation of defence such that no prejudice is suffered by the respondent. Therefore litigants must not fret if they are unable to serve notice and proof of security.

5.8 *Whither to Strict or Substantial Compliance in Electoral Petitions*

It appears beyond doubt that the proper position is that substantial compliance is part of our electoral jurisprudence. It is no longer part of our law that electoral proceedings are *sui generis* to the extent that courts' hands are tied and may not condone any departure from all conduct required by statute. This undisputed clarity of the law then revives the debate on the approach of the Electoral Court in respect of electoral petitions predominantly filed concerning the 2013 parliamentary elections.

As indicated above, nearly all of them were declared non-suited on account of the fact that petitioners did not sign the petition while other suffered from other defects which the court also regarded as fatal and therefore incurable. Only a single petition made its way to trial. What is discouraging is that those dismissed petitions were never given a reasoned analysis of the new approach to statutory interpretation in Zimbabwe – the four stage interpretation enunciated in the *Pio* judgment and reiterated in the *Chabvamuperu* and other judgments decided during that time. We will attempt to apply the test to section 167(1)(b) of the Electoral Act.

Step 1: The relevant legislation

Section 168(1)(b) provides that “an election petition shall be ... signed by the petitioner or all of the petitioners if more than one”. On the face of it this is a peremptory provision on account of the use of terms such as ‘shall’. If the legislature intended it to be directory it could have used the word ‘may’ in order to convey the meaning that someone else could sign the petition instead.

Step 2: What was done?

As far as many of the election petitions were concerned, they had fairly complied with requirements in Rule 21 of the Electoral Rules serve for non-compliance with section 168(1)(b) above. This is the case because the petitions contained affidavits that had been signed by the petitioners themselves notwithstanding that the top of the petitions were signed or ‘issued’ by petitioners’ legal practitioners. In recollection we have already proffered the reason that the requirement to have a petition signed by the petitioner is to ensure that it is in fact the person with the right to file a petition in terms of section 167 of the Electoral Act who in fact has presented it taking into account the public interest in not interrupting parliament as one of the critical arms of government. This is the legislative objective or the governmental purpose of the law. Compliance, be it strict or substantial, therefore, must give effect to this legitimate purpose that the legislature clearly intended.

Step 3: Whether the provisions of the relevant legislation were substantially complied with

In this part of the inquiry, the court would be required to be alive to the facts of each case. It being an issue of whether the petitioner signed or not the petition, all facts were before the court. Here the court ought to have recourse to section 168(1)(b) as to where on the petition the petitioner must sign. We have already made the point that Electoral Court Rules do not have a list of forms or templates which petitioners must follow or replicate in order for their pleadings to conform to the legal requirements. We also underscored the point that Rules 23 and 21 of the Constitutional Court and Electoral Court, respectively, envisage that a petition takes the form of a court application. Consequently, and this ought to have been apparent, the only occasion an applicant is required to sign is the founding affidavit, which, among other things, carries all the averments that need to be made in order for the relief being to be granted.

We therefore submit that to the extent that all petitions before the court had affidavits properly sworn to by respective petitioners, and that the law does not require affixing of a signature at any particular part of a petition, there was, as a matter of fact, strict compliance with section 168(1)(b) of the Electoral Act. In the result all petitions dismissed on this basis were improperly dismissed and everything must be done to correct the perpetuation of this wrong precedent in the future.⁷¹

Step 4: Whether there was any prejudice as a result of non-compliance with the legislation

Once a court concludes that there was strict or substantial compliance that gives effect to the legislative intention that alone dispenses with the need for the court to run the full errand of the test. This is because once a petitioner complies with requirements, such compliance cannot conceivably result in prejudice to the respondent. The petitioner would have fulfilled legal requirements, which are what the respondent stands to benefit from most.

However, it suffices to mention that failure by petitioners to sign the top page of the petition resulted in zero prejudice to the respondent. Once the respondent was confronted by a properly sworn affidavit, he or she had all the facts and averments necessary to prepare for the defence. To that end, the raising of preliminary points such as failure to sign a petition was an act of desperation and a ploy to deprive the petitioner (and the public) of the opportunity to be heard on the merits. It was so unfortunate that the court fell for it thereby setting off a dark period in the electoral jurisprudence of this country.

6 Conclusion

This paper has made a number of conclusions pertaining to electoral dispute resolution in Zimbabwe. First, Chapter 7 of the Constitution provides for the complete code in terms principles governing the electoral system for Zimbabwe. The principles include expeditious resolution of electoral disputes, including disputes challenging the result of an election. Second, electoral petitions implicate political rights that go beyond the parties prosecuting a petition to include rights of the electoral who voted for the feuding candidates. They also extend to the general voters in relation to their interest in preserving the integrity of the electoral system so that

⁷¹ It must be stated categorically that the negligence of lawyers who handled the petitions added to the maladministration of justice. In the majority of the pleadings, no attempt was made to direct the court to the correct approach to statutory interpretation and the adoption of the substantial compliance approach even to electoral litigation in Zimbabwe. Nonetheless, for the few petitions where the court was directed to abundant electoral jurisprudence some of which was discussed in this paper, the result, unfortunately, was the same.

it is able to yield a result that reflects the free will of voters. Third, our courts have treated electoral petitions as *sui generis* thereby triggering a general approach to entertain petitions as highly technical proceedings with very few of them being dealt with on the merits. Fourth, of all statutes that regulate electoral petitions, the Electoral Court Rules have suspiciously been sidelined since 1995, yet such revision would reform electoral dispute resolution in terms of the Constitution. Finally, the paper made a case for the need to interpret electoral law in terms of the new constitutional principles, which loathe a great deal overreliance on technicalities when dealing with constitutional issues, of which electoral law is part of.

The Role of Traditional Leadership and Customary Law under *Sui Generis* Systems of Intellectual Property Rights in Traditional Knowledge

*Gabriel Muzah**

1 Introduction

The global economy is transforming into a knowledge based economy where knowledge becomes valuable when recognised and transferable within intellectual property rights frameworks. Economic globalisation has brought close attention to different kinds of knowledge in various parts of the world resulting in the establishment in 2000 of the World Intellectual Property Organisation (WIPO) Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) where member states discuss the intellectual property issues that arise in the context of access to genetic resources and benefit-sharing as well as the protection of traditional knowledge and traditional cultural expressions.¹ Existing intellectual property rights frameworks have been proposed as possible alternative means that could be utilised for the protection of traditional knowledge,² but indigenous communities have demanded an instrument that recognises its holistic nature and the role that traditional leadership and customary laws protection systems play in the protection and preservation of their knowledge.³ This approach entails that measures for the protection of traditional knowledge are mutually supportive with other international systems and processes discussed in the Convention on Biological Diversity (CBD) and the Food and Agricultural Organization of the United Nations (FAO), the International Labour Organisation (ILO) Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169 or Convention) and the United Nations Declaration on the Rights of Indigenous peoples (UNDRIP or Declaration). As part of this international dialogue, many members of the IGC – including Brazil, Colombia, Egypt, Ethiopia, Indonesia, Iran, Morocco, the African Group, the Andean Community, the Asian Group, the Russian Federation and Venezuela – have called for the establishment of *sui generis* systems to complement or supplement the intellectual property rights system.⁴ These systems are premised on traditional leadership and customs of indigenous communities making customary law a vital area of inquiry as it has attained importance for the definition of national, regional and international regulations on traditional knowledge and genetic resources which is perceptible from an analysis of national constitutions.

However, despite the recognition of traditional knowledge within intellectual property rights frameworks, a gap in literature exists with regard to the effectiveness of customary law as a protective system. To remedy the gap, this paper aims at analysing the role of customary law under *sui generis* systems of intellectual property rights in traditional knowledge. The paper is based on a desk top analysis where the following research questions will be probed:

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¹ See <<http://www.wipo.int/tk/en/igc/>>.

² WIPO GRTKF/IC/6/14, para. 76, statement by the delegation of the United States.

³ WIPO GRTKF/IC/6/14, para. 228 and WIPO/GRTKF/IC/7/15/Prov. 2, para. 139, statements by the representative of Kaska Dena Council.

⁴ See WIPO, Traditional Cultural Expressions/Expressions of Folklore Legal and Policy Options, para. 108, n. 42, WIPO Doc. WIPO/GRTKF/IC/6/3 (2003), available at: <www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_6/wipo_grtkf_ic_6_3.doc>.

- What is the role played by customary law under the *sui generis* systems of intellectual property rights in traditional knowledge?
- To what extent is the mutual supportiveness of this system with human rights?

2 Relevance of the Study

Reference to the Zimbabwean Constitution provides a platform for highlighting the importance of customary law in defining regulations on traditional knowledge and genetic resources. Guidance in interpreting and applying the Zimbabwean Constitution is given explicitly to the courts, tribunal, forum or body in regard to the rights contained in Chapter 4, i.e. the Declaration of Rights. In Section 46(1)(a) the courts are enjoined when interpreting the Declaration to “give full effect to the rights and freedoms enshrined in this chapter”. The word “full” entails that no margin of appreciation of international law is to be permitted under Zimbabwean law. In applying the Declaration of Rights, the courts must also adhere to “the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom”, and, in particular, the principles and values set out in section 3 (part of Chapter 1) which sets out “founding values and principles” which include the supremacy of the Constitution, the rule of law, good governance and recognition of the equality and inherent dignity and worth of all human beings. Furthermore, the courts in applying and interpreting the Declaration of Rights must take into account international law and all treaties and conventions to which Zimbabwe is a party (section 46(c)), may consider relevant foreign law (section 46(e)) and must pay due regard to all the provisions of the Constitution, in particular the national objectives (section 46(d)). So, for example, in the case of misappropriation of traditional knowledge belonging to an indigenous community of Zimbabwe, in interpreting the Declaration of Rights, the courts must take into account the right to preservation of traditional knowledge which forms part of the national objectives in Chapter 2 and international laws and treaties which likewise secure these rights. Accordingly, the jurisprudence of international human rights law applying these instruments must be taken into account by the proposed Constitutional Court when interpreting and applying the Declaration of Rights.

3 Agreements and Fora on Human Rights, Indigenous Peoples and Traditional Knowledge

The integrity of traditional knowledge systems is maintained through the recognition of its holistic nature. It is linked to biodiversity, landscapes, cultural and spiritual values and customary laws. It can be best illustrated by the intrinsic relationship a Zimbabwean traditional community has with the Marula tree which forms an important part of their diet, tradition and culture to an extent of referring to it as the “tree of life” due to its ability to provide food and medicine which are fundamental human needs.⁵ The ripe fruits are eaten raw, the kernels are eaten either raw or roasted and fruit juice is fermented to produce children’s beverage or traditional beer, making jam, oil processing and added to sorghum or millet porridge. The wood is used for making light weight utensils which include drums, mortars, traditional wooden bowls and decorative curios which are used during cultural events such as marriages and other traditional ceremonies. The bark, leaves and roots are used for medicinal purposes to treat diarrhoea, sore eyes, toothaches, colds and flu.⁶ These therapeutic claims are supported by literature with the bark and leaf extracts having anti-diarrhoeal, anti-diabetic, anti-inflammatory, anti-septic, anti-microbial, anti-

⁵ R. A. Street and G Prinsloo, ‘Commercially Important Medicinal Plants of South Africa: A Review’, *Journal of Chemistry* (2013).

⁶ A. Maroyi, ‘Local Knowledge and Use of Marula [*Sclerocarya birrea* (A. Rich) Hochst.] in South Central Zimbabwe’, *12:3 Indian Journal of Traditional Knowledge* (2013) p. 398, at p. 403.

plasmodial, anti-hypertensive, anti-convulsant and anti-oxidant properties.⁷ This intergenerational knowledge was developed through interaction with the environment, and such intellectual creations are inseparably embedded. The biodiversity and landscape associated knowledge with regards to the marula tree cannot be separated from cultural and spiritual values which are also regulated by customary laws. According to Bash, for a variety of conceptual, historical and political reasons, contemporary international law distinguishes between “natural” land forms, cultural monuments, movable cultural property, the performing arts and scientific knowledge. Indigenous peoples do not make these distinctions.⁸

This holistic understanding of traditional knowledge dates back to the Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples (1993)⁹ which was the first international conference on the cultural and intellectual property rights of indigenous peoples attended by over 150 delegates from 14 countries including indigenous representatives from Ainu (Japan), Australia, Cook Islands, Fiji, India, Panama, Peru, Philippines, Surinam, USA and Aotearoa. It underlines that indigenous flora and fauna is inextricably bound to the territories of indigenous communities, and that land and natural resource claims must be settled in order to promote traditional production systems. It further notes that existing protection mechanisms are insufficient for the protection of indigenous peoples’ cultural and intellectual property rights.

During the same year, 1993, the Convention on Biological Diversity entered into force. It has three main objectives: “the conservation of biological diversity, the sustainable use of the components of biological diversity and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources”. Article 8(j) requires parties to:

respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and *promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of benefits arising from the utilisation of such knowledge, innovations and practices.*¹⁰

Article 10(c) requires countries to “protect and encourage the customary use of biological resources in accordance with traditional cultural practices”. This set the tone of the recognition of rights to land and traditional territories, natural resources and self-determination, as vital for the survival of indigenous peoples and cultures. The NGO resolution on farmers’ rights at the UN Food and Agriculture Organisation Conference in Leipzig in 1996 further emphasised the importance of recognising that collective knowledge is intimately linked to cultural diversity, land and biodiversity and cannot be dissociated from either of these three aspects. It became the precursor to the recognition of farmers’ rights, for the first time, in a binding international instrument. The International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) was approved by FAO in November 2001 and entered into force on 29 June 2004. Its objectives are the conservation and sustainable use of plant genetic resources for food and agriculture (i.e. agricultural biodiversity) and the fair and equitable sharing of benefits derived from their use. Zimbabwe is a contracting party and ratified the convention in 2005. Article 9 sets out the following measures that government should take to protect and promote farmers’ rights:

(a) protection of traditional knowledge relevant to plant genetic resources for food and agriculture;

⁷ J. A. Ojewole *et al.*, ‘Sclerocarya birrea (A. Rich) Hochst [Marula] (Anacardiaceae): A Review of Its Phytochemistry, Pharmacology and Toxicology and Its Ethnomedicinal Uses’, 24:5 *Phytoteraphy Research* (2010) p. 633, at p. 639.

⁸ R. Barsh Barsh, ‘How Do You Patent a Landscape? The Perils of Dichotomizing Cultural and Intellectual Property’, 8:1 *International Journal of Cultural Property* (1999) p. 14–47.

⁹ See the Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples (1993), available at: <<http://www.ngaaho.maori.nz/cms/resources/mataatua.pdf>>.

¹⁰ Emphasis added.

- (b) the right to equitably participate in sharing benefits arising from the utilisation of plant genetic resources for food and agriculture;
- (c) the right to participate in making decisions, at the national level, on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture.

Headquartered in Geneva, Switzerland, the International Labour Organisation was the first UN body that specifically dealt with indigenous matters. Work started in 1926 with the development of standards for the protection of indigenous workers. ILO first focused more on the integration of indigenous workers into mainstream society than on dealing with and securing customary indigenous rights. This approach changed when Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries was adopted in 1989. This treaty entered into force in 1991. Convention 169 focuses on land rights, labour, social security and education. While Article 15(1) provides for a rights-based approach to natural resources and thus complements the 1992 Rio documents, the issues of traditional knowledge and intellectual property rights are beyond the scope of Convention 169:¹¹ “The rights of the peoples concerned to the natural resources pertaining to their lands shall be specifically safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.” The Convention does not define who the indigenous and tribal peoples are but provides criteria for describing the peoples it aims to protect. Article 1(2) states: “Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.” Article 1(1) describes the difference between tribal and indigenous peoples which is also of relevance for the interpretation of the CBD. These treaties speak of “indigenous and local communities” without giving any indications who might be the actual members of these groups. According to Convention 169, the following distinction is made: 1) *tribal peoples*: their social, cultural and economic conditions distinguish them from other sections of the national community. Their status is regulated wholly or partially by their own customs or traditions or by special laws or regulations, and 2) *indigenous peoples*: are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries. Do, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions. The main drawback of Convention 169 is the very limited membership of currently 22 states, of which Zimbabwe is yet to be part. Although it is legally binding for its members, it does not include an enforcement and compliance mechanism. The specific importance of this Convention for indigenous peoples living in its member states specifically in the context of traditional knowledge and intellectual property rights was recently underlined by a judgement of the Supreme Court of Costa Rica. While supporting the future patentability of inventions “essentially derived from the knowledge associated with traditional biological practices or cultural practices in the public domain” in Costa Rica, the Supreme Court also stated that such an amendment “is a change that directly affects the interests of indigenous communities, and, as a result, in conformity with the 169 Convention this amendment must be consulted ...”. This judgement supports the call by indigenous peoples’ organisations to be formally included in the development of national intellectual property regulations that would cover their genetic resources and traditional knowledge.

The most comprehensive expression of indigenous peoples is found in the 2007 United Nations Declaration on the Rights of Indigenous Peoples. The UN General Assembly, in adopting the Declaration on 17 September 2007, referred to it as a “major step forward towards the promotion and protection of human rights and fundamental freedoms for all”. It stresses the right to, *inter alia*:

¹¹ Text available at: <<http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169>>.

- Self-determination, representation and full participation;
- Special measures to control, develop and protect sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of flora and fauna and oral traditions;
- Control access and assert ownership over plants and animals vital to indigenous cultures; and to own, develop, control and use the lands and territories, including flora and fauna and other resources which they have traditionally owned or otherwise occupied or used;
- Free, prior and informed consent (FPIC);
- Just and fair compensation for any such activities that have adverse environmental, economic, social, cultural or spiritual impact; and
- Collective as well as individual human rights.

Although the UNDRIP is not legally binding and consequently does not provide for compliance and enforcement mechanisms, its provisions add to the existing body of customary international law, and is a valuable reference point when articulating the rights of indigenous peoples.

Relevant member states of the African Regional Intellectual Property Organization (ARIPO) adopted the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore on 9 August 2010 at Swakopmund in the Republic of Namibia. This was in accordance with the objectives of ARIPO generally and in particular Article III(c), which provides for the establishment of such common services or organs as may be necessary or desirable for the coordination, harmonisation and development of the intellectual property activities affecting its member states. The Protocol recognises the intrinsic value of traditional knowledge, traditional cultures and folklore, including their social, cultural, spiritual, economic, intellectual, scientific, ecological, agricultural, medical, technological, commercial and educational value and further emphasises that legal protection must be tailored to the specific characteristics of traditional knowledge and expressions of folklore, including their collective or community context, the intergenerational nature of their development, preservation and transmission, their link to a community's cultural and social identity, integrity, beliefs, spirituality and values, and their constantly evolving character within the community concerned. The purpose of this Protocol is: "(a) to protect traditional knowledge holders against any infringement of their rights as recognized by the Protocol; and (b) to protect expressions of folklore against misappropriation, misuse and unlawful exploitation beyond their traditional context". The Protocol came into force on 11 May 2015, three months after the government of the Republic of Zimbabwe deposited the sixth instrument of ratification,¹² and became the latest *sui generis* system of intellectual property rights in traditional knowledge.

4 The Relevance of Traditional Leadership and Customary Law as the Primary Regulatory Mechanism over Uses of Traditional Knowledge

The relevance of traditional leadership and customary law as the primary regulatory mechanism over uses of traditional knowledge is deep rooted in the recognition of the holistic nature of traditional knowledge and its expression through substantive legal principles. Chapter 15 of the Zimbabwe Constitution recognises the institution, status and role of traditional leaders under customary law. It further provides that a traditional leader is responsible for performing cultural, customary and traditional functions of a chief, head person or village head for his or her community. The functions of these leaders include, among others: the promotion and upholding of cultural values of their communities and, in particular, to promote sound family values; taking

¹² See more at: <<http://www.aripo.org/news-events-publications/news/item/54-entry-into-force-of-the-aripo-swakopmund-protocol-on-the-protection-of-traditional-knowledge-and-expressions-of-folklore#sthash.17yyd46Y.dpuf>>

measures to preserve the culture, traditions, history and heritage of their communities, including sacred shrines; facilitating development; in accordance with an Act of Parliament, to administer communal land and to protect the environment and to resolve disputes amongst people in their communities in accordance with customary law. This implies that traditional leaders have the capacity to regulate the use of traditional knowledge using customary laws as a mechanism. The Zimbabwean High Court confirms customary law as a primary regulatory mechanism as decided in *Munodawafa v. Masvingo District Administrator & Others*¹³ where the plaintiff brought an action for an order declaring that the customary laws of succession were not observed nor given due consideration in the appointment of the fifth defendant as chief, directing the responsible minister to recommend to the president that the fifth defendant should be removed from the chieftainship, and requiring that a meeting of the elders of the clan be convened to elect the most suitable candidate. The fifth defendant argued that the Court no longer had jurisdiction in such matters in view of the wording of section 283 of the 2013 Constitution. This provides that an Act of Parliament must provide for, *inter alia*, the appointment, suspension, succession and removal of traditional leaders, in accordance with the prevailing culture, customs, traditions and practices of the communities concerned. However, the appointment, removal and suspension of chiefs must be done by the president on the recommendation of the provincial assembly of chiefs through the National Council of Chiefs and the minister responsible for traditional leaders and in accordance with the traditional practices and traditions of the communities concerned. Disputes concerning the appointment, suspension and removal of traditional leaders must be resolved by the president on the recommendation of the provincial assembly of chiefs through the minister responsible for traditional leaders. The plaintiff argued that, as the summons had been issued before the 2013 Constitution came into effect, the matter fell to be dealt with in terms of the procedure previously applicable. It was held that constitutionally, as provided for by section 171, the High Court has inherent jurisdiction to hear all civil and criminal matters throughout Zimbabwe. The High Court is therefore always a forum of jurisdiction that can be selected by the parties, and the Court will exercise its jurisdiction where it is clear that it should do so. Critically, however, where domestic remedies for resolving the issue are provided, as here, the Court will want to know why it should exercise its inherent jurisdiction if such remedies have not been exhausted. There was no reason why the remedies provided in section 283 of the Constitution should not be exhausted first.¹⁴

Defining traditional knowledge also provides guidance on the relevance of customary law. The Swakopmund Protocol defines traditional knowledge as any knowledge originating from a local or traditional community that is the result of intellectual activity and insight in a traditional context, including know-how, skills, innovations, practices and learning, where the knowledge is embodied in the traditional lifestyle of a community, or contained in the codified knowledge systems passed on from one generation to another. The term shall not be limited to a specific technical field, and may include agricultural, environmental or medical knowledge, and knowledge associated with genetic resources. This knowledge can only be effectively protected in accordance with laws, norms and practices of these local or traditional communities. These laws, norms and practices are defined as customary law by the said Protocol. Riley notes that:

[t]ribal law is drawn from a tribe's traditional customary law, tribal belief systems, and other contemporary forms of tribal governance, including ordinances and tribal constitutions. It therefore reflects not only substantive legal principles, but also the cultural context from which they evolved. Through tribal law, indigenous governance of cultural property and traditional knowledge will correlate specifically to the works tribes seek to protect, allow for forms of punishment consistent with the community's values, and properly incentivize behavior that is good for the community at large.¹⁵

¹³ (HC 8352/11) [2015] ZWHHC 571 (23 June 2015).

¹⁴ See <<https://www.zimlil.org/zw/judgment/harare-high-court/2015/571/>>.

¹⁵ A. Riley, "Straight Stealing": Towards an Indigenous System of Cultural Property

Traditional knowledge can also be defined in relation to how it is developed, responds and adapts to environmental, social, cultural and economic pressures and demands. A WIPO report notes: “What makes knowledge ‘traditional’ is not its antiquity: much traditional knowledge is not ancient or inert, but is a vital, dynamic part of the contemporary lives of many communities today. It is a form of knowledge which has a traditional link with a certain community.”¹⁶ This dynamism also subsists in customary law as noted by one judicial decision: “[O]ne of the most striking features of native custom is its flexibility; it appears to have been always subject to motives of expediency, and it shows unquestionable adaptability to altered circumstances without entirely losing its character.”¹⁷ The link between traditional knowledge and customary law suggests that solutions to traditional knowledge issues drawn from customary law can succeed. Customary law arguments have been used to support claims to intellectual property rights in traditional knowledge. An example is an Australian case involving aspects of copyright law, *Yumbulul v. Reserve Bank of Australia*, where the plaintiff asserted claims against the Federal Reserve Bank of Australia and the agency that represented the plaintiff in connection with a license agreement to reproduce on a commemorative ten dollar note an indigenous design that he made. The court found that the plaintiff inherited from his mother, a member of the Galpu clan, the right to make the traditional design that was the subject matter of the law suit. Unchallenged evidence was presented to the court that the “attainment of the right to make such a [design] is a matter of great honour, and accordingly abuses of rights in relation to the careful protection of images on such poles is a subject of great sensitivity”.¹⁸ This then becomes evident that the role of customary law under the Swakopmund Protocol is to act as the primary regulatory mechanism as it is within the scope of recognising the holistic nature of traditional knowledge.

5 Mutual Supportiveness of the Swakopmund Protocol with Human Rights

The preamble of the Swakopmund Protocol acknowledges the value of traditional knowledge systems and their contribution to local and traditional communities as well as “all humanity”. It further expresses the need: to recognise and reward the contributions made by such communities to the conservation of the environment, to food security and sustainable agriculture, to the improvement in the health of the populations, to the progress of science and technology, to the safeguarding of cultural heritage, to the development of artistic skills, and to enhancing a diversity of cultural contents and artistic expressions. The preamble also underscores the need to respect the continuing customary use, development, exchange and transmission of traditional knowledge and expressions of folklore by traditional and local communities, as well as the customary custodianship of traditional knowledge and expressions of folklore. Meeting the needs of the holders and custodians of traditional knowledge and expressions of folklore is an important aim of the Protocol. Contained in this aim is the empowerment of the holders of traditional knowledge and expressions of folklore, in order for them to exercise “due control over their knowledge and expressions”. The preamble emphasises that the protection of traditional knowledge and expressions of folklore must be “tailored” to the specific characteristics of such knowledge and expression.

This is in support with the provisions the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR, entered into force in 1976) which establishes the right to self-determination, including the right to dispose of natural resources, implying also the right to

Protection”, 80 *Washington Law Review* (2005) p. 69, at p. 90.

¹⁶ WIPO, ‘Intellectual Property and Traditional Knowledge 6’, available at: <http://www.wipo.org/freepublications/en/tk/920/wipo_pub_920.pdf>.

¹⁷ *Lewis v. Bankole*, [1908] 1 N.L.R. 81, 100-01 (Nig.).

¹⁸ *Yumbulul v. Reserve Bank of Australia*, at 123.

protect these resources including intellectual property. The Protocol also makes available the protection of intellectual property to traditional communities as it conceptualises the *sui generis* protection of traditional knowledge in line with Zimbabwe's constitutional provisions, which states that all are equal before the law and are entitled without any discrimination to equal protection of the law. Prior to this *sui generis* system of intellectual property rights in traditional knowledge positive protection through existing mechanisms tended to discriminate traditional or local communities as they did not recognise the holistic and collective nature of these rights. This is evident in the Australian case of *Bulun Bulun v. R & T Textiles Party Ltd.*¹⁹ The suit was based in part on a claim of equitable ownership of the design by one of the plaintiffs, an artist, on behalf of his indigenous group. The plaintiffs contended that under indigenous customary law the indigenous people were the traditional owners both of the body of ritual knowledge from which the painting was derived and of the subject matter of the painting. While acknowledging the possible application of indigenous intellectual property law from 1788 (when Australia was first occupied by the Europeans) to 1912 (when the Copyright Act was passed), the court held that the notion of "communal title" advocated by the plaintiffs could no longer be supported under Australia's legal system where copyright matters were now governed entirely by statute. The court decision is supported by the language in section 8 of the current Copyright Act that "copyright does not subsist otherwise than by virtue of this Act". The Court observed that under the Copyright Act, copyright is owned by the "author of a work", a concept held to exclude any notion of group ownership in a work unless it is a "work of joint authorship" within the meaning of the Act.²⁰

The Protocol extends protection to traditional knowledge that is: (i) generated, preserved and transmitted in a traditional and intergenerational context; (ii) distinctively associated with a local or traditional community; and (iii) integral to the cultural identity of a local or traditional community that is recognised as holding the knowledge through a form of custodianship, guardianship or collective and cultural ownership or responsibility. Such a relationship may be established formally or informally by customary practices, laws or protocols. It further prescribes the beneficiaries of protection as the owners of the rights shall be the holders of traditional knowledge, namely the local and traditional communities, and recognised individuals within such communities, who create, preserve and transmit knowledge in a traditional and intergenerational context in accordance with the provisions of section 4. This can be interpreted as providing the right for collective property and protection against being deprived of that property. This is mutually supportive of the Declaration of Rights as set out in Chapter 4 of the Constitution of Zimbabwe which provides for the right to own property alone as well as in association with others. It also provides for the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. This provision implies the protection of rights over advancements and innovations based on traditional knowledge.

While not legally binding, UNDRIP affirms a positive right of indigenous people to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. These set of rights are potentially covered by section 9 of the Swakopmund Protocol which follows the established trend to link the use of traditional knowledge to the two principles that became prominent in the Convention of Biological Diversity: the principle of prior informed consent and the principle of sharing benefits. Section 9 provides that the protection to be extended to traditional knowledge holders shall include the fair and equitable sharing of benefits

¹⁹ *Bulun Bulun v. R & T Textiles Party Ltd.* (1998), 41 I.P.R. 513, 525 (Austl.).

²⁰ *Ibid.*, at 525

arising from the commercial or industrial use of their knowledge, to be determined by mutual agreement between the parties. The national competent authority shall, in the absence of such mutual agreement, mediate between the concerned parties with a view to arriving at an agreement on the fair and equitable sharing of benefits. The right to equitable remuneration might extend to non-monetary benefits, such as contributions to community development, depending on the material needs and cultural preferences expressed by the traditional or local communities themselves.

6 Conclusion

The Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore within the framework of the African Regional Intellectual Property Organization has made traditional knowledge become valuable as it recognises and makes it transferable through intellectual property rights frameworks. The understanding of its holistic nature affirms the effectiveness of traditional leadership and customary law as the primary regulatory mechanism in this framework which is mutually supportive of the Declaration of Rights as provided in Chapter 4 of the Zimbabwean Constitution which also recognises the institution, status and role of traditional leaders under customary law. However, it should be noted that whilst Zimbabwe has deposited an instrument of ratification to this Protocol, it is yet to enact a statute to that effect. The Constitution provides in section 327(2) that an international treaty which has been concluded or executed by the president or under the president's authority (a) does not bind Zimbabwe until it has been approved by Parliament; and (b) does not form part of the law of Zimbabwe unless it has been incorporated into the law through an Act of Parliament.

Foreign Investment, Indigenous Communities and the Constitutional Protection of Property Rights in Zimbabwe

James Tsabora and Mutuso Dhlwayo***

1 Introduction

The 2013 Constitution – which is post-independent Zimbabwe’s first ever autochthonous Constitution – contains interesting perspectives in relation to the protection of property rights. Certainly, the rights framework created has important implications on the security of rights of both domestic and foreign investors interested in conducting business in the country. Similarly, the constitutional regime also impacts on the security of the land rights of indigenous communities held under customary law systems of tenure in Zimbabwe, particularly in view of the manner such rights are usually suppressed in favour of other investment projects. From a contemporary economic perspective, the legal protection of property and business interests has been hailed as a critical component in attracting investment and instilling business confidence in a country’s economic system. Indeed, the prominence of transnational business investment in the global economy means that the legal regulation of property rights is not only vital for the vibrancy and performance of the private sector but also essential in a globalised world characterised by private commercial transactions of a multinational character.

Yet in the dust created by the rush to attract foreign investment, most African governments deliberately ignore the security of land tenure of indigenous communities that host such investments. Large investment projects in sectors such as mining, road and dam construction and other infrastructure developmental projects have huge impacts on the land rights and interests of indigenous communities. Investment projects are therefore known to bring not only social, economic and environmental cost to host communities but also introduce land tenure insecurity in such areas. Inescapably one of the greatest issues generated by the presence of foreign investment projects in host communities directly relates to the insecurity of land rights of indigenous community groups. Ordinarily customary based tenure systems provide holders with a very weak level of protection of land rights and interests. In contrast, the investment licenses and special grants held by mostly foreign investment are strongly backed by legislative provisions that trump, in most instances, rights granted under customary law. African governments have struggled to strike the requisite, albeit delicate, equilibrium between rights of indigenous communities hosting foreign investment projects and the rights of foreign investors. It is therefore relevant to explore whether the constitutional framework reconciles the conflicting land rights and interests of foreign investment and indigenous communities.

The Zimbabwean social, economic and political system is not spared the depredations that have come with the foreign direct investment mantra in Africa. Since 2000 Zimbabwe has experienced political, economic and social developments that have left a huge imprint on the face of its economic and political system. In this vein, examples of policies that have brought grave and unintended consequences to the national economic system include the controversial policies of the land reform programme and the economic indigenisation policy. A more recent, very haphazard and

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incomprehensible policy direction known as ‘consolidation of diamond companies’ also deserves particular mention, owing to its deeply problematic implications to foreign investment. The core character of these controversial policy directions was the forcible acquisition, distribution, redistribution and transfer of private property rights in favour of government interests or under the guise of the public interest. Inevitably, the picture created by these economic policies is one without respect for private property rights, especially the property and investments of non-indigenous enterprises. Equally, the manner in which the foreign investment drive has been pursued was in total disregard of the land rights and interests of indigenous communities that hosted such investment.

This paper is a critical analysis of the constitutional and legislative protection of foreign investment within the context of the 2013 Constitution of Zimbabwe. Importantly, it asks, and seeks to answer, the question of whether the 2013 constitutional setup provides a reasonable shield to foreign investors against government policies that can potentially erode and impinge on their right to property. In addition to conceding the inevitable conflict between the interests of large scale investment and the land rights and interests of indigenous communities, this research also highlights the positivity brought about by the constitutional property clause through recognition of indigenous communities’ rights and interests to land. Finally, in order to illustrate the practical context of this research, this paper examines the diamond consolidation process, and its implications to the right to property. Consequently, the paper lays out in the open the variance between law and practice in Zimbabwe, and the possibilities that are likely to take place in cases where government’s economic interests are not pursued through the formal legal process but are pushed through predatory actions that defy the very law that was formulated to prevent them.

2 The Constitutional Setup

The right to property creates important socio-legal relations of both a horizontal and vertical nature in general, and of a private-public character in particular. The fundamental rights in the 2013 Constitution echo this position. Without doubt, the constitutional regulation of property rights is necessarily critical in the resolution of disputes and conflicts that arise and emerge in the context of these relationships. Indeed, the expectation is that the consequent regulatory fiat can optimally address the often conflicting legal relationships inherent in the property rights framework.

Section 71, which is the constitutional property clause, is aimed at this objective. It opens by defining property as “property of any description and any *right or interest in property*”.¹

Clearly, this definition does not add clarity at all into what really can be regarded as property. At best it is an open invitation to the courts to flesh out what is meant by the definition. In the case of *Hewlett v. Minister of Finance*,² the Supreme Court appeared unperturbed by this phrasing and decided that the definition “seems to embrace the widest possible range of property”. The observations by the Court find support from another angle. Under general common law, property generally refers to ‘things’ or valuable, corporeal objects of economic value, external to humans, which enjoy a separate legal existence and which can be subjected to juristic control. The objects of value that can be envisaged by this definition are various. It can thus be strongly asserted that the Constitution recognises wide range of objects as property, and this is a positive aspect in the protection of property rights in general. Both ordinary citizens and foreign investors become anxious in cases where the Constitution

¹ Emphasis added.

² 1982 (1) SA 490, at p. 497.

recognises a narrower definition of property than where such definition is as wide as it is currently envisaged.

It is also important to note that the constitutional definition identifies both ‘rights’ and ‘interests’ in property as constituting property as well. Essentially, this means that a person with any right in another person’s property is also protected by the right to property. Further, any person without such right but with an ‘interest’ in a property is protected. Of course the interest has to be legally recognisable. There seems to exist a blurred line between a land ‘right’ and a land ‘interest’ that is actionable and subject of protection under section 71.

Apart from defining property, section 71 recognises the individual right of every person “to acquire, hold, occupy, use, transfer, hypothecate, lease or dispose of all forms of property, either individually or in association with others”.

This section means every person can be right-holders in as far as property rights are concerned. Indeed, this right is contrasted to other rights in the Constitution that are limited to Zimbabwean citizens only. Importantly, this means that the right to property exists for both indigenous and foreign persons, juristic or natural. There is no discrimination, and this is welcome.

Further, section 71 provides that “no person may be compulsorily deprived of their property” except upon compliance with certain procedures and requirements in the section. By making reference to ‘no person’, section 71 prohibits the state and all forms of state authority from proceeding with deprivation until or unless certain terms and conditions set therein are met. Again, reference to ‘no person’ in the section deliberately addresses both citizens and non-citizens and thus guarantees protection of property to both citizens and non-citizens. This is very important in view of the legal phenomenon of foreign investment and foreign owned property not only in Zimbabwe but across the world.

Having presented these general features of the constitutional property clause, it becomes critical to interrogate the essence and substance of the clause in relation to property rights of foreign investment and the rights of indigenous communities.

3 Indigenous Communities and Land Interests

The significance of recognition of ‘interests’ as property in section 71 becomes critical in relation to land rights and interests of indigenous communities in areas that usually host large scale investment projects. The majority of these indigenous community groups enjoy land rights on the basis of customary law.³ Apart from that a host of other laws recognise the interests in rural land of these indigenous communal groups that host foreign investment. However, such recognition does not extend to providing land title or freehold title to rural communities over the land they occupy, use or live on. In general, these laws allow and permit various forms of occupation, use and alienation of the

³ See the report of the Economic Commission for Africa, *Relevance of African Traditional Institutions of Governance*, p. 24. The land distribution and redistribution of traditional customary authorities exist since pre-colonial times. However, following colonial occupation of Zimbabwe by white settlers, the new government system carved out land for exclusive use by the indigenous population and this land became known as the Tribal Trust Lands (TTL). The various colonial laws gave local chiefs a measure of control in land distribution and redistribution, but they remained under the ultimate authority of colonial administrators. See S. Chakaipa, ‘Local Government Institutions and Elections’, in J. De Visser, N. Steytler and N. Machingauta (eds.), *Local Government Reform in Zimbabwe – A Policy Dialogue* (University of Western Cape, Community Law Centre, 2010).

pieces of rural land within the context of each community's cultural and customary backgrounds. Important laws include the Communal Lands Act⁴ (CLA). This Act grants communities right of occupation on communal land for residential or agricultural purposes. The Act does not create or recognise individual title to land but gives specific guidelines on occupation and use of communal land by rural communities. Another piece of legislation is the Traditional Leaders Act⁵ which addresses land related duties and responsibilities of traditional chiefs in relation to communal land in the interests of communities. Finally, the Rural District Councils Act⁶ is another pertinent law which gives the legal basis for rural councils as the responsible authorities that administer communal land in the interest of their subjects.

Scholars have argued that although they do not amount to the right of land ownership, the constitutional recognition of these interests in land created by both customary law and legislation is necessary in a society that seeks to free itself from the rather abstract character of rights under the common law.⁷ Van der Walt, for instance, puts this succinctly as follows:

In terms of the traditional ownership paradigm it is assumed that ownership is not only the most comprehensive but also the most natural and the most desirable land right, and all other land rights are regarded with a certain measure of disdain: they are temporary, limited and less valuable. However, realities regarding the availability of a limited resource such as land for an ever increasing population, coupled with people's need for access to secure land rights, dictate that greater importance should be accorded to land rights, and that they should not be evaluated purely negatively simply because they amount to less than full ownership.⁸

In essence, what these scholars call for is for these interests in land to be recognised to the same level as is the right of land ownership. Yet other scholars even call for the registration of these land rights, albeit not as ownership, but as fragmented land use rights.⁹ A question may be asked whether the 2013 Constitution recognises other rights, apart from the right of private land ownership. The answer is in the affirmative, and two grounds justify such answer.

Firstly, section 71 of the 2013 Constitution recognises the right of every person “to acquire, hold, occupy, use, transfer, hypothecate, lease or dispose of all forms of property, either individually or in association with others”.¹⁰ In essence, this means that the section recognises four important rights: namely, (i) the right of private ownership (*dominium*), (ii) the right of possession (*possessio*), (iv) the right of use (*usus*) and (iv) the right of occupation (*occupatio*). What this means is that the mere use, occupation and possession of property is protected under section 71. Accordingly, the occupation, use or possession of land by indigenous communities in rural areas for residential, subsistent agriculture, pasture, small scale farming, among other purposes, creates land rights and interests in their favour, and such rights are protected by section 71.

⁴ Chapter 20:04.

⁵ Chapter 29:17.

⁶ Chapter 29:13.

⁷ See C. Cross and R. Haines, *Towards Freehold? Options for Land and Development in South Africa's Black Rural Areas* (Juta, Cape Town, 1988); A. J. van der Walt, 'The Fragmentation of Land Rights', 8 *South African Journal on Human Rights* (1992) p. 431.

⁸ *Ibid.*

⁹ G. Pienaar, 'The Registration of Fragmented Use-Rights as a Development Tool in Rural Areas', paper presented to the conference on "Constitution and Law IV: Developments in the Contemporary Constitutional State", Potchestroom University, South Africa, 2–3 November 2000.

¹⁰ Section 71(2).

The second ground why the 2013 Constitution appears to have accepted the direction of fragmented land rights is on the basis of Chapter 16, which, however, relates to agricultural land only.¹¹ Under Chapter 16, the state has power to alienate land to persons, through four mechanisms, namely: (i) transfer of ownership, (ii) a grant of lease, (iii) grant of occupation rights and (iv) grant of use rights.¹² Again, this means that the state can dispose its interests or rights in land through four avenues, namely: (i) granting *dominium*, (ii) granting *possessio*, (iii) granting *usus* and (iv) granting *occupatio*. The rights created by recognition in section 293 are similar to those created by recognition in section 71 of the Constitution. A critical observation that can be made is that these fragmented land rights are recognised and protected in both agricultural and in relation to all other property envisaged in section 71.

Accordingly, it can be strongly contended that the 2013 Constitution creates a comprehensive and protectionist regime that recognises the rights and interests of indigenous communities who make a living out of the land, through residence, subsistence, peasantry livelihoods and other informal means of livelihoods. The importance of this position is that all the rights that are enjoyed by indigenous communities under customary law and certain legislation amount to constitutionally recognised interests and rights to land and cannot anymore be regarded as weak, inferior or subordinate to the right of ownership.¹³ Thus licensing authorities, administrative bodies, government agencies and, pertinently, large scale investment projects that seek to establish their operations in areas inhabited by indigenous communities have to contend with this position. However, to what extent does this rights fiat benefit large scale investments, particularly in relation to the protection of their investments in Zimbabwe?

4 Foreign Investment and Land Rights

As argued above, the mere use, possession or occupation of land without freehold title to such land can grant the user, possessor or occupant a legally recognisable and enforceable right or interest in land. Large scale investments occupy and make use of huge tracts of land to set up physical and technological infrastructure for operational purposes. A clear example in Zimbabwe is Zimbabwe Platinum Mine (Pvt) Ltd (Zimplats), which holds in excess of 80,000 hectares of land.¹⁴ Another example is the Zimbabwe Mining Development Corporation that holds land measuring a total area of 63,548 hectares under special grant, but was reduced to 59,817 hectares after the cession of part of such land to a private company, Anjin Investments Pvt Ltd, in February 2010.¹⁵ By setting this infrastructure on the land, they become users, occupiers or possessors of the land onto or under which the infrastructure is built or established. Ordinarily, however, due to the nature of mining as a land intensive industry, large tracts of land are left for further and future exploration.

It is important to note that, in the mining sector, the three rights (*usus*, *occupatio*, and *possessio*) are not created or granted in favour of mining companies through application of land or land related

¹¹ Section 71 is a constitutional property clause, but does not apply to agricultural land. Section 72 applies to agricultural land, and is phrased in such a way that section 71, the property clause, is 'subject' to section 72.

¹² Section 293.

¹³ The socio-political and legal importance of this to society is clear, see A. van der Walt, 'Property Rights and Hierarchies of Power: A Critical Evaluation of Land Reform Policy in South Africa', 64 *Koers* (1999) pp. 261–264.

¹⁴ Zimplats is successor to BHP Minerals Zimbabwe, and was granted the 25 year long lease in 1994. See 'Mugabe Forges Ahead with Zimplats Land Grab', *Dailynews Live*, 6 January 2017, available at: <<https://www.dailynews.co.zw/articles/2017/01/06/mugabe-forges-ahead-with-zimplats-land-grab>>, (accessed 1 August 2017); 'President Sues Zimplats over 28000ha Idle Land', *The Herald*, <<http://www.herald.co.zw/president-sues-zimplats-over-28-000ha-idle-land/>> (accessed 1 August 2017).

¹⁵ See *Anjin Investments Pvt Ltd v. Minister of Mines & Ors*, HH228/2016.

legislation. These rights are created by relevant and applicable mining legislation. Under the Mines and Minerals Act (MMA),¹⁶ for instance, various mining rights are recognised and protected, and such rights have a direct impact on land ownership or the occupation, use or possession of land where such rights are exercised.

Mining rights are created, held, exercised, distributed and redistributed in a manner that grants to the holder of such rights interests and rights to land. For instance, under the Mines and Minerals Act, a miner can be granted a ‘special mining lease’,¹⁷ a ‘special grant’¹⁸ or a ‘prospecting licence’. The Mine and Minerals Amendment Bill (MMAB) also recognises a number of mining rights. It defines ‘mining title’ to mean (a) an exclusive prospecting licence, or (b) an exclusive exploration licence or (c) special grant for exploration.¹⁹ It further defines ‘mining right’ to mean (a) a certificate of registration of a block of precious metal claims, or (b) a certificate of registration of a block of precious stones claims, or (c) a certificate of registration of a block of base mineral claims, or (d) a certificate of registration of a site mentioned in section 47, or (e) special mining lease, or (f) mining lease or (g) special grants for mining. Without doubt, these mining rights, licenses and grants create land-use impacting rights which necessarily flow from the nature of the different mining rights in question.²⁰ Further, they inevitably create a legally recognisable and protected interest in land that is not owned by the mining companies in question. For instance, a prospecting licence grants a prospecting mining company the right to search for minerals, through various means, including pegging of the land.²¹ Further, the prospecting company also has surface land rights over that land, including fetching water and making use of firewood.²² The argument is therefore that despite mining legislation providing a framework for the acquisition of mining rights, various provisions in mines laws create interests and rights in land in favour of the mining companies. Indeed, the exercise of the mining rights created is impossible without the added recognition and protection of the rights of mining companies to the land upon which their investments are established and/or intend to be operationalised.²³

Perhaps this analysis will be incomplete if it omits discussion of yet another important provision in the Mines and Minerals Act. Section 2 of the Mines and Minerals Act provides as follows:

The dominium in and the right of searching and mining for and disposing of all minerals, mineral oils and natural gases, notwithstanding the dominium or right which any person may possess in and to the soil on or under which such minerals, mineral oils and natural gases are found or situated, is vested in the President, subject to this Act.

This provision needs clarification. Ordinarily, mineral resources are state property, and the state divests its ownership by parcelling out mining rights and mining title to third parties. In contrast, however, the fact that the Act creates a trusteeship of resources in the president is made clear. In essence, this section entails that third parties only hold mining rights at the pleasure of the president. Most

¹⁶ Chapter 21:05.

¹⁷ See Part VIII of the MMA.

¹⁸ Section 291 of the MMA.

¹⁹ Section 14 thereof. The MMAB recognises and confirms the nature of these rights as property rights. A newly inserted section 2A provides that: “A prospecting, exploration or mining right granted in terms of this Act is a limited right which is subject to the provisions of this Act.”

²⁰ Section 135 and 158 of the MMA (also the whole of Parts VIII & IX of the Act).

²¹ Section 27 of the MMA.

²² Section 27 of the MMA. See also section 178 of the MMA that recognises surface rights of miners.

²³ Naturally, the expiry or termination of the mining rights directly leads to the expiry or termination of whatever rights of possession, occupation or use to land that the mining company had. See *Grandwell Holdings Pvt Ltd v. Minister of Mines & Ors*, HH193-2016.

importantly, however, this ownership of mineral resources by the president extends only to minerals in the ground, still to be extracted, exploited, processed or refined. It does not extend to minerals lawfully extracted by private companies and in their possession. The section is aimed at guarding against landowners who claim that their ownership of the land extends to their ownership of everything in the soil, under it and above it including mineral resources.

Accordingly, mining rights and title are well encompassed within the context of the constitutional property clause. Mining investors have the right to acquire, hold, occupy, use and transfer mining rights, but in accordance with relevant and applicable laws. Importantly, however, the Constitution explicitly guarantees, protects and entrenches private property rights such as mining rights.

5 Compensation for Deprivations and Acquisitions of Property

An important feature of the property rights clause is that compulsory deprivation can only proceed in terms of a law of general application, and such deprivation must be necessary in the public interest (i.e. in the interests of defence, public safety, public order, public morality, public health, town and country planning or in the development or use of that property or another for a purpose that benefits the community). The fact that property is subject to deprivation and compulsory acquisition by the state means that the compensation regime for such acquisitions is critical. Generally, in the context of foreign investment, there is no doubting the fact that whilst a strong government that can enforce and protect property rights is necessary, danger always lurk as the same government can also abrogate or take away such rights without due and adequate compensation.

Under the Zimbabwean Constitution, the acquisition or deprivation of property is subject to compensation. In terms of section 71(3), in cases of compulsory acquisition or deprivation, the acquiring authority is required to give reasonable notice to all persons likely to be affected of the intention to acquire property before the acquisition can proceed. Implicitly, this means that an affected property owner can challenge the reasonableness of the notice period. Most importantly, the acquiring authority is required to pay fair and adequate compensation for the acquisition before acquiring the property, or within a reasonable time after the acquisition.

It is important to note that the 2013 Constitution seems to depart from previous constitutions in relation to compensation regimes. Previously only compulsory acquisition of property required compensation.²⁴ Deprivations, understood to refer to restrictions on the use of property, were uncompensated. The 2013 Constitution interchangeably uses the terms ‘acquisitions’ and ‘deprivations’ in section 71. Accordingly, it has become almost impossible not to conclude that this means that both acquisitions and deprivations are now subject to compensation.²⁵

It is hereby submitted that in practice the government is likely to compensate only those deprivations that are of such nature as to equate to acquisitions. The rationale is that ordinarily governments find it impossible to compensate for every kind of deprivation, large and small, for instance, those deprivations necessary in town and country planning, environmental conservation, telecommunications development, public health promotion or for any other public purpose. These

²⁴ *Hewlett v. Minister of Finance and Another*, 1982 (1) SA 490 (ZS) (1981 ZLR 571); *Davies v. Minister of Lands, Agriculture and Water Development*, 1994 (2) ZLR 294 (H) and 1997 (1) SA 228 (ZS).

²⁵ See A. Magaisa, ‘Property Rights in the draft Constitution’, available at <archive.kubatana.net/docs/demgg/crisis_zimbabwe_briefing_issue_86_120808.pdf> (accessed on 10 July 2017).

restrictions are necessary to society and critical in the enjoyment of not only property rights but other rights as well.

6 Compulsory Acquisition under the Mines and Minerals Act

In terms of section 398, the president has the right to “acquire either the whole or any portion of a mining location, or limit the rights enjoyed by the owner thereof” under the Mines and Mineral Act.²⁶ A mining location is defined in the MMA to mean “a defined area of ground in respect to which mining rights, or rights in connection with mining, have been acquired under this Act”. Substantively, this is the actual land or ground upon or under which mining activities are conducted. Such land can be compulsorily acquired by the president for a public purpose. The meaning of *public purpose* is not clear, but it is submitted that it may mean any use that is beneficial to society or that is meant to benefit a wider section of the public. For instance, in attempts to acquire parts of land given to Zimplats, the president claimed that:

The land to be acquired will allow for the immediate entry of new players into the platinum sector. This will bring immediate benefit to the public through employment creation and an enlarged revenue base for the government of Zimbabwe (that is more companies paying royalties, corporate tax and Pay As You Earn). The Government will also receive dividends as it will be a shareholder in the new companies to be brought on board, as will the local community in the area through the company share ownership scheme.²⁷

Further, the MMA makes it clear that the Land Acquisition Act applies in the compulsory acquisition of the mining location. Most importantly, compensation is payable for such acquisition. In order to attend to compensation, the Minister of Mines “may direct any person employed in his Ministry to conduct an investigation into the nature and extent of any mining operations that have been or are being conducted on the mining location that has been or is to be acquired”. It is not clear whether the compensation has to be fair, adequate or at market value, as there is no criteria or mechanism to assess the amount. However, it is submitted that the provision might be read to mean compensation that is fair in terms of market value of the acquired rights.²⁸

Another intriguing question is whether exploited or extracted mineral resources can be subjected to compulsory acquisition or deprivation under section 71. This question arises in view of the claim that extracted or exploited mineral resources are owned by the person or company that has lawfully extracted them, not the president or the state. Further, this question arises for purposes of business confidence – a foreign multinational company undertaking mineral resource exploitation in Zimbabwe needs to be sure that its exploited minerals are not subject to arbitrary seizure by the government on the basis that they belong to the state or the president.

7 Protection of Mining Investments from Seizure by the State

7.1 Case Study: Diamond Consolidation

The final question to be addressed is whether the state can seize or compulsorily acquire mining investments, such as a private company’s mines in terms of section 71, justifying this on the public

²⁶ Section 398(1).

²⁷ See *President of The Republic of Zimbabwe v. Zimbabwe Platinum Mines Pvt Ltd*, LA13/16.

²⁸ This would be in line with the common law basis of Zimbabwe’s property law; see F. Mann, ‘Outline of a History of Expropriation’, 75 *LQR* (1959) p. 188; *Estate Marks v. Pretoria City Council*, 1969 3 SA 227 A 244; *Bestuursraad van Sebokeng v. M & K Trust & Finansiële Maatskappy (Edms) Bpk*, 1973 SA 376 A 385.

interest. This brings us to one of the most controversial policies by the government of Zimbabwe, namely consolidation of diamond companies.

There is no formal, published policy document known as consolidation policy; neither was there a green paper or white paper document floated for discussions purposes prior to the adoption of this government position. Indeed, the consolidation is a government approach or position, not a policy framework. The consolidation of diamond companies was announced through the press and government media.

In order to understand critical aspects of the consolidation ‘policy’, it is helpful to start from a governmental interpretation. On 6 April 2017, the Parliamentary Portfolio Committee on Mines and Energy presented to Parliament a *Report on the Consolidation of Diamond Companies*.²⁹ The Report does not define or attempt to describe the true nature of consolidation. It states that by the end of 2015, government position shifted “with the thrust of centralising all diamond mining activities through Zimbabwe Consolidated Diamond Company (ZCDC)”.³⁰ At best, this is the nearest that the Report comes to definition of consolidation – centralising of diamond mining through a government diamond mining company, the ZCDC.

On paper, the Report implies that the purpose for the consolidation was in the public interest – it included the need “to stimulate growth and productivity of the diamond industry, as well as promote transparency and accountability in the entire diamond value chain, with the ultimate result of improved revenues inflows to Treasury”.³¹ In practice, however, the real and practical implications of the policy on the property rights of private mining companies, foreign or domestic and on the rule of law were swept under the carpet. Most importantly, the Report describes the corporate structure formed from consolidation as follows:

ZCDC’s shareholding would comprise of all the mining companies that were operating in Marange with government retaining a 50% shareholding. ZCDC was to appoint five of the ten board members and the rest would be selected from among the former joint venture partners. Each joint venture partner would get shares based on the net value of assets and liabilities.³²

There was no operational or financial incentive for private diamond companies to enter into consolidation at all. Government was fully aware of this, and expected the stiff resistance from targeted companies. The Report states that the consolidation was initiated in the context of section 291 of the Mines and Minerals Act which gave the Minister of Mines power to refuse renewing licenses of mining companies. This means that the government used a carrot and stick approach to private diamond companies; take the consolidation carrot dangled or face non-renewal of licenses and definite expulsion. Indeed, the consolidation policy was carefully timed to coincide with the expiry of mining licenses of various mining companies. Unsurprisingly, most diamond companies were conducting mining activities on the basis of expired mining licences and the government was well aware of this fact. Thus in addition to failing to renew expiring licences, the government just reminded companies

²⁹ *First Report of the Portfolio Committee of Mines and Energy on the Consolidation of Diamond Companies*, S.C. 9 – 2017, 6 April 2017, available at <http://www.veritaszim.net/sites/veritas_d/files/Portfolio%20Committee%20on%20Mines%20and%20Energy%20Report%20on%20the%20Consolidation%20of%20the%20Diamond%20Mining%20Companies%20-%20SC%209-2017.pdf>

³⁰ See section 2 of the Report.

³¹ See section 4.1 of the Report

³² See section 4.2.2 of the Report.

that they were operating illegally as their licences had expired, with some licenses having expired more than five years prior. Clearly, the carrot and stick approach was perfect, at least on paper. Despite this context, mining companies continued to resist consolidation, and the government did not hesitate to refuse to renew their licences, move in and take control of their mining locations, sites, operations and activities on the ground. Meanwhile, in the face of this resistance, the government consequently resolved to “expand its shareholding to 100 percent in ZCDC”.³³

Upon the controversial take-over of diamond mining investments, the government was faced with various challenges. The Report states that in addition to exploration problems, the outgoing companies had inadequately invested in diamond mining and had consequently failed to meet mining obligations.³⁴ Further, most of the joint venture companies were not fully fulfilling their investment agreements. The most damning finding by the Portfolio Committee was, however, that at the time of the take-over all the companies were insolvent.³⁵ This meant that these companies were highly exposed to litigation with creditors claiming large sums of money, attaching important mining equipment and auctioning them at very low prices.³⁶ Pertinently, the real danger this created was that one of the buyers of auctioned machinery would be the government,³⁷ which was in real need of cheaper mining equipment to operationalise seized mining locations. Thus, this vicious cycle stood to benefit the government and collapse private mining investment altogether.

The nature of the forcible takeover was aptly described by the High Court in the *Grandwell* case.³⁸ The judge observed as follows:

Apart from its marriage with Grandwell, it (government) had entered into several others with other foreign investors. But the government felt its partners were being unfaithful. It felt it was getting little or no remittances. To remedy this, it crafted a policy to merge all the diamond mining companies at Chiadzwa into one single entity. ... All the disparate companies would take up 50% of the equity in it. The government reserved the remaining 50% to itself. ... Apparently government felt there was little or no progress towards the consolidation. On that date it wrote to Mbada advising, among other things, that it had discovered that the Special Grants had expired, and that, with no title, Mbada had to cease all mining activities with immediate effect and vacate the mining site. Mbada was given 90 days to remove all its equipment and other valuables. Any further access to the mining site would be upon request. The Minister called a press conference to announce the new development. On the same day of the letter, Mbada’s operations were forcibly stopped through armed police. Processing plants were shut down. Mbada’s security team was disbanded and expelled from site. Other employees were forcibly evicted both from the workstations and from their site residences. Security systems were paralysed.³⁹

³³ *Ibid.*

³⁴ Section 4.3 of the Report.

³⁵ *Ibid.*

³⁶ Some of the cases involved joint venture agreements between a Zimbabwean state company (ZMDC or ZCDC) and a foreign state company mining vehicle in Zimbabwe, with the partnerships arising from bilateral international agreements between governments. *See for instance Sakunda Trading Pvt Ltd v. DTZ OZ-GEO Pvt Ltd*, 3102/17, where the foreign mining company approached the courts to compel the government to assume the debts and liabilities accrued by it in its mining operations prior to consolidation.

³⁷ Apart from the fact that the government is a shareholder in some of the creditors, such as Sakunda Pvt Ltd, the government was directly and indirectly a creditor since the common creditors included revenue authorities, customs and excise authorities, local authorities, rural district councils, traditional leadership authorities, mining authorities at district, provincial and national levels, and other agencies of government.

³⁸ HH193/16.

³⁹ *Ibid.*

In the briefest of terms, the takeover by government created chaos in the diamond mining industry and led to the erosion of investor confidence, the flight of foreign investment and adverse productivity patterns in the diamond mining sector.

7.2 ‘Consolidation’ and Compulsory Acquisition

There is very little doubt that both the consolidation and the take-over of diamond companies amounts to compulsory acquisition or deprivation with far reaching implications on private companies’ right to property as envisaged by section 71 of the Constitution. The existing mining laws do not provide for such forcible consolidation; neither do they make provision for the *modus operandi* to be adopted in operationalising the huge consolidated company.

In a research report entitled *Consolidation of Diamond Mines in Zimbabwe: Implications, Comments and Options*, Mtisi describes the consolidation from a legalistic perspective. In this vein, Mtisi explores the consolidation policy in the context of the Companies Act, and observes that:

the proposal to consolidate diamond mining companies is (in fact) an amalgamation of companies to form a new company that will take over the assets of the mining companies. This also means that the existing diamond mining companies will face dissolution. *This is what is contemplated in Section 193 (of the Companies Act)*. It means government wants to amalgamate companies although the government officials are using the word consolidation.⁴⁰

Generally, even by stretching the provisions of various laws, it remains difficult to reach a conclusion that the government has power to compel consolidation, or amalgamation of private mining companies. Mtisi shares this view, illustrating that:

there is no law which empowers Government to force companies to merge or amalgamate, unless if it (Government) is making the proposal as a shareholder in the diamond mining companies through ZMDC or Marange Resources. Government may have to negotiate with the companies and convince them to amalgamate. Government has leverage in the negotiations in that it grants mining licences in terms of the Mines and Minerals Act. It may also withdraw such licences. However, the possible negative implications of threatening investors with withdrawal of mining rights may work negatively against investments if not handled properly.⁴¹

From a constitutional perspective, it is prudent to start from the public interest perspective. Section 71 permits government to compulsorily acquire private property if it is in the public interest. In the above mentioned report, Mtisi lists a number of reasons for the government’s move to consolidate diamond mining. First was that “consolidation is aimed at rescuing the industry since the diamond mining companies have been struggling to operate after allegedly exhausting alluvial diamonds in all resource areas they were allocated”.⁴² Thus, government needed “to find ways of triggering investment in exploration hence the proposal to form a consolidated company that can ride on economies of scale and invest in exploration projects”.⁴³

Other reasons, according to Mtisi:

range from the need to promote transparency and accountability in the production, transportation, marketing and export of diamonds. Diamond mining companies have been fleecing the country. Some have reportedly not been

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

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Ibid.*

paying taxes and dividends. Further, Government also views the proposed consolidation as an opportunity to streamline administration and monitoring across the whole value chain of diamond mining (production to marketing) to improve transparency and accountability. The belief is that consolidation will assist in plugging diamond leakages worsened by vulnerabilities associated with having too many operators in the field.⁴⁴

Clearly, the consolidation can be understood as a policy crafted in the public interest. However this is not adequate to meet the requirements of section 71.

In terms of section 71, the right to property therein is limited. Thus compulsory deprivation is permissible in circumstances where:

- (a) the deprivation is in terms of a law of general application;
- (b) the deprivation is necessary for any of the following reasons –
 - (i) in the interests of defence, public safety, public order, public morality, public health or town and country planning; or
 - (ii) in order to develop or use that or any other property for a purpose beneficial to the community;⁴⁵

The consolidation was announced through the press, and not through the government gazette. It was a cabinet decision not carried through the legislature to be formally implemented through general law, or an Act of Parliament. In practice, this is what is meant by a law of general application. It is that there should be a law that sanctions the limitation of the right in question (in this case, the right to property), and that lays down the conditions which would have to be satisfied prior to the right being limited.⁴⁶ Such a law has to be rational, and there must be a rational link between the law and the attainment or achievement of a legitimate societal objective. Further, the law sanctioning the limitation must be of general application and not directed at specific individuals or group, and it must be reasonably certain.⁴⁷ People must know with a reasonable degree of certainty the conduct that is proscribed and the conduct that is permitted.⁴⁸ There was no such law; the mining law drafted in 1961 has no such provisions.

The need for a general law that provides concrete backing for government policy that limits fundamental rights is echoed in the general limitation clause in section 86 of the Constitution. Section 86 is a clause that formulates principles and draws the parameters within which laws that limit fundamental rights must fall. This limitation clause calls for the prior need of “a law of general application”.⁴⁹ In addition, such a law can only permit limitation of fundamental rights “to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom”. Some of the factors to be taken into account before limiting a right include consideration of the nature of the right in question, the purpose of the limitation, the nature and extent of the limitation, the need to respect and not prejudice rights of others.⁵⁰

⁴⁴ *Ibid.*

⁴⁵ Section 71(3) of the 2013 Constitution.

⁴⁶ See for instance the limitations in the Land Acquisition Act, Chapter 20:10.

⁴⁷ A. J. van der Walt, *Property and the Constitution* (PULP, University of Pretoria, 2012) p. 28.

⁴⁸ S. Woolman and H. Botha, ‘Limitations’, in S. Woolman *et al.* (eds.), *Constitutional Law of South Africa*, volume 2, 2nd edition (2006) pp. 48–49.

⁴⁹ Section 86(2).

⁵⁰ Section 86(2)(a)–(f).

In addition, there were no legal formalities that the government followed in seeking to pursue consolidation. Section 71 calls for some procedural steps to be followed by acquiring authorities prior to acquisition or deprivation. The government did not give any form of notice to private mining firms of the impending policy of diamond consolidation. However, the government had raised various warnings and alarm with the manner in which diamond mining was being conducted by mining companies.⁵¹ Such threats did not constitute notice in any manner.

Finally, there was no compensation extended to private mining firms for loss of property in one or another. These companies were compelled to close shop, their licences cancelled despite government guarantees and they lost huge income through government's vindictive behaviour. They lost huge investments that were protected by both domestic law and international bilateral investment agreements.

8 Overview

A number of points stand out from the analysis of the constitutional protection of property rights of foreign investors in the mining sector, as well as the impact of foreign investment on the land rights of indigenous communities. The conclusions to be drawn are as follows:

Firstly, there is no doubt that the 2013 Constitution recognises and protects the right to property. Thus the scope of protection encompasses the protection not only of the rights of foreign property owners and investors, but also guarantees fair and adequate compensation in cases of acquisition or deprivation by the government. Mining rights are property rights well envisaged by the constitutional property clause, and consequently enjoy the full protection accorded by this clause.

Secondly, the 2013 Constitution definition of property encompasses the rights and interests in land possessed by indigenous communities in terms of both customary law and legislation. Thus despite these communities lacking title to land, or freehold tenure, they cannot be easily removed, relocated or displaced from such land as the constitution protects their rights and interests on the land they reside upon, or use. Further, their occupation, use, possession and utilisation of communal land grants them use or occupational rights that are protected by the constitutional framework, despite these rights not equating to private ownership or dominium.

Thirdly, the mining laws that creates a rights framework for mining investors further recognises and protects the land rights of mining companies to the use, occupation and utilisation of the land upon which they conduct mining activities. Consequently, the special grants, general leases and other mining rights and licences are given under the mines law for a dual purposes, namely the right to conduct mining activities, and also the corollary right to the occupation, use and/or possession of the land where such activities are done. This paper has demonstrated that whilst the acquisition and redistribution of mining rights is usually done in terms of mining law, the acquisition of land rights may be done in terms of both mining law and land rights law.

The fourth point is that government policies that result in the compulsory acquisition and deprivation of the property rights of foreign investors fall outside the ambit of the constitutional protection clause, albeit to the extent such policies are not implemented through general law, or fail to compensate for the loss of rights. Accordingly, policies such as consolidation fell outside the precincts of the law. What

⁵¹ See for instance *Ministry of Finance 2014 Mid-Term Fiscal Review. 2015 National Budget Statement*, paras. 578–571.

government needed to do was to pass legislation that would create a justifiable framework for consolidation.

Finally, the mining law, particularly the framework Mines and Minerals Act, is outdated and out of sync with contemporary mining methods and practises. The Act needs to be amended as a matter of urgency, and despite positive efforts in this regard,⁵² government is not moving fast enough. As it is, the Act does not adequately complement the constitutional property clause; nor does it make it easy for government to manoeuvre in its attempts to balance the public interest and the expectations of foreign investors in the mining sector.

9 Conclusion

There is little doubt that the 2013 Constitution goes a long way in the recognition, protection and promotion of the right to property. Indeed, this research has illustrated that the manner in which the constitutional property clause is phrased extends a respectful level of recognition and protection to property rights of both foreign investors and indigenous communities. This set up provides an important value system that should guide and determine the content of legislation promulgated to give effect to and/or limit the right to property. And therein lies the problem. Existing legislation is still some way towards milking the gains of a Constitution that post-dates various statutes, and the mining law is just one example of such legislation.

In this paper, it has also been illustrated that as far as rights discourse is concerned, the Zimbabwean government struggles to balance the conflicting rights and interests of indigenous communities and foreign investors, particularly in the mining sector. Further, and more worryingly, the government has found it difficult to follow the requirements set out in the constitutional property clause prior to interfering with the right to property of foreign investors. This research clearly highlighted the variance between the content of constitutional rights and the content of government policy, and the implications this has had on the right to property are grossly adverse, in the least. Consequently, the consolidation policy, briefly sketched in this paper, was not crafted, implemented and applied in terms of a law of general application; neither did it ensure compensation for infringed rights. It was a policy that created chaotic developments echoed in various court decisions that eventuated as a result of the consolidation policy.

In conclusion, therefore, at least in relation to the right to property, constitutional theory has not matched or shaped government actions, manifested through government policies. Constitutional theory must match governmental practice in order for fundamental rights to be adequately recognised and protected in Zimbabwe. Constitutional practice must shape the actions and policies of government, and eventually promote the rule of law since it means the government is acting in terms of the Constitution. The larger the gap between constitutional theory and government practice, the lesser the right to property is guaranteed and protected. For Zimbabwe, the consolidation policy

⁵² This 2015 Mines and Minerals Amendment Bill was the third such meant to amend the Mines and Minerals Act, a piece of law that has stayed in the statute books since 1961. The government drafted the first amendment to the Mines and Minerals Act in 2007. This amendment did not see the light of day. The second amendment to the mines law was drafted in 2010. Again, this effort did not materialise into concrete legislation. In 2013, Zimbabwe adopted a new Constitution, the 2013 Constitution, and this necessitated various changes in all laws in general. Inevitably, the 2015 MMAB version could be seen as directly responding to the framework created by the 2013 Constitution, and incorporates, to some extent, positions suggested in the 2007 and 2010 draft mining law amendments.

explains the gap that exists between governmental practice and constitutional theory, and the state of the rule of law in the area of property rights.