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FOREWORD

I am delighted to welcome the inaugural issue of the Zimbabwe Rule of Law Journal. The idea of establishing this Rule of Law Journal has largely been influenced by existing demand in the legal fraternity for a peer reviewed law journal with a national scope.

The aim of this Zimbabwe Rule of Law Journal is to make a significant contribution towards knowledge creation, raising general awareness on aspects of the law and instill informed scholarly debates. The journal is a joint endeavor between the International Commission of Jurists Africa Regional Programme and the Centre for Applied Legal Research (CALR). This journal is composed of articles and papers written by academics, legal practitioners and law students.

The rule of law is a foundational value and principle of our Constitution as set out in section 3. The Preamble of the Constitution recognises the need to entrench the rule of law because it underpins democratic governance. The rule of law is the means by which fundamental human rights are protected. It is therefore absolutely necessary that there be a way in which the legal profession is enabled to play its role in ensuring that the rule of law is maintained and promoted. This first issue contains articles on house demolitions in violation of s 74 of the Constitution, the right of access to the voters' roll, fair labour standards, the justice delivery mandate of the Judicial Service Commission, the right to life and applicable criminal defences, employment of persons with disabilities, accountability of persons in high offices and public statements prejudicial to the State.

It is my hope that this journal will play an important role in nation building. It will offer information on rule of law issues and disseminate the jurisprudence of our courts and international and regional courts on this very vital subject. It will hopefully introduce, through the contributions by lawyers and other practitioners of their professional expertise, to the comparative and international dimensions of the rule of law principle and the comprehensive developments in this area. In this way this journal will seek to protect and promote the rule of law through critical analysis of judgments of the courts.

The current Constitution of Zimbabwe was adopted in 2013. Many of its provisions require interpretation by the courts in order to build a body of jurisprudence for the future. It can be said that with the coming into force of the 2013 Constitution and establishment of the Constitutional Court, the process of balancing the Court's functional and institutional establishment has just began. There is a need to strike a proper balance between constitutional functions and the concrete power of the Court and between the objects and subjects of constitutional control. This journal can, with the contribution of many professionals, become a permanent, continual and systemic source of assessment of the work of our courts and provide invaluable insights into the working of our system of governance.

I wish to thank the many individuals who have made it possible for this Journal to be produced and congratulate those who have prepared the articles that make up this first issue. I wish to apologize in advance for any inadequacies that may be picked up in this issue. It is the first and all efforts will not be spared to improve subsequent issues in all respects.

Harare, February 2017

Justice MH Chinhengo, Chief Editor

ACCESSING THE NATIONAL VOTERS' ROLL THROUGH THE RIGHT OF ACCESS TO INFORMATION IN ZIMBABWE

Justice Alfred Mavedzenge¹

Abstract

The call for electoral reforms in Zimbabwe has been at the centre of deliberations on political governance and democratic reform in the country. The Constitution² prescribes minimum standards and principles to which the conduct of elections in Zimbabwe must adhere. Zimbabwe is also bound by the SADC Principles and Guidelines Governing Democratic Elections which should give effect to amendments to the Electoral Act³ and related legislation.⁴ Amongst the key changes⁵ which must be made to the Electoral Act are those giving the Zimbabwe Electoral Commission (ZEC) the independence to fundraise for its operations; the independence to decide on foreign observer missions without interference from the sitting government; allowing diaspora Zimbabweans to cast their vote in elections; and imposing certain professional standards⁶ to be applied by ZEC when recruiting staff.

The main opposition party, Movement for Democratic Change led by Morgan Tsvangirai, has collaborated with other opposition parties⁷ to craft a document titled the *National Electoral Reform Agenda*, which details the reforms required to give effect to the standards and principles prescribed by the Constitution. However, the issue of public access to the national

¹ By Justice Alfred Mavedzenge, a Doctoral candidate in the Department of Public law at the University of Cape Town and a practising constitutional lawyer in Zimbabwe.

² 2013. See in particular sections 155, 156 and 158

³ [Chapter 2:13] of Zimbabwe

⁴ Including the legislation governing freedom of the media, freedom of expression and the freedom of assembly.

⁵ This information is gleaned from unpublished position papers presented by various Zimbabwean civil society organisations and academics. Some of the information can be obtained from <https://erczim.org/?cat=36> (Accessed on 29 July 2016)

⁶ To protect the independence and integrity of ZEC. It has been argued that these standards should, amongst other stipulations, prohibit the recruitment of serving State security agents to work within ZEC as this may undermine the independence of the Commission

⁷ Which include the MDC led by Professor Welshman Ncube, Transform Zimbabwe, the African Democratic Party and Progressive Democrats of Zimbabwe.

voters' roll has attracted much attention as signified by the court applications⁸ made to compel ZEC to release the national voters' roll to the public. The national voter's roll should be available to the public as it is an existing constitutional right, which the legislature are obliged to give effect to through amendments to the Electoral Act.

This paper argues that the issue as to whether citizens are entitled to access the national voter's roll has been settled in the Constitution which requires all State institutions to exercise public power and discharge their functions in a transparent and accountable manner as enforced through the right of access to information, enshrined in s 62. This right entitles citizens to request any record of information held by the State which is obliged to provide the requested information if that information is needed by the requester for purposes of fostering public accountability.

ZEC has the duty to provide citizens with access to the national voters' roll because it must be accountable and transparent regarding the state and condition of the national voters' roll. Additionally, the State is obliged to provide access to the requested record if the information is needed by the requester to protect or exercise any of the rights entitled to the citizen by law. Citizens have the right to a free and fair election as interpreted in the context of the entrenched values of transparency and accountability which include the right to hold ZEC accountable for the manner in which elections are organised. To exercise this right, the citizens can request access to the national voters' roll by invoking the right of access to information held by the State.

Introduction

The Constitution of Zimbabwe⁹, s 62 entrenches the right of access to information and provides as follows:

⁸ These include *Justice Mavedzenge v Chairperson of the Zimbabwe Electoral Commission* HC 4014/14

⁹ Constitution of Zimbabwe, Amendment No 20, 2013

*"Every Zimbabwean citizen or permanent resident, including juristic persons and the Zimbabwean media, has the right of access to any information held by the State or by any institution or agency of government at every level, in so far as the information is required for the exercise of public accountability."*¹⁰

In addition, the Constitution provides as follows:

*"Every person, including the Zimbabwean media, has the right of access to any information held by any person, including the State, in so far as the information is required for the exercise or protection of a right."*¹¹

This paper argues that the right to access any information held by the State includes the constitutional right of citizens and permanent residents of Zimbabwe to access the national voters' roll in both electronic and hard copy format. This argument is predicated on the fact that access to the national voters' roll is necessary for citizens to hold the ZEC accountable regarding how it discharges its constitutional duty of managing the national voters' roll and related registers. This argument is also based on the fact that citizens require access to the national voters' roll for them to be able to exercise their political rights, particularly the right to a free and fair election.

This paper is divided into three parts. In Part I, the nature and object of the right of access to information held by the State is discussed and it is sought to show that the purpose of the right of access to information is to give effect to the constitutional values of transparency and accountability. The discussion is also aimed at showing that the purpose of this right is to facilitate the protection and enforcement of other legal rights to which citizens are entitled.

In Part II, the paper discusses the application of the right of access to information held by

¹⁰ See s 62 (1) *ibid.*

¹¹ See s 62 (2) *ibid.*

the State to show that ZEC is an institution of the State and is therefore bound by the right of access to information.

In Part III, the paper discusses the scope and meaning of this right in order to show that it includes the right of the citizens to access the national voters' roll. The paper discusses the two possible constitutional grounds, within the scope of the right of access to information, upon which citizens can claim access to the national voters' roll. It is argued that the right to a free and fair election, as opposed to the right to participate in a free and fair election, includes the right to know that the elections will be or have been free and fair and that right can only be exercised if one has access to the national voters' roll.

Reference will be made to existing literature on access to information as a human right. The paper also refers to comparative foreign law because a wide or elaborate right of access to information is still a new right in Zimbabwe¹² and the local courts are yet to develop adequate jurisprudence in this area. Reference to relevant foreign law is permitted by the Constitution.¹³

Much of the foreign case law referred to in this paper is drawn from the jurisprudence of the Constitutional Court of South Africa and the Supreme Court of Kenya because both countries can be regarded as comparable jurisdictions in relation to Zimbabwe. The Constitution of South Africa¹⁴ and that of Kenya¹⁵ provide for the right to access information in a context where transparency, accountability and free and fair elections are entrenched as constitutional values. In Zimbabwe, constitutional rights are to be interpreted in a manner which upholds,

¹² The right of access to information was an implied right under the auspice of the right to freedom of expression enshrined in s 20 of the former Constitution of Zimbabwe, 1979. However the scope of the right was not as widely formulated as it exists in section 62 of the current Constitution.

¹³ Section 46 (1) (e) provides that, '*when interpreting this Chapter [the Declaration of Rights], a court, tribunal, forum or body may consider relevant foreign law.*'

¹⁴ 1996 s 32

¹⁵ 2010 s 35

resonates and promote these values¹⁶ and, as Zimbabwean courts develop their own jurisprudence on the right of access to information, they ought to be persuaded by how the courts in Kenya and South Africa have interpreted this right to give effect to the values of transparency, accountability and free and fair elections.

Another comparable point between Kenya and South Africa is the creation of independent electoral bodies¹⁷ with a constitutional mandate to ensure the realisation of certain political rights entrenched in the Bill of Rights, including the right to vote in a free and fair election.¹⁸ The Constitution of Zimbabwe creates ZEC to perform a similar constitutional function¹⁹ and Zimbabwean courts, therefore, ought to be persuaded to hold their electoral management bodies accountable to honour the rights enshrined in the Constitution's Bill of Rights. Thus, there are sufficient constitutional similarities between Zimbabwe, Kenya and South Africa which make it possible to refer to those jurisprudences regarding comparative foreign law to advance the arguments made in this paper.

Part I: Nature and object of the right of access to information held by the State

Jagwanth and Calland²⁰ have described the right of access to information as a leverage right, whose purpose is, on one hand, to facilitate the enforcement of public accountability and, on the other hand, the enforcement of other rights. This notion has been endorsed by various other authors, for instance, Currie and de Wal argue that the right to access information originates from the idea that, in an open and democratic society, government should be transparent and accountable for its actions and decisions, and therefore the public must have access to the relevant information in order to assess the rationality of Government decisions.²¹ In his commentary on the South African Bill of Rights, Devenish asserts that

¹⁶ See ss 3 and 46 (1) (b). Also see *Mudzuru v Ministry of Justice, Legal & Parliamentary Affairs* [2015] ZWCC 12 at 26

¹⁷ These are the Independent Electoral and Boundaries Commission of Kenya and the Electoral Commission of South Africa

¹⁸ See section 19 of the Constitution of South Africa, 1996 and Article 38 of the Constitution of Kenya, 2010

¹⁹ See sections 238 and 239 of the Constitution of Zimbabwe, 2013

²⁰ Saras Jagwanth and Richard Calland. 'The Right to Information as a Leverage Right'. *University of Cape Town* (2002) at 3
²¹ Iian Currie and Johan De Wal. *The Bill of Rights Handbook* 5th Ed (2005) at 684

the right of access to information is predicated on the need for accountability.²² Diallo and Calland²³ posit that the right of access to information serves different democratic objectives which include holding government to account and increasing citizen participation in State or public affairs.

The right of access to information is perceived as a leverage right which gives effect to the values of transparency and accountability because it allows citizens to access certain useful information held by the State; to scrutinize the lawfulness, propriety and rationality of decisions taken;²⁴ and to hold their leaders accountable. Furthermore, the right of access to information gives the citizens access to certain information which they can use to assess and establish whether or not their rights have been violated or are being threatened.²⁵ Hence the right of access to information is perceived as a right which is meant to give effect to the idea of open and transparent government, as well as facilitate the exercise of other rights.

The notion that the right of access to information is purposed to foster transparency and State accountability has also been endorsed in South Africa,²⁶ for instance, in the seminal case of *Brümmer v Minister for Social Development*²⁷ where the Constitutional Court of South Africa held as follows:

“The importance of this right ... in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the State. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency must be fostered by providing the public with timely, accessible and accurate information”

²² Gorge Devenish. *A Commentary of the South Africa Bill of Rights* (1999) at 446

²³ Fatima Diallo and Richard Calland (Ed). *Access to Information in Africa: Law, Culture and Practice* (2013) at 21

²⁴ See Note 23 at 685

²⁵ See Note 23 above

²⁶ See ss 1 (d) and 32 of the Constitution of South Africa, 1996

²⁷ 2009 (6) SA 323 (CC); 2009 (11) BCLR 1075 (CC) at 62.

More recently, the South African Constitutional Court maintained the same stance in *President of the Republic of South Africa v M & G Media Ltd*,²⁸ , when it held that:

"The constitutional guarantee of the right of access to information held by the state gives effect to accountability, responsiveness and openness, as founding values of our constitutional democracy. It is impossible to hold accountable a government that operates in secrecy. The right of access to information is also crucial to the realisation of other rights in the Bill of Rights. The right to receive or impart information or ideas, for example, is dependent on it. In a democratic society such as our own, the effective exercise of the right to vote also depends on the right of access to information. For without access to information, the ability of citizens to make responsible political decisions and participate meaningfully in public life is undermined."

Similarly, in *De Lange v Eskom Holdings*,²⁹ the South African High Court had the occasion to interpret the significance and purpose of the right of access to information held by the State where it held as follows:

"Various authorities and our higher courts have consistently held that the purpose of the right of access to information is to subordinate the organs of the state to a new regimen of openness and fair dealing with the public."

Thus, the South African jurisprudence on the interpretation of the right of access to information shows that the judiciary has taken the view that the purpose of this right is to guarantee citizens' access to information held by Government as a means of compelling the State to operate transparently and to be accountable. The Court also endorses this right to provide citizens with access to certain information necessary for them to exercise their other rights as transparency and accountability are entrenched as constitutional values³⁰

²⁸ 2012 (2) BCLR 181 (CC); 2012 (2) SA 50 (CC) at 10

²⁹ 2012 (1) SA 280 (GSJ); [2012] 1 All SA 543 (GSJ); 2012 (5) BCLR 502 (GSJ) at 28

³⁰ See s 1 (d) of the Constitution of South Africa, 1996

to be interpreted in a manner which upholds and promotes those values.³¹ Zimbabwean courts ought to be persuaded by this stance due to the entrenchment of similar values in the Constitution of Zimbabwe.

That the right of access to information is a leverage right, predicated on the need to enforce public accountability and other rights, is unequivocally endorsed by the Constitution of Zimbabwe, s 62 which allows that the right of access to information held by the State is guaranteed for two purposes. First, access to State information is guaranteed in order to foster public accountability. Section 62 (1) entitles citizens and permanent residents as well as Zimbabwean media to

"... any information held by the State or by any institution or agency of government at every level, in so far as the information is required in the interests of public accountability."

Second, through section 62 (2) the notion that the right of access to information is a leverage right to facilitate the enforcement of other rights is established, and entitles Zimbabweans to any information held by the State, *"in so far as the information is required for the exercise or protection of a right."*

The term 'right' is not only limited to constitutionally entrenched rights. Section 47 indicates that the entrenchment of the Declaration of Rights *"does not preclude the existence of other rights and freedoms that may be recognised or conferred by law, to the extent that they are consistent with this Constitution"*. Therefore the term 'right', as used in section 62 (2) should be interpreted broadly to include any right recognised under the law applicable in Zimbabwe, as long as the exercise of that right will not infringe or violate any provision of the Constitution. Lovemore Madhuku observes that law in Zimbabwe includes legislation, common law and customary law³² and, although this observation was made prior to the enactment of

³¹ See section 39 (1) (a) of the Constitution of South Africa, 1996

³² Lovemore Madhuku. *An Introduction to Zimbabwean Law* (2010) at 13-25

the 2013 Constitution, his views are still relevant as signified by section 332. Therefore the term 'any right' include those rights conferred upon the citizens by any legislation, common law, customary law or international law that is applicable in Zimbabwe.

The foregoing discussion demonstrates that, in terms of the Constitution of Zimbabwe, citizens have a right to access any information held by the State if they need that information for purposes of enforcing government transparency and accountability, or for purposes of enforcing any legal right. This paper contends that access to the national voters' roll can be justified on both grounds and therefore fits within the ambit of the right to access information, as enshrined in s 62.

Part II: Application of the right of access to information held by the State

In order to understand why and how access to the national voters' roll can be justified as part of the right of access to information, it is important to understand certain aspects regarding how the right of access to information applies in terms of the Constitution of Zimbabwe. First, the Declaration of Rights binds the State and all its agencies, including those that are in the executive, legislative and judicial branch of Government, as defined by the constitution.³³ In addition, the Constitution prescribes that the State and all the institutions and agencies of government at every level must respect, protect, promote and fulfil the rights enshrined in the Declaration of Rights.³⁴

The Constitution establishes the ZEC as an independent constitutional body³⁵ responsible for the proper custody of the national voters' roll and related registers.³⁶ Therefore, ZEC is an institution of the State. It has been argued elsewhere³⁷ that, by virtue of being an

³³ See s 45 (1) of the Constitution of Zimbabwe, 2013

³⁴ See s 44 *ibid.*

³⁵ See ss 232 (a) and 238 *ibid.*

³⁶ See s 239 (e) *ibid.*

³⁷ In the opposing affidavit submitted by the Chairperson of the Zimbabwe Electoral Commission in *Justice Alfred Mavedzenge v Chairperson of the Zimbabwe Electoral Commission* case no. HC 4014/14

independent constitutional body, ZEC is not bound by the Declaration of Rights. The fact that ZEC is an independent constitutional commission does not exonerate it from being bound by the Declaration of Rights or the Constitution. A Constitution prescribes how the State shall be organised or structured, creates State institutions, confers power to those institutions and prescribes rules, principles and values through which the assigned power shall be exercised by those institutions.³⁸ ZEC is guaranteed independence from being pressured by other State institutions or non-State actors but is still subject to law and Constitutional provisions. Only the judiciary, when applying the law, has the authority to direct how ZEC shall operate.³⁹ Therefore, there should not be doubt that ZEC is an institution of the State, which is required to respect, protect, promote and fulfil the rights enshrined in the Constitution.

Furthermore, ZEC is bound by the Declaration of Rights given that it is a Commission created to ensure the effective realisation of the rights enshrined in the Declaration of Rights. ZEC's mandate is to organise, supervise and conduct elections in a manner that is consistent with the principles set by the Constitution, in order to fulfil the right to a free and fair election⁴⁰ as enshrined in s 67 (1) (a). As will be shown later, the right to a free and fair election is not a right which can be exercised in isolation as it is closely related and sometimes dependent on other rights such as the right to access certain information which enables citizens to cast their votes freely and have those votes counted fairly. ZEC is thus not only bound by the right to vote but by the entire Declaration of Rights, to respect, protect, promote and fulfil the relevant rights enshrined therein, which include the right of access to information held by the State.

The notion that ZEC is bound by the rights enshrined in the Declaration of Rights is further supported by s 233 (a) and (c), which binds ZEC to support human rights and promote

³⁸ I derive this definition from Gorge Devenish's discussion of constitutionalism in *A Commentary on the South African Bill of Rights* (1999) at 16-17

³⁹ See s 165, read together with s 69 of the Constitution of Zimbabwe, 2013

⁴⁰ As well as other rights enshrined in the Declaration of Rights.

constitutionalism. Section 233 is significant as it is one of the provisions through which ZEC is created and it can be argued that the same constitutional provisions which create ZEC further bind it to honour human rights. Access to information is recognised as a constitutional human right and therefore ZEC is bound to honour that right. Constitutionalism is a complex phenomenon to define but, as Francois Venter argues, it is a doctrine that encapsulates the idea that:

"... those who govern are obliged to conduct the business of government in accordance with publicly articulated, prospective rules that enable citizens to assess the legitimacy and propriety of public policies".⁴¹

These rules are set by the Constitution and expanded in the enabling legislation and regulations. Constitutionalism, therefore, implies respect for the Constitution and all other laws which flow from it. In terms of s 233, ZEC is therefore obliged to promote respect for the Constitution, which also includes respect of the rights enshrined in the Constitution. In that regard, ZEC is bound not only to honour the right of access to information, enshrined in s 62, but to actively promote the observance of this right when discharging its constitutional mandate.

Since the adoption of the Constitution in May 2013, the Zimbabwean courts have handled some petitions⁴² in which citizens and or political parties sought to hold ZEC accountable on the basis of the Declaration of Rights. However, the courts have not been able to deal with this issue as most of those petitions were thrown out on technicalities.

However, prior to the commencement of the 2013 Constitution, the Zimbabwean Electoral Court in *Movement for Democratic Change v the Chairperson of the Zimbabwe Electoral*

⁴¹ Francois Venter 'The Withering of the Rule of Law' (1973) Vol 8 *Spectrum Juris* at 69-88

⁴² These are largely unreported because they were dismissed on technicalities.

*Commission*⁴³ held that:

"The clear intention of the Legislature in s 61 (5) of the Constitution [1979] was to ensure ZEC's independence provided it was operating within the law. It has to exercise its functions as provided by subs (4) for it to enjoy that immunity. It cannot for example conduct elections unfairly, outside the law, and which are not free and fair, but on being sued insist that the courts have no jurisdiction over it. The court would in such circumstances have jurisdiction to hear and determine complaints against ZEC."

This case was decided in 2008 in terms of the former Constitution of Zimbabwe,⁴⁴ which created ZEC as an independent constitutional body. However the Court insisted that the independence is not from the law and ZEC was subject to the jurisdiction of the Courts. Given that the 2013 Constitution has maintained a similar legal principle of subjecting all State institutions to the principle of the rule of law⁴⁵ and to honour the constitutional rights,⁴⁶ the courts must be able to follow a similar approach to hold ZEC accountable on the basis of the Constitution's Declaration of Rights.

The argument in favour of ZEC's accountability on the basis of the Declaration of Rights is well supported in comparative jurisdictions that have persuasive force in the Zimbabwean legal system.⁴⁷ In Kenya, in the case of *Raila Odinga v the Independent Electoral and Boundaries Commission*,⁴⁸ (IEBC) the IEBC was petitioned by a contestant of the State Presidential elections for having failed to maintain a credible national voters' roll.⁴⁹ On the question of whether the IEBC was bound by the Bill of Rights or not, the court made the following indication:

"[The] IEBC is a constitutional entity entrusted with specified obligations, to organize,

⁴³ HH-37-08 at 3

⁴⁴ The Lancaster House Constitution, 1979

⁴⁵ Section 3 (1) (b) of the Constitution of Zimbabwe, 2013

⁴⁶ Section 44 *ibid.*

⁴⁷ By virtue of section 46 (1) (e) *ibid.*

⁴⁸ Petition No. 5 of 2013, [2013] eKLR

⁴⁹ See *Raila Odinga v the Independent Electoral and Boundaries Commission*, Petition No. 5 of 2013, [2013] eKLRat 10

*manage and conduct elections, designed to give fulfilment to the people's political rights (Article 38 of the Constitution). The execution of such a mandate is underpinned by specified constitutional principles and mechanisms and by detailed provisions of the statute law".*⁵⁰

Thus the Supreme Court of Kenya interpreted the IEBC as an entity created to fulfil certain rights enshrined in the Constitution's Bill of Rights and thus bound by the Bill of Rights to honour the various fundamental rights enshrined therein, including the political rights entrenched in Article 38 of the Constitution of Kenya. This approach should be applicable in the Zimbabwean context as in similar situation, the ZEC is a constitutional entity, entrusted with the responsibility to protect, promote and fulfil the rights enshrined in the Declaration of Rights, which include the right to free and fair elections⁵¹ and the right of access to information.⁵²

In South Africa, the judiciary has also taken a similar stance that, although the electoral management body is created as an independent institution, it remains a State institution bound by the Bill of Rights. This was first confirmed by the Constitutional Court in its landmark judgment in the *August v Electoral Commission*.⁵³ In this case, the Independent Electoral Commission (IEC) was petitioned in an application which challenged the constitutionality of its decision to deny prisoners their right to vote. On the question regarding whether the IEC is bound by the Bill of Rights, the Court indicated as follows:

"The right to vote by its very nature imposes positive obligations upon the legislature and the executive. A date for elections has to be promulgated, the secrecy of the ballot secured and the machinery established for managing the process. For this purpose the Constitution provides for the establishment of the [Independent Electoral] Commission

⁵⁰ Ibid at 197

⁵¹ Enshrined in s 67 (1) (a) of the Constitution of Zimbabwe, 2013

⁵² Enshrined in s 62 ibid.

⁵³ Case CCT 8/99

*to manage elections and ensure that they are free and fair.*⁵⁴

Thus the Court took the view that the electoral commission is created to fulfil the rights enshrined in the Constitution's Bill of Rights, particularly the right to vote. Therefore, the IEC is bound to respect, protect, promote and fulfil the rights enshrined in the Bill of Rights.⁵⁵

Jagwanth observes that the right of access to information held by the State creates positive duties which must be performed by the State.⁵⁶ In Zimbabwe, these duties are encapsulated in s 44, whose import is to require the State to protect and promote the citizen's right to access information held by the State. The duty to protect human rights entails the obligation to take positive steps to protect rights bearers from activities which have the potential to undermine the enjoyment of their constitutional rights.⁵⁷ The duty to promote fundamental rights encompasses the obligation to take positive measures to create conditions which enable citizens to access and enjoy their fundamental rights.⁵⁸ Therefore both the duty to protect and promote culminate in the establishment of the obligation of the State to take positive measures to ensure that citizens enjoy their rights. Regarding the right of access to information, ZEC is therefore bound to take positive steps to provide citizens with information when they request it. The scope of this duty must be interpreted consistent with s 194 (1) which obliges all institutions of the State to ensure that they discharge their functions in accordance with the basic values and principles governing public administration, as enshrined in the Constitution. These include the requirement to foster transparency by providing the public with timely, accessible and accurate information.⁵⁹ Therefore ZEC has a positive obligation to timeously provide the national voters' roll when requested to do so and it must be provided in its accurate form.

⁵⁴ *August v Electoral Commission* Case CCT 8/99 at 16

⁵⁵ See s 7 (2) of the Constitution of South Africa, 1996

⁵⁶ See Note 23 at 7

⁵⁷ A. Akintayo. "Planning law versus the right of the poor to adequate housing: A progressive assessment of the Lagos State of Nigeria's Urban and Regional Planning and Development Law of 2010" (2014) *African Human Rights Law Journal* at 561

⁵⁸ *Ibid*

⁵⁹ See section 194 (1) (h) of the Constitution of Zimbabwe

Currie and de Wal rightly observe that constitutional rights are not absolute.⁶⁰ Constitutional rights must be exercised in a manner which respects the boundaries set by other rights and by important social concerns which include national security, public order and safety.⁶¹ Section 86 (1) read together with (2) (a) of the Constitution of Zimbabwe entrenches this principle of limitation by cautioning that the rights enshrined in the Declaration of Rights "*must be exercised reasonably and with due regard for the rights and freedoms of other persons.*" However, it ought to be emphasised that, although these rights are subject to limitations, they may only be limited for a reason and in a manner that is constitutionally valid.

Constitutional rights may only be limited through a law of general application, to the extent that the limitation is fair, necessary and is consistent with the underlying values of a democratic state⁶² which are openness, justice, human dignity, equality and freedom. Whether the limitation is justifiable is determined by considering the nature of the right being limited, the purpose, nature and extent of the limitation, the relationship between the limitation and the purpose of such limitation, and whether there are any less restrictive means of achieving the same purpose.⁶³ In South Africa, where similar guidelines exist, this has been interpreted to mean that the limitation must be for a purpose regarded as compelling in a democratic constitutional state,⁶⁴ there must be a good reason to believe that the purpose will be achieved by restricting the right, the restriction of the right must not be more than what is necessary to achieve the purpose and it must be the least restrictive manner through which the purpose may be achieved.⁶⁵

In view of the foregoing, the right of access to information may only be limited through a law of

⁶⁰ See Note 24 at 163

⁶¹ Ibid

⁶² See s 86 (2) of the Constitution of Zimbabwe, 2013

⁶³ See section 86 (2) (a)-(f) of the Constitution of Zimbabwe, 2013

⁶⁴ Based on such values as openness, freedom and human dignity. Also see Denise Meyerson. *Rights Limited: Freedom of Expression, Religion and South African Constitution* (1998) at 36-43

⁶⁵ *S v Manamela* 2000 (3) SA 1 (CC) at 32

general application, and such law includes legislation which applies to everyone in Zimbabwe. This right may be limited only for a purpose that is considered acceptable and compelling in a democratic state⁶⁶ and the State may enact legislation which may restrict access to certain information. Currently this legislation is the Access to Information and Protection of Privacy Act⁶⁷ which was, however, enacted prior to the adoption of the Constitution and it is due for realignment. The Constitution allows this legislation to restrict access to information if it is necessary for purposes of protecting or promoting national defence, public security or professional confidentiality.⁶⁸ Additionally, in terms of section 86 (2) (b), access to information may also be restricted if it is necessary to protect public order, public safety and health. However, it is not enough for the State to merely give one of these reasons as justification for restricting access to information. There must be a rational connection between the nature of the information for which access is being denied and the purpose for such restriction. Put differently, the nature of the information must be such that if released to the citizen, the legitimate purpose for the protection of such information will be undermined. Furthermore, the Constitution unequivocally cautions that, even where restriction is contemplated in order to promote or protect any of the aforementioned legitimate interests, the restriction must not go beyond what is necessary, fair and must be consistent with the values of a democratic society that is based on accountability and transparency⁶⁹ and must remain reasonable both in terms of the length of time and the amount of information for which access is being restricted.

In the next section of this paper, it will be demonstrated that there is no constitutionally justifiable reason for denying a citizen access to the national voters' roll. To the contrary, the Constitution obliges ZEC to provide citizens with access to the national voters' roll because it is in the interest of public accountability to do so and it is necessary for the exercise of

⁶⁶ See s 86 (2) of the Constitution of Zimbabwe, 2013

⁶⁷ [Chapter 10:27]

⁶⁸ See s 62 (4) *ibid*

⁶⁹ See ss 62 (4) and 86 of the Constitution of Zimbabwe, 2013

one's political rights, particularly the right to a free and fair election, enshrined in section 67 (1) (a) of the Constitution.

Part III The transparency and public accountability argument

Every Zimbabwean citizen has a constitutional right to access the national voters' roll in order to enforce public accountability by ZEC regarding the management of elections. This view is predicated on the fact that ZEC has a constitutional mandate to ensure proper custody of the national voters' roll and at the same time, it has the obligation to discharge this function in a transparent and accountable manner, especially when requested to do so.

Transparency and accountability are necessary normative values upon which every constitutional democratic State must be based.⁷⁰ Transparency is a normative constitutional value which demands that State institutions must discharge their duties and exercise public power in a manner that is open to the citizens as well as other State institutions.⁷¹ State accountability encapsulates the obligation of State institutions entrusted with public power and public resources to be answerable for the exercise of their power and utilisation of resources.⁷² Thus transparency is the idea that state affairs should be conducted in a manner that is open to public scrutiny and accountability is the idea that the State must account for its actions. A democratic society must incorporate adherence to these two values, amongst others, because public power is less likely to be abused when exercised openly and when the State is legally obliged to account to the citizens.

The Preamble to the 2013 Constitution shows that the Zimbabwean society has committed itself to establish a united, just, prosperous nation, founded on transparency as one of the cardinal values.⁷³ Additionally, transparency and accountability are entrenched amongst

⁷⁰ Justice Mavedzenge and Doug Coltart. *A Constitutional law guide towards understanding Zimbabwe's socio-economic human rights* (2014) at 18

⁷¹ *Ibid*

⁷² See *Black's Law Dictionary* 2nd Edition

⁷³ See paragraph 9 of the Preamble to the Constitution of Zimbabwe, 2013

the founding values and principles upon which the government should be based.⁷⁴ To give effect to these two values, the 2013 Constitution entrenches as fundamental the right of access to any information held by the State,⁷⁵ and a duty for all public institutions⁷⁵ to ensure that they are:

*"... governed by the democratic values and principles enshrined in this Constitution, including [that] transparency must be fostered by providing the public with timely, accessible and accurate information"*⁷⁶

By entrenching transparency and accountability as founding values and by guaranteeing the right of access to information held by the State, there cannot be doubt that the 2013 Constitution has subordinated the exercise of all public power to openness and public scrutiny.

ZEC exercises public power to prepare, supervise and conduct elections of public office bearers in Zimbabwe, as described in Part II of this paper. This power should be discharged to give effect to the constitutional principle that the authority to govern is derived from the people⁷⁷ and through a free and fair election⁷⁸ which is conducted in accordance with the principles enshrined in s 155 as well as the founding values stated in s 3 of the 2013 Constitution. ZEC has the responsibility to compile voters' rolls⁷⁹ and to ensure the proper custody and maintenance of these rolls and registers.⁸⁰ This constitutional function must be exercised in a manner which adheres to the normative values of transparency and accountability, as discussed earlier.

The proper maintenance of the national voters' roll is the bedrock of the electoral democracy⁸¹

⁷⁴ See s 3 (2) (g) of the Constitution of Zimbabwe, 2013

⁷⁵ See s 62 (1) and (2) *ibid*

⁷⁶ See s 194(1) (h) *ibid*

⁷⁷ Entrenched in section 3 (2) (f) *ibid*

⁷⁸ See s 3 (2) (a) and (b) *ibid*

⁷⁹ See s 239 (d) *ibid*

⁸⁰ See s 239 (e) *ibid*

⁸¹ This is because the right to vote is exercised when one is registered as a voter on the voters' roll. See schedule 4 of the

because, in terms of the 2013 Constitution,⁸² the authority to govern is acquired through a free and fair election and the right to vote in that election may only be exercised when a citizen is registered as a voter.⁸³ It is impossible to achieve the constitutional goal of establishing and maintaining a democratic Zimbabwean society in which the authority to govern is derived from the people through a free and fair election, if the national voters' roll is not managed properly. Thus, ZEC has a duty to inspire confidence amongst the citizens that the elections are based on a properly managed national voters' roll. In that regard, the citizens have both a legitimate interest and a justiciable fundamental right to know if the national voters' roll does exist in proper shape and condition necessary for the proper conduct of elections.⁸⁴ This right is exercised on the basis of s 62 (1)⁸⁵ by requesting ZEC to provide a copy of the national voters' roll in a manner that enables the public to scrutinize its' quality. ZEC has an obligation to respect, protect and promote this right and therefore has a duty, especially when requested to do so, to uphold and foster the obligation of transparency and accountability in the management of the national voters' roll and the maintenance of the democratic electoral system.

Access to the national voters' roll as a means of enforcing the right to a free and fair election.

In addition to the public accountability argument, access to the national voters roll is constitutionally justified for purposes of protecting and enforcing the right to a free and fair election. The right of access to information guarantees the citizens access to any information held by the State, if access to the requested information is necessary to exercise or protect their rights.⁸⁶

Constitution of Zimbabwe, 2013

⁸² See s 3 (2) of the Constitution of Zimbabwe, 2013

⁸³ See schedule 4 ibid

⁸⁴ Section 155

⁸⁵ Which guarantees citizens the right of access to information held by the State

⁸⁶ See s 62 (2) of the Constitution of Zimbabwe, 2013

Section 67(1) (a) entrenches the right of every Zimbabwean citizen to a free and fair election for any elective public office.⁸⁷ Despite the numerous election petitions brought before it, the Zimbabwean judiciary has not yet elaborately interpreted what this right entails. Devenish⁸⁸ argues that when interpreting the provisions of the Constitution, the starting point should be the consideration of the grammatical formulation of the provision. In Zimbabwe, this principle is constitutionally entrenched in section 46(1) (d) which requires the court or a body to duly consider the relevant provisions of the Constitution when interpreting the fundamental rights. It is therefore imperative to pay attention to the grammatical formulation of the right to a free and fair election, in order to establish its scope and meaning.

"Every Zimbabwean citizen has the right-(a) to free, fair and regular elections for any elective public office established in terms of this Constitution or any other law".⁸⁹

The grammatical formulation of this right shows that it is not limited to the right to 'participate' in a free and fair election. Citizens are not mere participants in an electoral process, but are also active agents with legitimate interests or concerns. Therefore, in addition to the right to 'participate' in a free and fair election, they have the right to know that the elections have been or are going to be free and fair, and the right to take legally valid corrective actions to ensure that the elections comply with set requirements of being free, fair and regular. Additionally, s 46(1) (b) of the 2013 Constitution, prescribes that:

"When interpreting this Chapter [The Declaration of Rights], a court, tribunal, forum or body must promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom, and in particular, the values and principles set out in section 3 [of the Constitution]"

The above provision has been interpreted by the Constitutional Court of Zimbabwe⁹⁰ to

⁸⁷ Elective public offices in Zimbabwe include the State President, Legislators and Local authority councillors.

⁸⁸ Gorge Devenish. *Interpretation of Statutes* (1992) 26

⁸⁹ Section 67(1) (a)

⁹⁰ See *Mudzuru v Ministry of Justice, Legal & Parliamentary Affairs* [2015] ZWCC at 26

imply that constitutional rights must be interpreted in a manner which adequately resonates with the entrenched founding constitutional values and principles. Therefore the scope and meaning of the right to a free and fair election ought to be established in a manner which incorporates and upholds the values of openness and accountability.

The incorporation of the value of transparency into the scope of the right to a free and fair election creates the right of a citizen to an election which is conducted transparently. The management of the national voters' roll is an integral part of the process of organising the elections. Therefore, the citizens have the right to have their national voters' roll managed properly and in a manner that is open to them. Put differently, as part of the right to a free and fair election, the citizens have the right to know and verify the condition of the national voters' roll. This right may be exercised by invoking the right of access to information held by the State through access to the national voters' roll as that information is necessary to exercise their right to know and verify the condition of the national voters' roll.

The incorporation of the value of accountability into the scope and meaning of the right to a free and fair election creates a duty for ZEC to be accountable to the citizens when called upon to do so, during the process of preparing or conducting an election. As indicated above, the management of the national voters' roll is a significant part of preparing for an election in terms of the 2013 Constitution. Therefore, as part of the right to a free and fair election, the citizen is entitled to the right to call ZEC to account on the condition of the national voters' roll and it is impossible to demand accountability without access to the necessary information.

For the citizens to be able to call ZEC to account regarding the condition of the national voters' roll, they need to have access to a copy of the national voters' roll in a form which is suitable for them to assess whatever they need to ascertain. On that basis, the citizens can

invoke section 62 (2) of the 2013 Constitution to request access to the national voters' roll.

Conclusion

Access to the national voter's roll is guaranteed as a constitutional right. This right is derived from the governance framework as entrenched in the 2013 Constitution. This framework requires that the exercise of all public power and the discharge of all public functions must be done in a manner that is open to the public, and the State must be accountable to its citizens. The right of access to any information held by the State is a constitutional right which citizens are entitled to use in order to enforce public transparency and accountability. It is a mechanism provided by the Constitution to give effect to the underlying values of transparency and accountability.

Therefore the citizens may request access to the national voters' roll in order to foster transparency in the manner in which ZEC manages and maintains the national voters' roll. In addition, the right of access to information is a leverage right, which can be used to access information necessary to exercise or protect other rights. The right to a free and fair election implies the right to know if the elections have been free and fair or are going to be free and fair. This right may only be exercised if a citizen has access to the national voter's roll.

BIBLIOGRAPHY

State Constitutions and Statutes

Access to Information and Protection of Privacy Act [*Chapter 10:27*] of Zimbabwe

Constitution of Kenya, 2010

Constitution of South Africa, 1996

Constitution of Zimbabwe, 2013

Electoral Act [*Chapter 2:13*] of Zimbabwe

Case law

August v Electoral Commission Case CCT 8/99

Brümmer v Minister for Social Development 2009 (6) SA 323 (CC); 2009 (11) BCLR 1075 (CC)

De Lange v Eskom Holdings 2012 (1) SA 280 (GSJ); [2012] 1 All SA 543 (GSJ); 2012 (5) BCLR 502 (GSJ)

Justice Mavedzenge v Chairperson of the Zimbabwe Electoral Commission HC 4014/14

Movement for Democratic Change v the Chairperson of the Zimbabwe Electoral Commission HH-37-08

Mudzuru v Ministry of Justice, Legal & Parliamentary Affairs [2015] ZWCC 12

Raila Odinga v the Independent Electoral and Boundaries Commission, Petition No. 5 of 2013, [2013] EKLR

Republic of South Africa v M & G Media Ltd 2012 (2) BCLR 181 (CC); 2012 (2) SA 50 (CC)

S v Manamela 2000 (3) SA 1 (CC)

Articles

A. Akintayo 'Planning law versus the right of the poor to adequate housing: A progressive assessment of the Lagos State of Nigeria's Urban and Regional Planning and Development Law of 2010' *African Human Rights Law Journal* (2014)

Francois Venter 'The Withering of the Rule of Law' Vol 8 *Spectrum Juris* (1973)

Saras Jagwanth and Richard Calland 'The Right to Information as a Leverage Right' *University of Cape Town* (2002)

Books

Denise Meyerson *Rights Limited: Freedom of Expression, Religion and South African Constitution*, Juta Legal and Academic Publishers, South Africa, 1st edition, 1998

Fatima Diallo and Richard Calland (Ed). *Access to Information in Africa: Law, Culture and Practice*, Brill, Netherlands, 2013

Gorge Devenish *A Commentary of the South Africa Bill of Rights*, Butterworths, South Africa, 1999

Gorge Devenish *Interpretation of Statutes*, Juta, South Africa, 1992

Henry C Black *Black Law Dictionary*, 2nd Ed, Lawbook Exchange Limited, New Jersey United States of America, 1995

Iian Currie and Johan de Wal. *The Bill of Rights Handbook* 5th Ed, Juta and Company, South Africa, 2005

Justice Mavedzenge and Doug Coltart *A Constitutional law guide towards understanding Zimbabwe's socio-economic human rights*, International Commission of Jurists, Zimbabwe, 2014

Lovemore Madhuku *An Introduction to Zimbabwean Law*, Weaver Press, Zimbabwe, 2010

FAIR LABOUR STANDARDS ELEVATED TO CONSTITUTIONAL RIGHTS: A NEW APPROACH IN ZIMBABWEAN LABOUR MATTERS.

Rodgers Matsikidze¹

Introduction

Labour rights, like any other socio-economic rights, have been statutory rights since the enactment of the Labour Relations Act of 1985. The Constitution of Zimbabwe 2013 brought in another dimension that incorporates the second and third generation rights into the Bill of Rights. This paper seeks to argue that s 65 (1) of the Constitution of Zimbabwe introduces a new approach in determination of labour matters as it entitles direct access to the Constitutional Court through which alleged violations of labour standards may be addressed and, secondly, fairness is the central factor in determination of alleged violations and practices. This paper concludes by arguing that the Supreme Court decision in the case of *Nyamande & Another v Zuva Petroleum (Pvt) Ltd*² (the *Zuva* case), among others, is incorrect as it exalts common law over clear constitutional rights. It further concludes that the Supreme Court leapt to the protection of the employer when that protection could still have been attained without the court entangling itself in judicial activism.

The meaning of section 65(1) of the Constitution of Zimbabwe

Section 65(1) of the Constitution of Zimbabwe provides as follows:

"Every person has the right to fair and safe labour practices and standards and to be paid a fair and reasonable wage".

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² *Nyamande and Another v Zuva Petroleum (Pvt) Ltd* SC -43-15

This section is basically three in one. The section may be expanded as follows:

- a. right to fair labour practices and standards,
- b. right to safe practices and standards,
- c. right to be paid a fair and reasonable wage.

This paper will focus on part (a): the right to fair labour practices and standards. What is clear and apparent is that the right does not define fair labour practices and standards. The right is pluralistic in nature; it appears one right yet is a convolution of rights. The concept of fair labour practice is alien to common law but is an invention of the International Labour Organization (ILO).³ There are a number of ILO Conventions that set out various labour standards and minimum practices that are acceptable under the ILO family.⁴ International labour standards are legal instruments drawn up by the ILO's constituents, setting out basic principles and rights at work.⁵ The international labour standards are therefore either conventions, which are legally binding international treaties that may be ratified by member states, or recommendations that are non-binding agreements.⁶ What is apparent from this definition is that standards are a creation of ILO.⁷ Hence the referral to standards under municipal law should derive its definition from the ILO definitions.

Zimbabwe employs the transformation doctrine as a way of domesticating international instruments. In section 327 (2) of the Constitution of Zimbabwe, an international instrument needs to be signed and ratified first for it to be binding. In addition, after the ratification, parliament should then by an Act of parliament incorporate the convention or treaty into municipal law. Hence, in this instance, the definition of what is a standard or practice can be

³ Xavier Beaudonnet (ed) *International Labour Law and Domestic Law*, ILO, Switzerland, 2010

⁴ ILO, *Freedom of Association, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, 2006.

⁵ ILO, *Rules of the Game, A brief introduction to International Labour Standards*, ILO, Revised Edition, Switzerland, 2009, p14.

⁶ Ibid

⁷ ILO, *Constitution of the International Labour Organisation*, ILO Switzerland, Geneva, 2009

adopted from the ILO literature since Zimbabwe has already ratified and signed a number of international labour standards as will be discussed. Section 326 (1) of the Constitution of Zimbabwe provides reference to the international customary law in interpreting treaties and conventions and provides that customary international law is part of the Zimbabwean law unless it is inconsistent with the Constitution and Acts of parliament. However, when interpreting a statute or the Constitution of Zimbabwe the rule is that the Constitution or statute must be interpreted in such a manner that is consistent with international customary law or convention or treaty.⁸

The answer to what constitutes a fair labour standard and practice is thus found under international law. As already pointed out, a number of these fair labour standards and practices exist, including:

- a. right to fair dismissal,
- b. right to maternity leave,
- c. right to vacation leave,
- d. right to fair conditions and terms of employment,
- e. right to organize
- f. right to join trade union of choice etc.⁹

The Zimbabwean Labour Act [*Chapter 28:01*] does set a number of fair practices and standards. Section 6, s7, s8, s9 and s10 of the Labour Act (28:01) lists unfair labour practices and standards.

However, particular to the purpose of this paper is s12B of the Labour Act where it is provided that an employee has a right not to be unfairly dismissed. It is submitted that this provision

⁸ Sections 326 and 327 of the Constitution of Zimbabwe.

⁹ See ILO, *Rules of the Game, A brief introduction to International Labour Standards*, ILO, Revised Edition, Switzerland, 2009, in general.

is a fair labour practice and standard. Thus, when interpreting the provisions of s65 (1) of the Constitution of Zimbabwe, there should be inclusion of the right to fair dismissal. In dealing with cases of fair labour standards as set in the Labour Act the courts will be essentially be dealing with matters raising constitutional issues. In the case of *NEHAWU v University of Cape Town (NEHAWU)* the court ruled that because the Labour Relations Act 66 of 1995 gave content to the rights in respect of labour relations in s 23 of the constitution, its interpretation application “*in application compliance with the constitution*” are constitutional issues.

The court in NEHAWU further held that the right to fair labour standards and practices in s 23(1) of the Labour Relations Act 66 of 1995 is applicable to both the workers and employers. Rautenbach argues that the focus of s23 (1) of South African Labour Relations Act is to ensure that the relationship between the worker and the employer is fair to both.¹⁰ He says the right not to be unfairly dismissed is essential to the right to fair labour practices.¹¹

The Supreme Court of Zimbabwe (SCZ) seems to have adopted an opposite approach in dealing with matters of unfair dismissal. Its standard is clearly a common law approach as opposed to ILO jurisprudence yet the common law does not define what unfair dismissal constitutes. The approach by the Zimbabwean Supreme Court seems to be conservative as it is based on the concept of lawfulness and not fairness.

There is a difference between the two concepts of fairness and lawfulness. A termination maybe within the parameters of the law but yet not fair. Lawfulness is confined to what the rules of law say yet fairness referred to in s12B of the Labour Act (28.01) extends beyond what the rules of law enunciate. Fairness also includes the aspect of equity and morality to some extent unlike law that may be law despite its moral content.¹² Hence, the correct

¹⁰ I M Rautenbach, *Overview of Constitutional Court Decisions on the Bill of Rights-2002*, TSAR 2003 p182

¹¹ Ibid

¹² Lovemore Madhuku, *Introduction to Law In Zimbabwe*, Harare, Weaver Press, 2010

interpretation of the provisions of sections 65(1) of the Constitution of Zimbabwe as read with s12B of the Labour Act [Chapter 28.01] requires dismissal not only to be lawful but fair. Hence the penalty to terminate ought not only to be lawful but fair.

In the case of *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* (2007) 12 BLLR 1097 (*Sidumo*), the South African Supreme Court ruled that in deciding dismissal disputes in terms of the compulsory arbitration provisions of the Labour Relations Act 66 of 1995 (LRA), Commissioners should approach a dismissal with 'a measure of deference' because the commissioner ought to be persuaded that dismissal is the only fair sanction. The Supreme Court held that once the employer establishes that dismissal is the only fair sanction, and the end of the inquiry as the discretion to dismiss lies with the employer. This approach is the same as the one adopted in the judgments of *Toyota v Posi* SC -55-2007; *Tregers Plastics (Pvt) Ltd v Woodreck Sibanda and Anor* SC-22-2012; and *Innscor Africa Limited v Letron Chimoto* SC264-2010 where the Supreme Court clearly concretise the sanctity and supremacy of the employer's decision to dismiss in cases where there is belief that the misconduct goes to the root of the contract.

The South African Constitutional Court ruled that the *Sidumo* case raised constitutional issues especially in view of the fact that the Labour Relations Act was enacted to give effect to the rights contained in ss 23 and 33 of the South African Constitution.¹³ Further, the court noted that the issues pertaining to the determination of the powers and functions of the Labour Court canvassed in the *Sidumo* case are essentially constitutional issues.¹⁴

The South African Constitutional Court (SCC) in disposing the *Sidumo* case ruled that, although s23 (1) of the South African Constitution affords fair labour practices to both the employer

¹³ See p 50 of the *Sidumo* judgment.

¹⁴ See para 51 *ibid*.

and the employee alike, to the employees it affords security of employment.¹⁵ The Court held that a primary purpose of the LRA is to give effect to the fundamental rights conferred by s23 of the South African Constitution. The provisions of s1 of LRA are similar to the provisions of s2A of the Labour Act [*Chapter 28.01*]. Hence the application and interpretation of the provisions is the same. The SCC further ruled that s185 of the LRA provides that every employee has the right not to be unfairly dismissed and subjected to unfair labour practices. ¹⁶It ruled that the onus is on the employer to prove that the dismissal is fair.¹⁷ The reasoning in the Zimbabwean *Zuva* case, however, is contrary to the SCC reasoning in the *Sidumo* case.

Right to terminate on notice under section 65 (1) of the Constitution of Zimbabwe

The SCC ruled further that the Commissioner first examines whether the decision to dismiss was fair or reasonable and that such a decision should be made in light of the rule breached. The SCC ruled that the Commissioner was an independent adjudicator who considers the competing interests of the employer and the employee. The court noted that when interpreting s145 of LRA they ought to do so in a manner that is compatible with the values of reasonableness and fair dealing that an open and democratic society demands.¹⁸

The SCZ endorsement of termination in the *Zuva* case resulted in mixed feelings between the employees and employers. The workers described it as a resurrection of the Master and Servant Ordinance of 1905, while the employers celebrated it as a case that enhances labour flexibility and an entrance to a free market economy.

This paper argues that the approach by the SCZ exalted the common law right of termination on notice over a constitutional right, and incorrectly so. The case ignored the new legal

¹⁵ See para 55 *ibid*.

¹⁶ See para 58 *ibid*.

¹⁷ See para 58 *ibid*.

¹⁸ See para 158 of the *Sidumo* judgment.

terrain set by the Constitution of Zimbabwe 2013. What is clear is that the discretion of the employer to dismiss in terms of s 65 of the Constitution of Zimbabwe is subjected to the test of fairness. The SCZ seems to deviate from jurisprudence that clearly originates from ILO conventions on labour. The *Zuva* case buttresses the above view on termination.

The employees in question were terminated on notice after the following sequence of events: the employer initiated a retrenchment process and the employees in question were then selected for retrenchment. The employer then offered a retrenchment package to the employees, which the employees rejected. The employer opted to refer the matter to Retrenchment Board for quantification of the retrenchment package. The employer later revised its position and then terminated the employees on three months' notice on a no fault basis. The Supreme Court then ruled that both the employer and the employee had a common law right to terminate an employment relationship on notice. The court further held that the common law right in respect of both the employer and the employee could only be limited, abolished or regulated by an Act of Parliament or a statutory Instrument Act which is, clearly, *intra vires* an Act of Parliament.

The Supreme Court further ruled that it is also a well-established principle of statutory interpretation that a statute cannot effect an alteration of the common law without saying so explicitly. The court did find that in s12B of the Labour Act [*Chapter 28:01*] there expressly or impliedly was no abolition of the employer's common law right to terminate an employment relationship by way of notices. The court ruled that section 12B deals with dismissal and the procedures to be followed in those instances where an employment relationship is to be terminated by way of dismissal following misconduct proceedings. The court made a finding that termination on notice is another method of dismissal similar to other methods like retrenchment etc.

It is argued that the termination on notice is contrary to the provisions of S65 (1) of the Constitution of Zimbabwe through exalting the common law right over a constitutional right. This is so if termination on notice is looked in the context of ILO jurisprudence, or as a component of right to fair labour practice and standards.

Termination on notice is dismissal

John Grogan argues that there is significant development on the law of dismissal¹⁹ which, as Grogan puts it, has gone outside the framework of the statute to the Constitutional framework.²⁰ Grogan argues that s 23 of the South African Constitution affords everyone the right to fair labour standards.²¹ In addition, Grogan argues that in the case of *Old Mutual Life Assurance Company SA Ltd v Gumbi* 2007 28 ILJ 1499 the Supreme Court of Appeal recognized, as an implied term of every contract of employment, a right to be terminated fairly. Grogan defines dismissal anchored on section 186(1) of the LRA.²²

In terms of section 186 (1) of the LRA, dismissal means that:

- a. An employer has terminated a contract of employment with or without notice.
- b. An employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms and then the employer offers to renew it on less favourable terms or did not renew it.
- c. An employer refuses to allow an employee to resume work after she took maternity leave in terms of any law or collective agreement governing her contract of employment.
- d. An employer who dismisses a number of employees for the same or similar reasons and then offers to re-employ one or more of them but refuses to re-employ another or;
- e. An employee terminates a contract of employment with or without notice because the employer made employment intolerable for the employee.

¹⁹ John Grogan, *Dismissal*, Juta (2010) p9

²⁰ John Grogan, *ibid* p10

²¹ *ibid* p10

²² *ibid* p10

- f. An employee terminated a contract of employment without notice because the new employer, after a transfer of the business, lowered the conditions and terms of employment.

The provisions of s186 (1) LRA buttress the argument that dismissal includes terminating on notice or without notice. In other words dismissal is not confined to misconduct hearings as the Supreme Court implied. The term dismissal is not a common law principle. Grogan argues that the word dismissal does not occur in the language of the common law.²³ Hence s 12B (1) of the Labour Act that provides the right not to be unfairly dismissed is not to be interpreted from a common law position. There are two key aspects in s12B (1) of the Labour Act, namely, the concept of fairness and lawfulness.

The Supreme Court therefore was incorrect to rule that termination on notice is outside the armpit of dismissal. The South African LRA clearly puts termination on notice in the armpit of the dismissal. Assuming that one does not want to follow the above reasoning, termination on notice still will be found to be violating s 65(1) of the Constitution of Zimbabwe. The violation occurs in respect to two aspects.

First, the right to terminate on notice without compensation does not pass the test of fairness under ILO Convention (C150).²⁴ Convention 158 governs termination and the concept of fair termination is enshrined in this convention. Even though Zimbabwe has not signed and ratified the Convention, Convention 158 has great persuasive value and the courts can rely on it based on s326 of the Constitution of Zimbabwe. In other words, the Supreme Court should have followed the decisions of the courts of other jurisdictions where the definition of fairness in termination have been pronounced. Hence the employees in the *Zuva* case terminated on notice without compensation were terminated unfairly.²⁵

²³ Ibid 13

²⁴ Termination of Employment Convention, 1982

²⁵ Michelle Olivier, Interpretation of the Constitutional provisions relating to international law, paper based on doctoral thesis '*International Law in South African Municipal Law: human rights procedure, policy and practice*'

The second aspect was for the Supreme Court to inquire whether terminating on notice without compensation is a fair labour practice or standard. In other words, the court ought to have proceeded to measure the termination on notice against set standards or practices on termination particularly as the countries that follow ILO jurisprudence are member states, like Zimbabwe.

What is clear and apparent is that there is no standard or practice that classifies termination on notice without compensation as a fair standard.²⁶

Conclusion

The Constitution of Zimbabwe, particularly s 65 (1), provides a new approach to labour matters but what remains for any Zimbabwean court is to adopt an approach that helps for citizenry to enjoy their rights in full. In any event, the Constitution of Zimbabwe 2013 requires a purposive and broad interpretation rather than a narrow interpretation that unduly constricts the rights. It is hoped that in the near future the Supreme Court will expand on the right to fair labour practices and practices as provided for in s 65 (1) of the Constitution of Zimbabwe.

(2002) UNISA.

²⁶ See also Munyaradzi Gwisai, *Labour and Employment Law in Zimbabwe*, Harare, UZ & Zim Labour Centre, 2006.

ASSESSING THE JUSTICE DELIVERY MANDATE OF THE JUDICIAL SERVICE COMMISSION IN ZIMBABWE'S CONSTITUTIONAL FRAMEWORK

James Tsabora¹ and Shamiso Mtisi²

Abstract

The judicial service commission has emerged as one of the most integral institutions in constitutional and democratic states that respect the ideals of the rule of law and constitutionalism. As an institution therefore, a judicial service commission is a critical functionary in a constitutional state; it oils the wheels and fuels the engine of justice. Its integrity and status in a constitutional democracy derives, not only from the nature of its mandate, but also from the manner of its constitution, composition, appointment and most importantly, the scope of its powers. Generally, the mandate of the judicial service commission is to promote judicial independence, which is a fundamental facet in ensuring the rule of law and constitutionalism. Indeed, important debates on the rule of law and constitutionalism have invariably included the contribution of judicial institutional systems in the promotion or erosion of the rule of law and democracy in a constitutional society. Such debates necessarily take new twists and turns with the substitution of a constitutional framework by another.

This article explores the constitutional mandate of Zimbabwe's Judicial Service Commission, and makes the finding that this Commission is vital in the promotion of judicial independence, in safeguarding democracy, and in entrenching constitutionalism in Zimbabwe. It further observes that in view of Zimbabwe's long road to democracy and judicial independence, the Commission can only be applauded and given time to consolidate its true status and position in Zimbabwe's justice administration system.

1. Introduction

The Judicial Service Commission (JSC) is positioned at the fulcrum of the justice administration

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system in Zimbabwe. Its mandate is both regulatory and administrative, and is expected to promote constitutionalism by being independent, impartial, accountable, and efficient as well as through its capability to instill public confidence. These mandates are critical in view of the greatest danger faced by contemporary African democracies, being the subsuming of judicial service commissions as arms or extensions of the executive. This consequently translates to a reality where justice equates to the wishes and whims of the executive, with for instance, the appointment of judges being based not on merit but on political grounds of loyalty.³ Accordingly, one of the most problematic questions in contemporary African judicial systems is how the JSC could effectively discharge its justice delivery and administration mandate without political interference. This question is central to the major arguments fostered in this paper.

Structurally, these arguments are presented in four layers of analysis. The first layer of analysis is the applicable legal framework, including the 2013 Constitution, the Judicial Service Act, the Judicial Service Regulations and the Judicial Service (Code of Ethics). This legal framework establishes the JSC institutional system and illustrates its structure, mandate, powers and limitations. Within the legal framework are different strands of inquiry that will be analysed such as composition of JSC, judicial appointment, tenure of office, removal and resource availability among others. The second level of inquiry is the contribution of the JSC to judicial independence. Measured against international instruments and national legislation, there is need to assess how far the JSC has advanced the principle of judicial independence, which is central to constitutionalism and judicial integrity. The third component will be an assessment of the practical challenges faced by the JSC since its inception in Zimbabwe. The final component suggests possible ways of alleviating some of the challenges, and a statement of recommendations that can be adopted to enhance the capacity of the JSC to effectively discharge its constitutional mandate.

³ J.B Diescho "The Paradigm of an Independent Judiciary: Its History, Implications and Limitations in Africa", in N. Horn and A Bosl (ed) "The Independence of the Judiciary in Namibia" (2008) Konrad Adenauer Foundation (Macmillan Educational Namibia) 35.

1.2 Why is a Judicial Service Commission necessary?

In the Zimbabwean context, the JSC is generally understood as the body responsible for the administration of justice.⁴ However in practice, the JSC has advisory, supervisory and regulatory mandates which enable the judiciary to function efficiently and deliver its constitutional functions⁵. The JSC's administrative role extends beyond mere provision of stationery and salaries; it now extends to judicial selection processes through conducting public interviews and even making regulations governing the judiciary with the approval of the Minister of Justice, Legal and Parliamentary Affairs.⁶ Further, and more substantively, it is now the appointing authority for magistrates in Magistrates' Courts.⁷

It appears that, in other countries the functions of judicial service commissions similarly extend beyond administrative duties. According to Manyatera and Fombad, the emerging trend is that JSCs are becoming increasingly popular and an important feature of most judicial appointment systems in both civil and common law jurisdictions.⁸ The authors cite several jurisdictions that have adopted either judicial selection commissions or judicial services commissions.⁹ The use of judicial appointment commissions might reduce political patronage through use of open and transparent mechanisms in the appointment process.¹⁰ However, all this depends on the surrounding or enabling political or governmental system. As Manyatera and Fombad were quick to note, the existence of JSCs do not necessarily translate to effective and transparent justice delivery by the judiciary; much depends on the composition and competencies of the commission,¹¹ with these commissions faring much better

⁴ The Judicial Service Commission was first introduced into Zimbabwe's Lancaster House Constitution by Constitutional Amendment Act No.23 of 1987 (the 7th Constitutional Amendment).

⁵ This was confirmed in the case of *Judicial Service Commission v Ndlovu and Others* HB 172/13 in which Justice Moyo stated that the Judicial Service Commission does the administrative work leading to the appointment of judges.

⁶ On making regulations see Section 190(3) of the Constitution of Zimbabwe

⁷ Section 181(3) of the Constitution of Zimbabwe

⁸ See generally G. Manyatera and C.M Fombad "An Assessment of the Judicial Service Commission in Zimbabwe's New Constitution" (2014), XLVII Comparative and International Law of South Africa 2-9

⁹ Manyatera and Fombad op cit note 6) 6-7; cited the example of UK, USA, South Africa and some countries in Anglophone Africa as well as Latin American countries such as Argentina, Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Mexico, Panama and Paraguay among others.

¹⁰ Manyatera and Fombad (op cit note 6) at 8

¹¹ Manyatera and Fombad (op cit note 6) at 3

in political contexts which respect and uphold the rule of law.¹²

This is confirmed by international soft law principles that recognise the use of commissions. A good example is the Latimer House Guidelines on the Independence of the Judiciary, which states that a judicial service commission should be established by the Constitution or by statute, with a majority of members drawn from the senior judiciary.¹³ Similarly, the Beijing Statement of Principles of the Independence of the Judiciary also recognise the consultation of JSCs in making appointments and, further, that such commissions should include representatives of higher courts and legal practitioners to ensure judicial competence, integrity and independence.¹⁴

1.3 The constitutional mandate of the Judicial Service Commission in Zimbabwe

Pursuant to constitutional best practises and international standards, Zimbabwe made specific provision for the functions of the JSC in the 2013 Constitution. This is clearly in line with the Latimer House Guidelines which state that judicial appointments should be made by a JSC established by the Constitution or statute.

The Judicial Service Commission is accordingly established in terms of Section 189 of the Constitution. Under the old Lancaster House Constitution, the JSC had been established in terms of Section 84 whose role was to be consulted by the President and recommend appointment and removal of judges.¹⁵

Section 190(2) of the 2013 Constitution establishes the primary responsibility of the JSC, and states that, “*the Judicial Service Commission must promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice in Zimbabwe, and has all the powers needed for this purpose*” (emphasis added). Further, section 190(3) proceeds

¹² Manyatera and Fombad (op cit note 6) at 9

¹³ The Latimer House Guidelines on the Independence of the Judiciary (2008)

¹⁴ Article 15 of the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region 1995.

¹⁵ See generally Brian Crozier ‘Courts and Judiciary Under a New Zimbabwe Constitution’ in N. Kersting (ed) *Constitutional in Transition Academic Inputs for a New Constitution in Zimbabwe*, FES, 2005, 279.

to provide that the Judicial Service Commission, ***with the approval of the Minister responsible for justice*** may make regulations. Moreover, section 190(4) provides for the passage of an Act of Parliament that may confer on the JSC functions in connection with the employment, discipline and conditions of service of persons employed in the higher courts. These provisions have deep implications and need to be clearly analysed and examined.

1.3.1 Comment

Under the 2013 Constitution, the JSC appears to be a *constitutionally entrenched body* responsible for matters relating to the judiciary and the administration of justice.¹⁶ It may be submitted that this entrenchment is general, not specific, and this is strongly supported by a closer reading and contextual analysis of the whole Constitution. It may also be argued that what the constitution did was to merely establish the JSC and set out its functions. The concept of constitutional entrenchment connotes inclusion of provisions in the Constitution that are deliberately and exceedingly difficult or almost impossible to amend. Section 190 that establishes the JSC is not one of the specially protected clauses or strongly entrenched clauses in the constitution such as the Bill of Rights, the land provisions as well as term limits for public office.¹⁷ Those provisions are the 'entrenched' provisions of the Constitution and would demand, for instance, a referendum to be changed, while the rest of the constitutional provisions including the provision establishing the JSC only require 90 days notice, public views and a two-third majority vote in parliament to be changed, an easy task if a ruling political party commands more than two-thirds majority in Parliament. To that extent therefore, the JSC is not a specifically 'entrenched' constitutional institution.

The second point of inquiry is the mention in the Constitution that the JSC has "*...all powers needed*" for the purpose of discharging its constitutional mandate referred to in section 190(2). If measured against the powers of the executive, one may come to the conclusion that the JSC does not have all the powers. This conclusion can be reached after assessing the powers of the Minister and the role

¹⁶ See section 189 of the Constitution of Zimbabwe, 2013; See also Manyatera and Fombad (op cit note 6) at 19.

¹⁷ Section 328 provides for the Amendment of the Constitution.

of Parliament as stated respectively in section 190(3) and (4). The Minister has power to approve regulations made by the JSC. The fact that the JSC can make regulations does not mean that they will automatically pass into law. They require Ministerial approval and if the Minister does not approve them it means the regulations will not be passed. This means that the Constitution came close to granting the JSC law-making powers, but did not go far enough. Further, if Parliament feels threatened by the JSC it may pass an Act that does not provide adequate protections for employment, discipline and conditions of service of persons employed by the courts as contemplated in Section 190(4). Cumulatively, the powers of the executive and even the legislature in the Constitution whittle down the powers granted by the "*all powers needed for the purposes*" provision.

1.3.2 Other functions and contextual aspects on the role of JSC

It is important to state that the functions and responsibilities of the JSC should be understood in the context of the whole Constitution. This is because, unlike other commissions in the Constitution, the JSC is an institution that directly safeguards democracy, constitutionalism and the rule of law. In this regard, the fact that JSC is responsible for facilitating and promoting judicial independence, impartiality, integrity as well as effective and efficient delivery of justice means that it is also concerned with promoting the founding values and principles stated in s 3 of the Constitution. In particular the following values and principles are key; the supremacy of the Constitution, the rule of law, fundamental human rights and freedoms, equality of all human beings, good governance and transparency and accountability. These values tie in very well with the concept of judicial independence which is espoused in s 164 of the Constitution. Section 164 (1) states that the courts are independent and subject only to the Constitution and the law, which they must apply impartially, expeditiously and without fear, favor or prejudice. Section 164(2) goes on to state that the independence, impartiality and effectiveness of the courts are central to the rule of law and democratic governance. In this equation it is evident that the JSC should be at the centre of promoting judicial independence, impartiality and effectiveness. It has been observed that rigorous application of rule of law is the bedrock of a democratic society and if the rule of law is to be upheld,

it is essential that there should be an independent judiciary to scrutinise the actions of government and ensure they are lawful.¹⁸ Even the Bangalore Principles of Judicial Conduct states in its preamble that a competent, independent and impartial judiciary is essential if the courts are to fulfill their role in upholding constitutionalism and the rule of law.¹⁹

1.4 The JSC and the legal framework

Under the 2013 Constitution, the JSC clearly has the power to drive and implement judicial reforms.²⁰ However, as highlighted above, the mandate of the JSC to make regulations has to be exercised with the approval of the Minister of Justice.²¹ When the JSC was established (under the Lancaster House Constitution), it had no secretariat and had to meet only when the need arose²² but, despite the lack of secretariat, there were a number of developments between 2006 and 2014 that positively enhanced its justice delivery mandate. These include the passage of the Judicial Service Act in 2006, the Judicial Service Regulations in 2012 and the Judicial Service (Code of Ethics) Regulations in 2014. These statutes were essential to give effect to the constitutional mandates and functions of the JSC and, most importantly, in promoting judicial independence. A short analysis of some of these laws is therefore apposite.

The Judicial Service Act [*Chapter 7:18*] was passed in 2006, giving effect to section 91(1) of the old Constitution. Section 5 (1) of the Act outlined the functions of JSC to include fixing conditions of service, administering and supervising the judicial service, appointing persons and exercising disciplinary powers among other functions. However, there might be need to amend the Judicial Services Act so that it clearly captures the functions of the JSC as currently reflected in the Constitution. This is simply because the Act predates the 2013 Constitution, and does not clearly emphasize the JSC role

¹⁸ Lord Phillips 'Judicial Independence' <http://www.ucl.ac.uk/constitution-unit/events/judicial-independence-events/lord-phillips-transcript.pdf>, accessed 2 November 2015

¹⁹ The Bangalore Principles of Judicial Conduct, 2002

²⁰ See generally, Chief Justice G. Chidyausiku "The Role of Judicial Service Commissions in Enhancing Judicial Independence and Ensuring the Right to a Fair Trial", (27 -30 August 2015), paper presented during the Southern Africa Chief Justices Forum Annual General Meetings and Conference, 4

²¹ Section 190(3)

²² Chief Justice Chidyausiku op cit note 18 at 4

of promoting and facilitating the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice in Zimbabwe, as prescribed in Section 190 of the new Constitution.

In much the same light, the Judicial Service (Code of Ethics) Regulations were passed in 2012, and similarly predate the 2013 Constitution. However, it is one of the key achievements of the JSC to date due to the establishment of a comprehensive framework on procedures for appointment and recruitment of judicial members, performance, resignation, termination of employment and salaries. Generally, under the Regulations, in order to promote efficiency and effectiveness, the JSC is required to recruit members with knowledge and ability about the task, relevant experience and requisite qualifications and qualities.²³ Therefore, recruitment is based on merit.²⁴ On disciplinary issues and procedures,²⁵ the important aspect is what constitutes acts of misconduct. Some of the acts of misconduct include absence from duty, failure to perform duties, negligence, inefficiency or incompetence, sexual harassment and corruption or dishonesty.²⁶ These Regulations clearly indicate that the JSC has made significant efforts, at least from a legislative perspective, to contribute to judicial independence, impartiality and integrity. The language used in the “code of ethics” is also in accord with international soft law principles and guidelines on judicial service commissions and judicial independence.²⁷

2. Contribution of JSC to judicial independence: theory and practice

2.1 Conceptual meaning and scope of judicial independence

A conceptual analysis of judicial independence is important at this point in order to fully assess how the JSC has contributed to judicial independence. The independence of the judiciary is pivotal to the protection of human rights²⁸ and instrumental in the pursuit of constitutional values and the

²³ Section 3

²⁴ Section 3 (2)

²⁵ Section 45 -46

²⁶ Third Schedule to Section 45

²⁷ Bangalore Principles op cit note 17; Latimer House Guidelines op cit note 11

²⁸ L.Chiduzo “Towards the Protection of Human Rights. Do the new Zimbabwean Constitutional Provisions on Judicial

rule of law.²⁹ As a starting point, judicial independence was one of the concepts associated with the separation of powers doctrine in the writings of the French jurist, Montesquieu in the second half of the 18th century.³⁰ The basic importance of judicial independence is that it is a balancing power on the exercise of power by the other two arms of government, namely the executive and the legislature.³¹

In principle this means that some constitutional guarantees and safeguards are important to protect the judiciary from interference by the executive. In that regard the words of Judge 'O' Linn in the Namibian case of *S v Heita* are most apposite. The learned judge stated that

*"... the judiciary has no defence force or police force. They are not politicians. They cannot descend to the arena to defend themselves....precisely because they cannot protect themselves, unscrupulous persons may exploit this weakness by scandalising the court..."*³²

At the international level, judicial independence has been recognised in many instruments, and the emphasis has been on the need for competent, independent and impartial tribunals or courts.³³ Further, judicial independence has been characterised as having two components or two separate pillars, namely institutional independence and individual independence.³⁴ It manifests itself through several essential criteria that include security of tenure, integrity, impartial judicial appointments and dismissal mechanisms as well as ability of the judiciary to manage its own budget and administration of the

Independence Suffice" (2014) PER/PELJ (17) 1.

²⁹ J. Ferejohn "Dynamics of Judicial Independence: Independent Judges, Dependent Judiciary" (November, 1998) 7; <http://www.usc.edu/dept/law/symposia/judicial/pdf/ferejohn.pdf>, accessed 2 November 2015

³⁰ See generally O.C Ruppel "The role of the Executive in Safeguarding the Independence of the Judiciary in Namibia" (2008) http://www.kas.de/upload/auslandshomepages/namibia/Independence_Judiciary/ruppel.pdf, accessed 2 November 2015

³¹ N. Horn and A Bosl (ed) "The Independence of the Judiciary in Namibia" (2008) 10 Konrad Adenauer Foundation, Macmillan Educational Namibia

³² *S v Heita* (1992) 3 SA 785 (NmHC)

³³ See Article 19 of the Universal Declaration of Human Rights 1948, Article 14 of the International Covenant on Civil and Political Rights 1966 and Article 7 of the African Charter on Human and Peoples' Rights. The treaties recognise the right of every person to equality and to a fair and public hearing by an independent, competent and impartial tribunal or judiciary established by law.

³⁴ International Bar Association "Beyond Polokwane: Safeguarding South Africa's Judicial Independence" (July 2008) 20; <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=B2397A56-9D7C-4990-9B57-2749409604A5>; accessed 3 November 2015; also see generally the words of Justice Parker in *Jacob Alexander v The Minister of Justice and others* (Unreported case) HC of Namibia Case No. A210/2007 and Value 1 of *The Bangalore Principles of Judicial Conduct*, 2002.

courts.³⁵ Financially, a restricted budget, for example, can create inefficiency and affect independence and this will eventually lead to the manipulation of the judiciary by the executive.³⁶

However, it has been stated that there is an exception to the rule of judicial independence which exists for purposes of facilitating the achievement of the mandate of the judiciary.³⁷ The exception is the requirement that the state should take measures to protect the judiciary and, in fact, the executive is legally obliged to protect the judiciary.³⁸ John Ferejohn candidly stated that, even if judges enjoy some insulation from political intrusions, the Constitution ensures that the institutions within which they work, i.e. the courts, remain remarkably dependent on executive power-wielding officials.³⁹ This is because the courts rely on parliament and government for implementation of judicial decisions, allocation of funds and passage of laws. This portrays a necessary linkage between the judiciary and the executive. If the limits and scope of this necessary linkage is not properly established, the legislature, for instance, can interfere with judicial independence by passing legislation to limit the jurisdiction of the courts if they feel threatened.⁴⁰

2.2 Analysis of the legal functions of JSC in promoting judicial independence

As observed above, the concept of judicial independence has significant meaning and relevance for promoting the rule of law and constitutionalism in Zimbabwe. For a start, the JSC itself is at the centre of promoting judicial independence as stated in s 190 (2) which states that the JSC must promote and facilitate the independence, accountability, and the effective and efficient administration of the judiciary. Such a mandate supposes that the JSC should promote the practical application of s 164(1)

³⁵ See generally M. Diibotelo (Chief Justice of Botswana) (August 2015) “*Importance of Appointment Procedures in ensuring judicial Accountability and Independence of the Bench*” paper presented during The Southern Africa Chief Justices Forum Annual General Meeting and Conference held at Victoria Falls from 27 – 30 August 2015

³⁶ See generally O.C Ruppel op cit note 28 at 224

³⁷ Op cit note 28 at 219

³⁸ Op cit note 28 at 219

³⁹ J. Ferejohn op cit note 27 at 6

⁴⁰ In Zimbabwe during the height of the land invasions and land reform programme, government passed Constitutional Amendment No. 17, through insertion of Section 16B in the old Constitution, now Section 72 (3)(b) in the new Constitution which ousted the jurisdiction of the courts after a string of Supreme Court decisions based on discrimination, inequality. See generally, *Commercial Farmers Union v Minister of Lands and Others* 2000 (2) ZRL 469 (S)

which states that courts are independent and are subject to the Constitution and law which they must apply impartially, expeditiously and without fear, favour or prejudice. It can also be argued that under s 164 (2) (a), the state is required not to interfere with the functioning of the courts, and the JSC has an implicit duty to ensure this is the case. Further, given its administrative functions to make the judiciary operate efficiently and effectively, the JSC has a clear duty to ensure that the state, as proclaimed in s 164 (2) (b), assists and protects courts to ensure their independence and well-being. This the JSC can do by approaching the state for adequate funding for salaries and administration costs.

Moreover, the JSC has a duty implied in s 165 to ensure that its members follow the guiding principles related to judicial independence such as to desist from any political activity, or acceptance or solicitation of any gift, loan or favour that may influence their judicial conduct.⁴¹

As indicated already, the adoption of the Judicial Service Act, the Judicial Service Regulations and the Judicial Service (Code of Ethics) Regulations has been made in order to enhance the mandate, role and responsibility of the JSC under the Constitution. There are many provisions in these Acts that have a direct bearing on judicial independence and those provisions are an expression of the commitment of JSC towards promoting judicial independence. These include personal and institutional independence, integrity, propriety, equality, impartiality and competence and diligence.⁴² Other important aspects related to judicial independence relate to the need to curb corruption, dishonesty and involvement in political activities.⁴³ These are similar to the principles expressed in s 165. Therefore to a large extent, by including these values and principles as part of the ethics that the judiciary should abide by, the JSC's constitutional mandate of promoting judicial independence is made very clear.

2.3 Composition of JSC and judicial independence

The composition of the JSC itself, in theory and in practice, has great implications for the independence of the judiciary and its integrity. This is because if the JSC is not composed of fit and proper persons

⁴¹ Section 165 (5)

⁴² Section 4

⁴³ Third Schedule to Section 45 of the Judicial Service Regulations

or is packed with people who advance the interests of a certain faction, then this will be a threat to judicial independence. Madhuku therefore correctly notes that the extent to which the appointment of judges is free from political manipulation is largely reliant on the independence of the JSC itself.⁴⁴ In terms of composition, s 189 (1) states that the JSC is made up of the Chief Justice, Deputy Chief Justice, Judge President of the High Court, one judge nominated by other judges, Attorney-General, Chief Magistrate, Chairperson of the Civil Service Commission, three practicing legal practitioners, one professor or senior lecturer of law, a public accountant and a person with human resources experience. The Chief Justice presides over the meetings of the JSC.⁴⁵ Section 189(3) states that some members of the JSC will serve for only one non-renewable term of six years. Those that serve one term include the judge nominated by other judges, legal practitioners, law professor or lecturer, public accountant and human resources person.

An analysis of the composition of the JSC shows that there has been an attempt to promote diversity in terms of representation of various interests. Further, the inclusion of the representatives of the senior members from the judiciary and the independent legal profession goes a long way in ensuring judicial independence, integrity of the judicial sector and impartiality of judges and magistrates. Manyatera and Fombad, rightly note that such a composition might augur well for the assessment of judicial candidates as most of the members are well placed to critically scrutinise the suitability or otherwise of the candidates to the judicial office.⁴⁶

Apart from these observations, however, there are several issues to examine as they may in practice affect decisions of the JSC to effectively promote judicial independence. The first issue is that there are two opportunities for Presidential appointment of members of JSC. These include the human resources person in terms of s 189(1) (k) and a possible appointee by the President from the academic field in terms of s 189(1) (i). Section 189(1)(i) states that one professor or senior lecturer

⁴⁴ L. A Madhuku (2002), *Journal of African Law* 238; see also L. Chidzuza op cit note 26 at 379.

⁴⁵ Section 189 (2)

⁴⁶ Manyatera and Fombad op cit note 6 at 18

of law designated by an association representing the majority of the teachers of law at Zimbabwean universities or, in the absence of such an association, appointed by the President. What is worrying about this provision is that, it is possible that such an association might not exist. If that is the case, then the President will make an appointment of a senior law lecturer or a professor to sit in the JSC for a period of six years. Section 189(1)(i) and (k) are just a simple indication of how it is virtually impossible to completely exclude political appointments to the JSC.

The second point arising from Section 189 in relation to nominations by associations is that it is not clear what criteria the associations will use, within their internal systems, to select members who will sit in the JSC. Both the Constitution and the Judicial Service Act appear to be silent on the qualities and abilities of members that may be chosen to represent their associations in the JSC. The importance of this is that given the crucial role the JSC is supposed to play in the appointment, removal and administration of justice the qualities of people who should be chosen by the associations to sit in JSC should also fit within the framework of what is called a fit and proper person.

The third and somewhat worrisome point is that, as in other countries, the Chief Justice is the Chairman of the JSC. The Chief Justice already has other responsibilities including head of the Supreme Court and the Constitutional Court. There is too much concentration of powers in one individual, and there is a high chance of him failing to effectively fulfil his duties.

Comparatively, however, the South African JSC has been criticised as heavily weighted with Presidential and parliamentary appointees and in that sense, it has become too political.⁴⁷ This is because South Africa adopted a multistakeholder approach. The South African JSC is made up of representatives of the judiciary, legal profession, including attorneys, academics, advocates, political parties represented in parliament, members of the national and provincial executive and presidential appointees.⁴⁸

⁴⁷ E. Camer "*Judicial Selection Process*" <http://www.courtingjustice.com/judicialselection.html>, accessed 4 November 2015

⁴⁸ See Democratic Governance and Rights Unit (DGRU) "*Judicial Selection in South Africa*" (2010) www.dgru.uct.ac.za/usr/dgru/...judicial%20selectionoct2010pdf, accessed 9 November 2015

Commenting on the composition of the South African JSC, Magaisa stated that it is a system that says democracy is about majority rule, but it also considers the interests of the minority and recognizes the importance of skills and expertise.⁴⁹ This is a sober assessment of the position in South Africa, but it does not make the system attractive in any way since it is heavily composed of political players. It defeats the whole purpose of judicial independence and it inevitably raises the risk of political-party based deliberations and decision making.

2.4 Appointment of judges generally

Appointment of judicial officers has a great bearing on judicial independence. Theoretically, there are several threats to judicial independence that may be brought about by judicial appointments. Executive controlled judicial appointments processes mostly result in “court packing”. The International Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa recommend that an independent body should be entrusted with selection of judicial officers.⁵⁰ There are a wide variety of judicial appointment mechanisms world-wide that reflect different levels of adherence to the concept of judicial independence.⁵¹ In the USA, for example, the President appoints judges whom are then subjected to interrogation by the Senate. During apartheid in South Africa, the courts were packed with political appointees and prosecutors and judges had to follow the direction of the incumbent leaders and deal with enemies of the apartheid regime.⁵²

As stated already, the Latimer House Guidelines makes it clear that constitutional systems should have an appropriate independent process in place for judicial appointments which should be made by a JSC and based on merit,⁵³ while judicial positions are also advertised.⁵⁴ What this boils down to

⁴⁹ A. Magaisa “Does the public have a role in Zimbabwe’s new Judicial appointment process?” (July 2014) <http://alexmagaisa.com/does/-the-public-have-a-role-in-zimbabwes-new-judicial-appointments-process/>, accessed 30 October 2015

⁵⁰ L.Chiduzo op cit note 26 at 376

⁵¹ Ginsburg and Garoupa “*The Comparative Law and Economics of Judicial Councils*” 2008, Berkeley Journal of International Law Vol 27.1.53 quoted by Manyatera and Fombad op cit note 6 at 2

⁵² J. B Diescho op cit note 1 at 35

⁵³ Principle II of Annex of the Commonwealth (Latimer House) Principles on the Three Branches of Government (2003) and see also Principle 12.3 of the Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct (2010)

⁵⁴ Latimer House Guidelines, 1998

is that to secure judicial independence, judicial appointments should be made on the basis of clearly defined criteria and a publicly declared process to enhance equal opportunity.⁵⁵ On tenure, the UN Basic Principles on the Independence of the Judiciary state that once a person is appointed as a judge, their tenure should be guaranteed until mandatory retirement age or expiry of their term of office. Therefore, security of tenure is an important factor in promoting judicial independence.

2.5 The appointment process and role of JSC in Zimbabwe

As stated, the JSC plays a role in the selection and appointment of judges, magistrates and other judicial officers. The appointments are in terms of the Constitution and the Judicial Service Act. In order to critically assess the performance of the JSC on judicial appointments it is important to analyse the specific rules first.

Section 180(1) provides for the appointment of all judges and s 180(2) goes on to state that whenever it is necessary to appoint a judge, the JSC must **advertise** the position, and **invite the President** and the **public** to make nominations. Thereafter, JSC is required to prepare a list of three qualified persons as nominees and submit the list to the President whereupon the President must appoint one of the nominees. However, if the President considers that none of the persons on the list submitted by the JSC is suitable for appointment, he must require the JSC to submit a further list of three qualified persons from which he will appoint one of the nominees.⁵⁶ Another important provision is s 184 which provides that the appointments to the judiciary must reflect broadly the diversity and gender composition of Zimbabwe. What is clear is that s 180 sets out the procedures for the appointment of judges and JSC plays a role. Below is an analysis of the intricate aspects about these provisions as well as what the JSC did in practice.

⁵⁵ Latimer House Guidelines *ibid*

⁵⁶ Section 180(3)

2.5.1 Advertisement of positions

The first issue and mandatory duty⁵⁷ of the JSC is the requirement to advertise the position. Clearly, this is a positive development that may enhance transparency and also shows the application of and adherence to internationally accepted standards.⁵⁸ Advertising has been hailed as vital in that it opens the door to a wider group of potentially qualified people⁵⁹ and competition might improve the chances of selecting the best candidates. In compliance with this constitutional duty, in 2014, the JSC issued an advertisement calling for nominations to three positions each for Judges of the Supreme and High Courts. The advert was widely circulated and flighted in the media to invite members of the public to nominate suitably qualified persons to fill the positions for which nomination forms from the offices of the JSC in Harare, or the offices of Provincial Magistrates in the Provinces and also online from the JSC website (www.jsc.co.zw) were available. This was a positive transparent public relations exercise by the JSC.

2.5.2 Nominations by the President and the public

The second issue for consideration is the requirement that the JSC should invite the President and the public to make nominations.⁶⁰ This means the President and the public are all required to make nominations, yet the President is responsible for appointing the judges. Chiduzza, rightly in our view, termed this provision alarming.⁶¹ In general, the fact that the President also nominates and at the same time appoints judges puts to the test the whole concept of judicial independence. The question that arises is whether the nominations by the public will have any effect since the President is also required to submit nominations.⁶² Magaisa aptly stated that the situation creates a moral hazard, which he called the risk that the appointing authority is more likely to prefer his/
her own nominees for appointment over those by the public.⁶³ Magaisa went on to recommend

⁵⁷ A. Magaisa op cit note 47.

⁵⁸ Principle II of Annex of the Commonwealth (Latimer House) Principles on the Three Branches of Government (2003) calls for advertisement of judicial positions; see also Principle 12.3 of the Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct (2010)

⁵⁹ Democratic Governance and Rights Unit (DGRU) op cit note 46 at 26

⁶⁰ Section 180(2)(b)

⁶¹ L. Chiduzza op cit note 26 at 382

⁶² A. Magaisa op cit note 47

⁶³ A. Magaisa op cit note 47

that the JSC should develop safeguards such as being fair, impartial and give equal opportunity to all candidates regardless of the source of their nomination, ensure a merit based approach, disclose the source of nomination – whether it was the President or the public – and disclose all information about the candidates including their personal background, qualifications and track records. The submissions by Magaisa are very valid; judicial independence will be compromised if the President is to appoint his own nominees.

In practice, the JSC invited the public to make nominations when it issued the advert for positions of judges at the Supreme and High Courts in 2014. It is assumed that the public indeed made nominations, although it is not clear which section of the public did so. One can only speculate that it is most likely the legal fraternity. It is also not clear how the President was invited to nominate and whether he indeed made nominations as the JSC does not disclose detailed information about the whole process. These are some of the reasons why the assertion and call by Magaisa for disclosure of the source of nominations for candidates remains valid.

2.5.3 Short listing for public interviews

The requirement that the JSC should conduct public interviews is also a progressive approach to judicial appointments. On this point, Magaisa stated that after calling for nominations the ***JSC is required to consider and shortlist them if necessary***, (although it is unclear whether Magaisa was referring to any Constitutional section when he stated this or whether he was simply referring to standard practice) and then the JSC should carry out public interviews of the prospective candidates.⁶⁴ There is nowhere in s 180 where it is stated that the JSC will consider and shortlist candidates. The only reference to a list is the list prepared by JSC that will be submitted to the President for appointment after the interviews or a second list, in the event that the President rejects the first list. Therefore, what is not clear from the Constitution is the process the JSC will go through in vetting, selecting, screening or shortlisting candidates. It is also not clear within the text of the Constitution if the screening, vetting or shortlisting is done by a special committee within the JSC. This is an important

⁶⁴ Magaisa op cit note 47

process that goes to the core of judicial independence in that during shortlisting, if the JSC is not independent as well, it might tinker with the process by selecting persons who may not be fit and proper, but who represent executive interests.⁶⁵

For interest sake, the Regulations outline some of the General principles applicable to recruitment of members used by the JSC such as merit, knowledge, experience, qualifications and potential for training.⁶⁶ They also provide that the JSC shall complete to its satisfaction all the checks necessary to confirm that the candidate is eligible for appointment.⁶⁷ The point here is that what is in the Constitution is not adequate in terms of procedures that are followed by JSC in selecting, screening or shortlisting candidates who would have been nominated by the public or the President so that they attend public interviews for the position of a judge. This point is made, despite the fact that the JSC might have some policy guidance document it uses to screen, evaluate or shortlist nominees. This leaves room for manipulation of the system and paints an unclear picture on the process.

However, the above analysis is contrary to the view of Manyatera and Fombad who stated that one inescapable conclusion from an analysis of the new judicial selection procedures is that they are intended to ensure greater transparency and accountability in the selection of judges.⁶⁸ This general conclusion is only acceptable if this new process is compared to the unknown system under the Lancaster House Constitution. However, it is submitted that the level of transparency is not sufficient under the current system where the vetting, screening, evaluation process and short-listing procedures of candidates to attend public interviews are not clearly stated.

In practice, the JSC has managed to organise the first batch of public interviews for the positions that were advertised in 2014. The public interviews elicited much public interest and excitement. However, what emphasises the need to come up with a strong and publicly known screening,

⁶⁵ On a "fit and proper person" see Section 177(2), 178(2) and 179(2)

⁶⁶ Section 3

⁶⁷ Section 5(5)

⁶⁸ Manyatera and Fombad op cit note 6 at 20

evaluating, selecting or shortlisting process is the fact that some of the candidates who attended the public interviews performed dismally and this was noted even by ordinary members of the public. Some of the candidates did not have adequate knowledge of the law and procedures. The question is then whether these persons were properly passed through the screening or vetting process. If they did, questions remain on the nature and manner of the secret vetting and process itself.

2.5.6 List of qualified persons, appointment or rejection

The other function of JSC is to submit a list of three qualified persons as nominees to the President,⁶⁹ whereupon the President must appoint one of the nominees to office. However, the President holds an ace card. He may reject the list of three nominees that has been submitted by the JSC using s 180(3). The JSC will then be required to submit a second list from which the President must choose one nominee.⁷⁰ This may sound like a buffer for ensuring that a "suitable" candidate" is chosen although it may be a point for further discussion as to whether the phrase "fit and proper person"⁷¹ to hold office as a judge and the phrase "suitable for appointment"⁷² are referring to the same qualities or not. However, it is inevitable that there is a degree of pressure on the JSC when the President rejects the first list, and there is need for a second list to be submitted to him.

Manyatera and Fombad stated that the fact that executive discretion is limited to the list submitted by the commission goes a long way in guaranteeing the separation of powers and independence of the commission at the appointment stages.⁷³ This point is contested and contradicted by Chiduzo, however, who argues that the President might refuse to make an appointment if his preferred candidates are not included on the first list submitted by the JSC.⁷⁴ This is a vital point, and we associate with Chiduzo as there is no safeguard in the Constitution against this eventuality. Magaisa, alive to the dangers of Presidential nominations, suggests that the only safeguard to curb this is the disclosure of

⁶⁹ Section 180(2)(d) and (e)

⁷⁰ A. Magaisa op cit note 47

⁷¹ Sections 177(2), 178(2) and 179(2)

⁷² Section 180 (3)

⁷³ Manyatera and Fombad op cit note 6 at 21

⁷⁴ L.Chiduzo op cit note 26 at 382.

the sources of the nominees from the President and the public.⁷⁵ This may help to curb the possible abuse of the powers by the President to reject the first list submitted by the JSC since it will put the whole process under the public spotlight.

2.5.7 Appointment of Magistrates and role of JSC

The appointment of magistrates is now the responsibility of the JSC in terms of s 182 which states that an Act of Parliament must provide for the appointment of magistrates and other judicial officers, but magistrates must be appointed by the JSC. It also states that such appointment must be made transparently and without fear, favour, prejudice or bias. Previously magistrates were appointed by the Public Service Commission (PSC) under the ministry of Public Service and this made them less independent from the executive. The Judicial Service Regulations regulates the appointment of members of the judiciary by setting out some general JSC principles, such as suitability with regard to task knowledge, relevant experience, qualifications and qualities and potential for training and development.⁷⁶ In some cases entry examinations may be set.⁷⁷

In theory, the transfer of the appointment of magistrates from the PSC to the JSC is a welcome development. However, it might be argued that magisterial appointments have not been treated with as much weight as judicial appointments. The motivation for this is practical, since it would be difficult and costly to advertise, invite public and presidential nominations, and hold public interviews for appointment of magistrates given the high number of magistrates required at various stations in the country.

It may be stated that although magistrates belong to lower courts, the concepts of judicial independence, impartiality, rule of law and democracy should not be sacrificed because of the court hierarchy system. It is also important to note that while the appointment of magistrates does not enjoy extensive

⁷⁵ See generally Magaisa, *op cit* note 47, and also Democratic Governance and Rights Unit *op cit* note 46.

⁷⁶ Section 3

⁷⁷ Section 4

constitutional recognition like that of judges, this may pose a threat to judicial independence because magisterial courts are the courts of first instance⁷⁸ for the appearance of litigants and for some it is their only contact with the justice delivery system of Zimbabwe.⁷⁹ Many problems related to judicial independence, impartiality, lack of competence and corruptions among others occur at the lower courts.

The Magistrate Courts are also a fertile ground for political interference and court packing if the appointment processes by the JSC are not watertight in practice. Many people are convicted and may not appeal, or their cases are not reviewed. This is despite the fact that the appeal or review process is supposed to act as a way of ensuring that people who face injustice at the lower courts at least find justice in the upper courts. In the case of *Van Rooyen and Others v The State and Others*, Chief Justice Chaskalson (*as he then was*) stated that;

*"...magistrates' courts are courts of first instance and their judgments are subject to appeal and review. Thus higher courts have the ability to protect the lower courts against interference with their independence, but also to supervise the manner in which they discharge their functions."*⁸⁰

In practice therefore, judicial independence should not be restricted to judges of the superior courts; it should begin at the lower courts where external influence and pressure is easy to exert on adjudicating personnel.

2.5.8 Financial independence

Section 164 (2) (b) provides that the state must assist and protect the court to ensure their independence. This provision entails that the state must also provide all resources including financial resources for the courts to effectively carry out their mandate. Regarding financial independence, s 188 (3) of the Constitution states that the salaries, allowances and other benefits of members of the judiciary are a charge on the Consolidated Revenue Fund. Section 20 of the Judicial Service Act

⁷⁸ Magistrates Court Act [Chapter 7:10]; Section 5 states that the Magistrate Court shall be a court of record.

⁷⁹ Judicial Service Commission, www.jsc.co.zw, accessed 10 November 2015

⁸⁰ *Van Rooyen and Others v The State and Others* (2002) ZACC 8; 2002 5 SA 246

states that the funds of the Judicial Service shall consist of moneys appropriated by Act of Parliament for the salaries and allowances payable to and in respect of members of the Judicial Service and the recurrent administrative expenses of the Judicial Service. Funds of the JSC also include any donations, grants, bequest made to the Judicial Service and accepted by the Commission with the approval of the Minister. These provisions raise the question on whether the courts will be independent if the JSC and the courts rely on the state for financial resources. However, it is important to point out that the JSC has a duty to approach the state for adequate funding for salaries and administration costs.

3. General challenges faced by the Judicial Service Commission

The JSC is now an established constitutional body, having existed since 1987. As with many other Commissions and constitutional bodies aimed at safeguarding democracy and the rule of law, it continues to face many challenges ranging from the limitations of financial resources and human resources, among others.

3.1 Financial resources

The lack of adequate financial resources for the JSC has affected the effective and efficient administration of justice. Most administrative issues which the JSC deals with require funding and these include construction of courts, stationery, recording equipment, libraries, transcribers, computers, transport and furniture. Many of the Magistrates Courts in Zimbabwe, except the regional magistrates, lack basic modern technology such as desktop computers. This affects their research capacity given the current worldwide reliance on internet and online sources of legal data. Further, case management has also been a major problem at both the High Court and Magistrates Courts where court records have been known to occasionally disappear.⁸¹ Generally, if the state is failing to provide adequate funds to the JSC it means that it is failing to fulfill its duty in terms of Section 164(2)(b) which requires the state to assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and

⁸¹ This was again confirmed by Chief Magistrate Guvamombe who stated that "because of manual filing we sometimes lose records or take time to locate them, thus delaying court proceedings; see *Zimbabwe jobs freeze puts pressure on country's judiciary*, The Independent, March 21, 2014. <http://www.theindependent.co.zw/2014/03/21/zimbabwe-jobs-freeze-puts-pressure-countrys-judiciary/>

effectiveness.

3.2 Human resources

The main challenge related to human resources is the shortage of magistrates country-wide as well as the paucity of magistrates' court buildings. Reports indicate that the shortage of magistrates was caused by the fact that JSC had frozen recruitment of magistrates due to budgetary constraints.⁸² This has reportedly resulted in magistrates working longer hours which may compromise the quality of judgments.⁸³ Although there is a shortage of magistrates it has been reported that there is no backlog at the magistrate's courts. This is commendable due to the efforts of JSC. However, it is understood that the High Court has a huge backlog which it is battling to clear and this means that many litigants will not have access to justice.⁸⁴ This will be contrary to the constitutional requirement that justice must not be delayed.⁸⁵

3.3 Training

The closure of the Judicial College in 2008, due to financial challenges, has also affected training programmes for magistrates in Zimbabwe. However, acknowledging the role played by the Judicial College, the JSC is making efforts to reopen it for purposes of offering refresher courses to magistrates,⁸⁶ with the objective of improving the quality of judicial service.⁸⁷ Training of judges and magistrates is very important as it may help to ensure that members of the judiciary are aware of new legal developments, trends and approaches. It is in this light that even the Judicial Service Regulations acknowledge the need for such a college of continual education.⁸⁸

⁸² *The Independent*, op cit note 79

⁸³ *The Independent*, op cit 79

⁸⁴ It must be highlighted that the introduction of digital records in the High Court has helped solve this problem.

⁸⁵ Section 165(1)(b)

⁸⁶ *The Herald* 'JSC resuscitates Judicial College' (July 30, 2015)

⁸⁷ *The Herald* op cit note 83

⁸⁸ Section 42

4. Addressing the challenges

4.1 Funding

The delivery of justice and its administration has cost implications. Poor funding is detrimental to justice delivery, and jeopardizes the work of judicial officers and various other stakeholders in the justice delivery system. Thus, the fact that government continually faces financial challenges and competing budgetary commitments does not justify underfunding or under-resourcing the judiciary. It is important that the state give priority funding to the judiciary as this guarantees judicial integrity and the quality of judicial services. The state has a duty to ensure that the judiciary's mandate is both facilitated and enhanced. It has been suggested that to avoid political influence, the budget for the judiciary should be set or fixed as a percentage to be charged on the national budget every year.⁸⁹ However, it is also important for the JSC to ensure that it properly manages and accounts for all funds received in line with the Public Financial Management Act and the Audit Office Act.

Further, to ensure effective and efficient administration of justice, JSC should also find ways of getting additional funding from different sources so that it is able to recruit more magistrates and facilitate the appointment of High Court judges. The conditions of service (salaries) for judicial officers should also be improved to curb corrupt activities.

4.2 Independent judicial monitoring

Another important suggestion is for the JSC to work closely with NGOs that can assist in monitoring the performance of the courts. These groups can also assist the JSC by compiling information and carrying out background checks, on a voluntary basis, on any nominees for judicial appointment for purposes of screening. This system is being used by the Democratic Governance and Rights Unit in South Africa.⁹⁰

⁸⁹ See generally L. Chidzuza op cit note 26 at 395

⁹⁰ Information available at <http://www.dgru.uct.ac.za/> accessed on 20 November 2015.

4.3 Screening, vetting and selection of nominees

On the process of appointing judges, the JSC should improve its screening and selection of nominees invited for public interviews based on well-defined and detailed criteria. If the JSC has already adopted some guidelines then these should be published on the JSC website to build public confidence in the judicial appointment process. Further, as suggested by Magaisa, a set of safeguards to protect public confidence in the judicial appointment process should be adopted that includes disclosure of the source of nomination as to whether it was the President or the public, and sufficient disclosure of all information about the candidates including their personal background, qualifications and track records.

5. Conclusion

There is little doubt that an independent judicial service and a proactive Judicial Service Commission are both critical in the realisation and promotion of rule of law and constitutionalism in Zimbabwe. The Constitution generally enhances the role and purpose and integrity of the judicial system in Zimbabwe, and clearly departs from the system established under the 1980 Lancaster House Constitution. The relevant provisions, as has been demonstrated throughout the article, go a long way towards promoting judicial independence, integrity, transparency and accountability. However, the system is not perfect, with practical as well as legal loopholes that need to be addressed going forward. It is however clear that there is an attempt in the Constitution to balance the interests of various stakeholders in establishing the mandate, scope of powers, the nature of appointment and the constitution of the JSC. This attempt is inevitable in view of the fact that, as an institution that protects and safeguards democracy, the JSC operates within the confines of the larger political environment. What is inescapable is the fact that this constitutional institution greatly contributes to judicial independence, which in turn is critical for the attainment of the rule of law and constitutionalism in Zimbabwe.

LANGUAGE RIGHTS IN SECTION 6 OF THE ZIMBABWEAN CONSTITUTION: LINGUISTIC DIVERSITY AFFIRMED AND ACCOMMODATED?

*Innocent Maja*¹

Abstract

This article examines the extent to which the language rights regime in s 6 of the Zimbabwean Constitution affirms and accommodates linguistic diversity in Zimbabwe. The study further suggests ways in which Zimbabwe could practically implement the language rights norms in s 6 of the Constitution.

Introduction

Section 6 of the Zimbabwean Constitution ("the Constitution")² is an embodiment of the constitutional regime for the protection of language rights in Zimbabwe. It provides for three crucial concepts that help protect language rights, namely: a) official language status; b) use of official languages; and c) promotion of use and development of all languages in Zimbabwe.

Perhaps the relevant question is why study the constitutional protection of language rights in Zimbabwe? Four reasons come to mind.

First, the intrinsic value of language affirms the need to protect language rights. Language is a mirror of one's cultural identity,³ a vehicle of culture,⁴ a medium of expression,⁵ a means of transfer of

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² Constitution of Zimbabwe (Amendment Act 20) of 2013

³ Webb and Kembo-Sure (eds) *African voices* (2000) 5 contend that in Africa, 'people are often identified culturally primarily (and even solely) on the basis of the language they speak.'

⁴ Kwesi Kwaa Prah, in his 2006 report commissioned by Foundation for Human Rights in South Africa 'Challenges to the promotion of indigenous languages in South Africa' 3-4, argues that language is a central feature used to transmit, interpret and configure culture.

⁵ In *Malawi African Association and Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000) para 136, the African Commission on Human and Peoples' Rights established that '[l]anguage is an integral part of the structure of culture; it in fact constitutes its pillar and means of expression par excellence. Its usage enriches the individual and enables him

knowledge⁶ and a source of power, social mobility and opportunities.⁷ The constitutional protection of language rights recognises, affirms and accommodates linguistic diversity.

Second, the legal protection of language rights help address the problem of discrimination of linguistic minorities based on language that has been prevalent in the history of most African states including Zimbabwe. According to Skutnabb-Kangas, the promotion and protection of linguistic human rights is an attempt to apply the concept of human equality so as to cover the use of language and, hence, make any linguistic discrimination visible and problematic, and abolish such discrimination.⁸

Africa's pre-colonial and post-colonial history shows how political power relations⁹ introduced inequality in terms of language use to African languages that otherwise had the same linguistic value.¹⁰ Again, the post-colonial drive towards national unity, social integration and construction of a national identity in most African countries led to language policies that favoured the use of one official *lingua franca* for purposes of administrative efficiency to the exclusion of other languages.¹¹ According to Bamgbose, most African countries adopted the language as-a-problem orientation that favoured one language and

to take an active part in the community and its activities. To deprive a man of such participation amounts to depriving him of his identity.'

⁶ KL Dooley & LB Maruska 'Language rights as civil rights: Linguistic protection in the post-colonial democratic development of Canada and South Africa,' (2010) 3 *Journal of global change and governance* 1 2 argue that "Language is the means by which knowledge is transferred between individuals, between individuals and the state (and vice versa), and between individuals and subsequent generations through educational practices and various forms of culture left as nationalistic directives for each new generation to carry on the traditional 'mother tongue' of their particular national group."

⁷ S Makoni & B Trudell 'Complementary and conflicting discourses of linguistic diversity: Implications for language planning' (2006) 22(2): 14-28 *Per Linguam* 21.

⁸ T Skutnabb-Kangas 'Linguistic human rights, past and present,' in T Skutnabb-Kangas & R Phillipson (eds) *Linguistic Human Rights: Overcoming Linguistic Discrimination* (1994) 98-99 summarised linguistic human rights as follows: a. Every social group has the right to identify positively with one or more languages and to have such an identification accepted and respected by others. b. Every child has the right to learn fully the language(s) of his/her group. c. Every person has the right to use language(s) of his/her group in any official situation. d. Every person has the right to learn fully at least one of the official languages in the country where s/he is a resident, according to her/his own choice.

⁹ T Skutnabb-Kangas, 'Multilingualism and the Education of Minority Children' in T Skutnabb-Kangas & J Cummins (eds), *Minority Education: From Shame to Struggle* (1988) 12.

¹⁰ K Henrard Devising an adequate system of minority protection: Individual human rights, minority rights and the right to self-determination (2000) 244.

¹¹ See M Beloff, 'Minority Languages and the Law' (1987) *Current Legal Problems* 140.

restricted other minority languages.¹² Such language policies invariably led to linguistic assimilation,¹³ linguistic loss and discrimination against linguistic minorities.¹⁴

Third, most linguistic minorities are numerically inferior, politically non-dominant, poor and socially vulnerable. They require the assistance of the law to protect their rights in a functioning ethnolinguistic democracy. *S v Makwanyane and Another* established that democracy demands that the law protects vulnerable (linguistic) minorities who are unable to protect themselves due to their numerical inferiority.¹⁵ In a continent awash with states that claim to be democratic¹⁶ and have numerous linguistic minority groups,¹⁷ (for example, over 250 in Nigeria,¹⁸ over 200 each in Sudan¹⁹ Chad²⁰ and Cameroon,²¹ more than 100 in Tanzania,²² over 20 in Zimbabwe²³ and over 15 in South Africa),²⁴ all clamouring

¹² It is interesting to note that A Bamgbose Language and the nation: *The language question in Sub Saharan Africa* (1991) identifies two approaches to minority language rights. The first is the language-as-a-problem orientation and it favours a single language and attempts to restrict (and sometimes annihilate) the role of minority languages. The second is the language-as-a-resource orientation that sees all languages as useful cultural and identity resources that need to be accommodated to foster strong, representative and sustainable unity. This thesis supports the latter orientation.

¹³ S May 'Uncommon languages: The challenges and possibilities of minority language rights' (2000) 21(5) *Journal of Multilingual and Multicultural Development* 366 369 describes the process of linguistic assimilation as that involving a. introduction of majority language replaces the functions of a minority language, b. linguistic minorities shifting to speak the majority language. This shift has three processes that include i) pressure to speak a majority language in the formal domain, ii) lesser use of minority language and ii) the replacement of a minority language with a majority over two or three generations.

¹⁴ See J Blommaert 'Language policy and national identity' in T Ricento (ed) *An introduction to language policy: Theory and method* (2006) 10; N Dorian 'Western language ideologies and small-language prospects' in L Grenoble & L Whaley (eds) *Endangered languages: Language loss and community response* (1998) 3–21. The concept of discrimination is explored in the definition section of this Chapter.

¹⁵ *State v T Makwanyane and M Mchunu* 1995 3 SA 391 (CC) argues that "[t]he very reason for... vesting the power of judicial review of all legislation in the courts was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalized people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected."

¹⁶ See S Dersso & F Palermo *Minority rights in M Tushnet et al (eds) Routledge Handbook of Constitutional Law* (2013) 162.

¹⁷ A Lodhi 'The language situation in Africa today' (1993) 2(1) *Nordic Journal of African Studies* 79 81 argues that Africa has at least 2 000 languages spoken in its 54 countries.

¹⁸ J Maxted & A Zegeye 'North and Central Africa' *World directory of minorities* (1997) 405- 408.

¹⁹ See RK Hitchcock 'Human rights and indigenous peoples in Africa and Asia' in DP Forsythe & PC McMahon (eds) *Human rights and diversity* (2003) 209.

²⁰ Maxted & Zegeye (n 18 above).

²¹ Dammers & Sogge 'Central and Southern Africa' in *World directory of minorities* (1997) 479.

²² See RE Howard *Human rights in Common Wealth Africa* (1986) 97.

²³ Section 6 of the Constitution recognizes 16 languages.

²⁴ Section 6 of the Constitution recognizes 11 languages and also lists the San and Koi languages.

for protection, a study of the legal protection of minority languages and linguistic minorities presents African states with useful criteria they can use to balance different linguistic interests in their territories.

Fourth, the legal protection of language rights contributes towards the preservation of the identity of language speakers. In Africa, identity is linked to language. Webb and Kembo-Sure argue that in Africa, *"people are often identified culturally primarily (and even solely) on the basis of the language they speak."*²⁵ Examples include the Tonga, Ndebele and Shona in Zimbabwe. Constitutional recognition of language rights therefore aids the preservation of the identity of linguistic minorities. This is especially significant in view of Henrard's contention that the right to identity²⁶ has been regarded as part of the "peremptory norms of general international law"²⁷ used to protect minorities.²⁸

The preceding discussion therefore indicates that there is merit in studying about the legal protection of language rights in Zimbabwe.

Because Zimbabwe has not yet developed language rights jurisprudence, the paper uses international and foreign comparative law jurisprudence in its analysis. The analysis also takes into account constitutional values in order to preserve the Constitution's normative unity or value coherence.²⁹ The constitutional values include the principles of accommodation of diversity, multilingualism, fundamental human rights³⁰

²⁵ V Webb & Kembo-Sure (eds) op cite note 3 at 5.

²⁶ The right to identity is impliedly provided for in article 27 of the ICCPR and explicitly enshrined in article 1 of the 1992 Declaration on Minorities and article 1 of the UNESCO Declaration on Race and Racial Prejudice.

²⁷ Henrard (n 10 above) who argues that the Badinter Arbitration Commission, established in 1991 by the European union in the wake of the break-up of Yugoslavia (Council of Ministers, EU, Joint Declaration on Yugoslavia, 27 August 1991. Opinion no 2, 20 November 1991) explicitly recognised that the right to identity of minorities is part of the 'peremptory norms of general international law.'

²⁸ P Thornberry, "The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis, Observations and an Update" in A. Phillips & A Rosas (eds), *Universal Minority Rights* (1995) 392 argues that the right to identity is sometimes regarded as constituting the whole of "minority rights."

²⁹ See *Executive Council of the Western Cape Legislature v President of the RSA* 1995 4 SA 877 (CC) para 204 & *S v Mhlungu* 1995 3 SA 867 (CC) paras 45, 105. SA Constitutional Court jurisprudence in *MEC for Education, KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC) paras 63-64 & *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 1 SA 406 (CC) para 55 has established that constitutional values are mutually interdependent and that collectively they form a unified, coherent whole.

³⁰ Section 44 of the constitution places an obligation on the state to respect, protect, promote and fulfil rights enshrined in the constitution. It provides that 'The State and every person, including juristic persons, and every institution and agency at

and freedom, equality of all human beings, peace, justice, tolerance, fairness and the rule of law.³¹

The paper is divided into six parts. The first part analyses the legal and practical implications of official language status. The second section explores the concept of the use of official languages. The third part highlights the legal implications of promotion of use of all languages. The fourth section identifies the implementation gap created by s 6. The fifth part investigates whether s 6 language rights can be limited. The final segment concludes the discourse.

1. Official language status

Section 6(1) of the Constitution officially recognises 16 languages namely, Chewa, Chibarwe, English, Kalanga, Koisan, Nambya, Ndau, Ndebele, Shangani, Shona, sign language, Sotho, Tonga, Tswana, Venda and Xhosa. Interestingly, s 6 neither defines an official language nor explains the legal implications of affording official language status to a language. There is no language rights jurisprudence from the Constitutional Court to help clarify these aspects. International law helps clarify the legal implications of declaring a language official.

a. What is an official language?

Even though international law does not define an official language, De Varennes convincingly defines an official language as "*a form of legal recognition of an elevated status for a language in a state or other jurisdiction.*"³² A UNESCO report defines an official language as "*a language used in the business of government – legislative, executive and judicial.*"³³

every level must respect, protect, promote and fulfil the rights and freedoms set out in this Chapter.'

³¹ See the Preamble and sections 3 and 6 of the Constitution.

³² F de Varennes 'Draft report on international and comparative perspectives in the use of official languages: models and approaches for South Africa' (October 2012) 4. In the same vein, a decision of the Spanish Constitutional Court 82/1986 of 26 June, which decided on the unconstitutionality appeal against the Basic Law on the Normalisation of Basque Language Use, second legal fundament stated that '*... a language is official when it is recognised by public authorities as the normal means of communication within and between themselves and in their relations with private individuals, with full validity and legal effects.*'

³³ UNESCO Report entitled 'The use of vernacular languages in education,' (1953) 46.

b. What factors should be taken into account when a state decides to confer official language status on a language?

International law and foreign comparative law highlights that the declaration of official language status is a political process left to the discretion and prerogative of each state. For instance, in *Podkolzina v Latvia*,³⁴ the European Court of Human Rights held that³⁵

"... the Court is not required to adopt a position on the choice of a national parliament's working language. That decision, which is determined by historical and political considerations specific to each country, is in principle one which the State alone has the power to make."

International law and foreign comparative law does not quite clearly define the factors that need to be taken into consideration when a state is considering affording official status to a language. For instance, in *Diergaardt v Namibia*,³⁶ the United Nations Human Rights Committee (UNHRC) did not spell out the criteria used to afford official status to a language. Instead, the UNHRC took the view that whatever official languages a state freely chooses; it cannot use such a choice in a way which would violate international human rights law such as freedom of expression.

However, reference to foreign comparative law help reveal some of the criteria a state can use in considering to grant a language official status. For example, *Podkolzina v Latvia* establishes that the sovereign state can take into account historical and political considerations. The UN also took the view that the determination of an official language or languages is a historical, social and political process.³⁷

³⁴ *Podkolzina v Latvia* 2002 ECHR 34.

³⁵ See *Birk-Levy v France*, application no. 39426/06, published on 6 October 2010.

³⁶ Communication 760/1997, *J.G.A. Diergaardt (late Captain of the Rehoboth Baster Community) et al. v. Namibia*, UNHR Committee (6 September 2000) U.N. Doc. CCPR/C/69/D/760/1997 (2000). See also Communications 359/89 & 385/89, *John Ballantyne and Elizabeth Davidson, and Gordon McIntyre v Canada*, UNHR Committee (31 March 1993) UN Doc. U.N. Doc. CCPR/C/47/D/359/1989 and 385/1989/Rev.1 (1993)

³⁷ *Study of the problem of discrimination against indigenous peoples*, UN Doc. E/CN.4/Sub.2/476/Add.6 states that "During the process of nation building, a language, usually that of the segment of the population which gains supremacy and imposes itself socially, politically and militarily on other segments in various regions and whose language dominates the other languages or dialects in the country, becomes, because of these extra-linguistic factors, the language of highest standing and, ultimately, the official language. Official recognition is of great importance to this and the other languages spoken in the country because, whether or not it is provided for in the Constitution or other basic law, such a selection means that this

Capotorti contends that these factors include the numerical importance of a linguistic community, their political and economic position within the state and the stage of development of a language.³⁸

Vieyetz summarises these social, historical and political considerations as a) the sociolinguistic situation of the country; b) the linguistic dynamics of the country and its context; c) the pre-existing legal situation and d) the political organisation of the state.³⁹

The above analysis shows that whenever a state is considering affording official language status, it should take into account a) the number of people that speak the language, b) the level of development of the language, c) the extent of use of the language, d) the language's history of discrimination, e) the functional load of the language in government business and f) the areas where the language is dominantly used.

c. The levels of official language status

International law does not clearly stipulate whether or not the granting of official language status to at least two languages in a state implies that the languages enjoy the same status. However, useful guidelines could be obtained from Vieyetz's study⁴⁰ that came up with four levels of official languages status that he calls officialities. The first level is what he calls '*full officiality and dominant language.*' In this case, official language status shows all the possible effects and the language involved is considered an element of the state's linguistic identity. The official language is fully used in government business. Examples of full officiality and dominant language include French in France or Monaco, Swedish in Sweden or Russian in the Russian Federation.

privileged linguistic instrument will be used in the various activities of the State... At the end of the colonial dependence... the people of many countries... faced the problem of having to decide which language would henceforth be the official language of their new State. During this process, what became the official language – either the single official or one of them – was often the language introduced by the colonizers; in a few cases, a national language was chosen."

³⁸ F Capotorti 'Study on the rights of persons belonging to ethnic, religious, and linguistic minorities' (1979) UN Docs. E/CN.4/Sub.2/384/Rev.1, Sales No E78XIV1 75-76.

³⁹ EJR Vieyetz 'Official languages and minority languages: Issues about their legal status through comparative law' (2004) *II Mercator International Symposium: Europe: A new framework for all languages?* 15.

⁴⁰ EJR Vieyetz (n 39 above) 24-25.

The second level of official language status is what Vieytez calls '*full officiality and non-dominant language.*' In this case, a language is afforded full official language status but it is not dominant because of social limitations. The language is still an identity element of the state although it evokes a colonial past (Malta) and it is an element of a more symbolic nature generally based on historical or geographical explanations. Examples include Irish Gaelic in Ireland, Swedish in Finland, English in Malta, Russian in Belarus or French in Luxembourg.

The third level of official language status is what Vieytez calls '*partial or limited officiality and dominant language.*' This level comes with two variations. The first variation is called '*exclusive officiality*' where the territorial principle is strictly adopted and different languages are given official language status in the areas where they are dominantly spoken. This is the case of French or German in Switzerland or Belgium and the Swedish of the Aaland Islands. The second variation is called '*shared officiality*' where official language status is shared by two or more languages within a territory, municipality, province or region. These are the cases of Feroese in the Feroe Islands, Greenlandish in Greenland, German in the South Tyrol, Russian in Transnistria or Crimea, Albanian in Kosovo or Catalan in Catalonia or the Balearic Islands.

The fourth and final level of official language status is what Vieytez calls '*partial or limited officiality and non-dominant language.*' Again, this has two variations. The first variation is called '*officiality in the institutional sphere of political autonomy.*' This refers to cases where a language, although giving way socially to the state language with which it shares officiality, benefits from some symbolic institutional presence in a sub state organised sphere. The second variation is called '*officiality in the local institutional sphere without its own political power.*' In this case, official language status is largely limited in the institutional, geographical or population spheres. Examples include Slovenian in Italy, Serbian languages in Germany, Hungarian in Slovenia or Sami in Norway.

Vieytez's observations and classification of official language status therefore reveal a need to clarify

the content of official language status granted to the 16 languages in s 6 of the Constitution and how language rights provided for in s 6 can be practically implemented across Zimbabwe.

There are a number of practical ways that Zimbabwe can approach the challenge of implementing s 6. The first approach may entail Zimbabwe adopting the Ethiopian model. The Ethiopian model has one language (Amharic) as the official language of the whole country through the medium of which federal services are provided and regional governments are given the discretion to confer official language status to the one or more languages spoken in that region.⁴¹

Using the Ethiopian model, Zimbabwe could use English as its official language of record (as is currently obtaining) and have other languages used concurrently with English at a provincial level taking into account the number of the speakers of that language in each particular province and other practicality considerations. For example, Shona can be the official language for Harare, Manicaland province and all the Mashonaland provinces. Ndebele can be an official language for Bulawayo and all the Matabeleland provinces. This approach will be reasonable and practical given the demographic and political structure established by the Constitution. Section 264 allows for devolution of powers and responsibilities to provincial councils. Given that most linguistic minorities are concentrated in specific areas across Zimbabwe, it would be easy for provincial councils to use an official language that is mainly spoken in that province or town.

The challenge with this approach though is that out of the 16 official languages, only English, Shona and Ndebele will be afforded official language status and would be used for government business in Zimbabwe's 10 provinces. Such an approach would be in violation of s 6(1) in that it would reduce the other 13 official minority languages to symbolic official languages. Speakers of the other 13 languages could claim that they are being discriminated against on the basis of language.

⁴¹ Section 5 of the Ethiopian constitution. See also Fessha 'A tale of two federations: Comparing language rights regime in South Africa and Ethiopia' (2009) *African Journal of Human Rights* 501.

A different approach might be needed in order for Zimbabwe to accommodate the other 13 official minority languages in a way that complies with s 6(1). This different approach may include the use of the other 13 languages in the cities and or towns where they are predominantly spoken. This territorial approach to minority language rights minimises the cost of implementing s 6(1) and reasonably protects minority languages and linguistic minorities in areas where they are concentrated.

Another approach may be for Zimbabwe to adopt the Belgian model where official language status is afforded to different languages spoken in different regions.⁴² Using this model, Shona can be the official language for Harare, Manicaland province and all the Mashonaland provinces. Ndebele can be an official language for Bulawayo and all the Matabeleland provinces. As argued above, other official languages would be excluded.

A third approach may be to combine national official language status with regional and municipal (or metropolitan) official language status.⁴³ In this approach, all 16 languages will be official languages as prescribed by s 6(1) but they will be mainly used where the majority of the speakers are concentrated. This approach is reasonable, practical and or rational given Zimbabwe's language demography.

According to Hachipola,⁴⁴ the following languages are spoken in specified areas in Zimbabwe: **Barwe** (Nyamaropa, Nyakombu districts in Nyanga and the Muzezuru and Mukosa areas of Mudzi); **Chewa/Nyanja** (mines and farms like Alaska, Trojan, Wankie, Shamva, Madziba, Mazoe, Acturus, Antelope, Mangura mines, Triangle, Hippo Valley sugar plantations, Mufakose, Mabvuku, Tafara, Matshobana, Makokoba, Njube, Tshabalala and Luveve); **Chikunda** (Lower Guruve (Kanyemba and Chikafa) and Muzarabani districts); **Doma** (Chiramba, Koranzi, Chiyambo, Mugaranapanja and Kuhwe areas of the Guruve District); **Fingo/Xhosa** (Mbembesi area near Bulawayo, Fort Rixon, Goromonzi (in

⁴² K Malan K Malan 'The discretionary nature of the official language clause of the Constitution' (2011) 26 *SA Public Law* 381-403.

⁴³ More along the lines of Canada. See K Malan K Malan note 42 381, 400-403.

⁴⁴ See SJ Hachipola 'A survey of the minority languages of Zimbabwe' 1998 25 and I Mumpande 'Silent voices: Indigenous languages in Zimbabwe' (2006) 7-9.

Chief Rusike's area), Msengezi, Marirangwe, and Gwatemba); **Hwesa** (Northern part of the Nyanga District); **Kalanga** (Bulilima and Mangwe Districts, Nyamandhlovu District, Kezi, Tsholotsho and Matobo Districts); **Nambya** (Hwange, Tsholotsho, Western Lupane and around Hwange National Park); **Shangani** (Chiredzi District, Beitbridge (Chikwalakwala), Mwenezi (in Chief Chitanga's area), Zaka (in Chiefs Tshovani and Mutshipisi areas), Mberengwa and Chipinge (in Gonarezhou); **Sotho** (Gwanda South (around Manama), Gwanda North (in Chief Nhlamba's area), Bililimamangwe (Plumtree), Beitbridge, Shashe, Machuchuta, Masera, Siyoka, Kezi and Masema (in the Masvingo District); **Tonga** (Binga District, west and north-west parts of Lupane District, Hwange, Chirundu (Kariba, Nyaminyami and Omay Districts), Gokwe North (Simchembu and Nenyunga), Mount Darwin and Mudzi (Gorongwa, Mukota and Dendera); **Tswana** (Bulilimamangwe District and Mpoengs (between Ramaguabane and Simukwe rivers that flow along the Botswana-Zimbabwe border); **Khoisan** (Tsholotsho (Maganwini, Sinkente, Pumula, and DomboMasili) and also Bulilimamangwe's area of Siwowo); **Venda** (Beitbridge); **Zimbabwe sign language** (schools like the Zimbabwe School Sign, Masvingo School Sign and Zimbabwe Community Sign) and **Sena** (Muzarabani, on plantations like Katiyo Tea Estate and other plantations, commercial farms and mines).

d. Language of Record

Section 6(2) empowers Parliament to prescribe a language of record in Zimbabwe. A language of record is one that is used in the official records of a country. The main drawback of this clause is that it does not stipulate the criteria that Parliament should use to determine language of record status and thus gives Parliament a wide discretion. It is also not clear how many languages should be prescribed languages of record. There is also no clarity regarding whether languages of record will cover government business throughout Zimbabwe or in certain provinces or municipalities in Zimbabwe.

There are various approaches that could be taken to determine the language of record. The first approach may be to formally declare English as the language of record throughout the country since English is currently the de facto language of record. The second approach may include having English

as the language of record throughout the whole country and then have other official languages as languages of record together with English in areas where those official languages are spoken. A third approach could be to have different official languages as languages of record in areas where the speakers are mainly concentrated. For example, Ndebele can be a language of record in Bulawayo, Tonga can be a language of record in Binga, Shona can be a language of record in Harare, etc.

Section 6(2) does not also reveal whether or not the drafters aspired to have all 16 official languages to be developed to be languages of record. If this is so, there could be need for the envisaged Act of Parliament to provide specific timelines expected to ensure that all 16 official languages become languages of record. A leaf can be borrowed from s 4(5) of the Law Society of Zimbabwe Model Constitution that provides that:

...An Act of Parliament must provide that— (a) within ten years from the commencement of this Constitution, every official language is a language of record, alongside English, where it is predominantly spoken and has been predominantly spoken for the past one hundred years; and (b) within twenty-five years from the commencement of this Constitution, all official languages must be recognised as languages of record alongside English.

Such a provision would give the state sufficient time to progressively develop all the 16 official languages to be languages of record.

2. Use of Official Languages

Section 6(3) obliges the state and its institutions and agencies to use official languages. The Constitution does not mention the scope of use of official languages. Should some or all the official languages be used in education, media, cultural activities, public service and communication with government?

However, despite this omission, s 6(3) does highlight two main considerations that need to be taken into account when regulating the use of official languages. First, all official languages should be treated equitably. Secondly, the state should take into account the language preferences of people

in regulating use of official languages. The scope of use of official languages is not provided for in s 6(3). Neither has the Constitutional Court dealt with any matters relating to s 6(3) and international law and best practices from other states might therefore be useful in giving content to these sections.

International law does not expressly clarify whether official language status guarantees use of that language.⁴⁵ The use of official languages in administration, public education, public health, media, courts, business and other government activities depends on the provisions of the individual country's constitution, legislation, policies and jurisprudence. This ranges from the language being symbolic; to defined limited use of language, to undefined use of language; to unlimited use of an official language.

Implicitly, there are strong grounds that an official language should be used in government business.⁴⁶ This position accords with the definition of an official language cited above. *Mentzen alias Mencina v Latvia*⁴⁷ established that "... A language... cannot be divorced from the way it is actually used by its speakers. Consequently, by making a language its official language, the State undertakes in principle to guarantee its citizens the right to use that language... In other words, implicit in the notion of an official language is the existence of certain subjective rights for the speakers of that language."

In the same vein, De Varennes⁴⁸ convincingly argues that "... there is therefore, in the absence of legislation to the contrary, at least a very strong implication that a government has an obligation to use such a language, and a corresponding individual right for citizens to use that official language."

Official language status should therefore not be symbolic but should guarantee the use of that language. According to Wenner, an official language should be used in a court of law, when communicating with government, in public notices, in government reports, documents, hearings, transcripts and other

⁴⁵ For instance, in *Société des Acadiens du Nouveau-Brunswick v Association of Parents for Fairness in Education* (1986) 1 S.C.R. 549 (Canada) para 59 the Supreme Court of Canada held that the recognition of the status of official languages for French and English at the federal level under Article 16 of the Canadian Constitution did not guarantee as such a right to any type of service or use in either official language.

⁴⁶ F de Varennes'Draft report on international and comparative perspectives' op cit note 32 at 10.

⁴⁷ Application no. 71074/01, admissibility decision of 7 December 2004

⁴⁸ F de Varennes op cit note 32 at 10.

official publications as well as in legislation and in the proceedings and records of the legislature.⁴⁹ In countries where more than one official language must be used, their use as a general rule is provided for through constitutional provisions, legislation, regulations, guidelines and case law.

One way of interpreting s 6 is to use the values of multiculturalism, inclusive linguistic diversity, equality, human dignity and to take into account international law as required by s 46(1)(c). Such a wide interpretation would place an obligation on Zimbabwe to use all the 16 officially recognised languages. Such an interpretation is in line with s 63(a) of the Constitution that affords everyone the right to use the language of their choice.

Of course, practicality and financial considerations need to be taken into account to determine which languages are used where. It would be impossible to use all the 16 languages in government business in all the 10 provinces in Zimbabwe. On this score there are a number of practical challenges that could arise in implementing s 6(1) of the Constitution, if this is the objective. First, some of the 16 languages (like Koisian, Nambya, Sign Language, Chibarwe, etc) are not developed enough for them to be used for government purposes. Further, there is a huge financial cost associated with using all the 16 recognised languages as the languages of record in all the 10 provinces. The cost lies in the development of the languages and translation of all official records into the 16 languages. The state would need to progressively develop some of the undeveloped official languages before they can be effectively used in government business.

Suffice to mention that s 6(3) does not provide for equal treatment of official languages in terms of use but for equitable treatment. According to Currie, equitable treatment is treating all official languages in a just and fair manner in the circumstances.⁵⁰ Applied in the Zimbabwean context, these circumstances will include "*language preferences of people affected by governmental measures or communication.*"

49 MW Wenner 'The politics of equality among European linguistic minorities' in RP Claude (ed) *Comparative human rights* (1976) 184 193.

50 I Currie & J de Waal *The Bill of Rights Handbook* 6th Edition (2014).

This has two implications. The first implication is what Malan meant when he said "*[e]quitability may mean precisely that English, being one language that is understood by all or at least most citizens and inhabitants, be used as the anchor language.*"⁵¹ The second implication is that the section acknowledges that not all the officially recognised languages can be used equally and practical steps should therefore be taken to avoid a scenario where one language dominates and others are diminished.

Equitable treatment therefore affords the state and government institutions and agencies a broad discretion on the content of the considerations to be made when deciding how to treat official languages. The reality, though, is that English has taken a prominent role in the business of government with some official languages not used at all. This makes the official language status afforded to the other 15 languages merely symbolic.

a. Language use in government activities and public service

Currie argues that government activities are divided into legislation and administration. Currie⁵² contends further that legislation should be published in the principal languages of the state and provincial legislation should be published in the official languages of the province. In administration however, Currie contends that there is greater flexibility where government should consider factors like demography, language preference of the population in the province, usage, etc.

Varenes interestingly suggests the use of a '*sliding-scale*' approach⁵³ to assess which official language should be used in particular government activity. This approach urges local authorities where language speakers are concentrated to increase level services in non-official minority languages as the number of language speakers increase beginning from the lower end of the sliding-scale and moving

⁵¹ K Malan K Malan 'The discretionary nature of the official language clause of the Constitution' (2011) 26 SA Public Law 381392.

⁵² I Currie & J de Waal *The Bill of Rights Handbook* (2005).

⁵³ F de Varenes, *Language, minorities and human rights* (1996) 177-178.

progressively to the higher end.⁵⁴ The services to be provided would include availing widely used official documents in minority languages, accepting oral or written applications in minority languages and use of minority languages as an internal and daily language of work within public authorities. Tailored to suit the concrete linguistic circumstances of each state, the sliding-scale approach can be an effective weapon to accommodate linguistic diversity. In any case, the sliding-scale approach clearly acknowledges that it is impractical to provide every government service in all the 16 official languages in all ten provinces in Zimbabwe.

As regards use of languages in the public service, international law does not oblige states to provide all public services in every language that members of the public might speak given the multiplicity of languages spoken in most multilingual states worldwide. States are expected to provide public services and communication in official languages in places where their speakers are found in significant numbers, the public services in question are of a very important nature, and the resources required to provide the public services can be made available without unduly compromising the distribution of resources in other areas of public demand as well.⁵⁵ Zimbabwe could use the '*sliding-scale approach*' to determine from the size of a linguistic population, their territorial concentration, the capacity of the state, and the nature of the service to determine which minority languages should be used in public service. Such an approach is practical in Zimbabwe where language groups are usually territorially concentrated and most social and economic affairs are conducted at local levels in the regional or local vernacular.

b. Language use in education

Section 75(1) of the Constitution affords everyone a right to state funded basic and progressively state funded further education. In international law, three key issues deal with the right to education, namely, mother tongue education, curricular content and establishment of private educational institutions.

⁵⁴ F de Vareennes, *ibid* at 177.

⁵⁵ F de Vareennes, *ibid* at 177-178.

i. Mother tongue education

The right to education in UN treaties was not initially intended to include the right to mother tongue education.⁵⁶ However, a later realisation concluded that the right to education cannot be fully enjoyed without involvement of the mother tongue.⁵⁷ Education involves the transfer of information which is most effective when the recipient understands the language used in transmitting education.⁵⁸ Mother tongue education is also important for the preservation of the language and traditions of the culture conveyed through it to future generations;⁵⁹ and impacts the emotional, cognitive and socio-cultural development of students.⁶⁰

In any event, substantive equality and equality of opportunity demands that education is offered in the mother tongue to facilitate equal access to education by marginalised, disadvantaged and vulnerable linguistic minorities to avoid later repercussions on access to jobs and political power. That is the reason why mother tongue education is a concept widely acceptable under international, regional and foreign comparative law. For instance, the right of migrant workers' children⁶¹ and indigenous people to be educated in their mother tongue are vividly recognised under the International Labour Organisation Conventions No. 107⁶² and 169.⁶³ Policies like additive bilingualism have been developed to ensure that learning a second language should not be to the detriment of the mother tongue.⁶⁴

Article 18 of the Cultural Charter for Africa affords states the discretion to choose one or more African languages to introduce at all levels of education. This choice could be guided by the 'sliding-scale

⁵⁶ See article 26 of the Universal Declaration, the *travaux préparatoires* of the Universal Declaration and the *Belgian Linguistic Case* 1 EHRR 252 (1965)

⁵⁷ See G Sieminsky, Working paper on the education rights of minorities: The Hague Recommendation UN Doc. E/CN.4/Sub.2/AC.5/1997/WP.3, 5 May 1997, 2.

⁵⁸ T Skutnabb-Kangas 'Language policy and political issues in education' in S May & N Hornberger (eds – 2nd ed) *Encyclopedia of Language and Education* (2008) 107-119.

⁵⁹ K Henrard op cit 10 at 257-258.

⁶⁰ T Skutnabb-Kangas, *Bilingualism or not: The education of minorities*, Clevedon: Multilingual Matters (1981) 118-119.

⁶¹ Arts 45(3) and (4) of the CMW.

⁶² Art 23.

⁶³ Art 28(1).

⁶⁴ D Young, "The role and the status of the First Language in Education in a multilingual society" in K Heugh et al (eds) *Multilingual education for South Africa*, (1995) Johannesburg: Heinemann 63 68 argues that the mother tongue should continue to be used throughout various levels of education even when a second language is introduced.

approach⁶⁵ taking into account the number of minority students seeking education in their language and the extent of the burden this puts on public resources.⁶⁶ The right to education in s 75 of the Constitution arguably includes the right to be educated in the mother tongue.

Another key provision in respect to language rights in education is s 62 of the Education Act.⁶⁷ It presents a number of interesting insights. For instance, S 62 (1) of the Education Act provides that⁶⁸

"... Subject to this section, all the three main languages of Zimbabwe, namely Shona, Ndebele and English, shall be taught on an equal-time basis in all schools up to form two level."

For Shona and Ndebele language speakers, this provision means mother tongue education up to form two level although there is no guarantee of mother tongue education for Shona and Ndebele speakers beyond form two. Only English is the dominant language taught up to tertiary level.⁶⁹ Again, this provision elevates English, Shona and Ndebele above all other official languages and forces other language speakers to learn in English, Shona or Ndebele.

However, in practice English Language is given more learning time as compared to Shona and Ndebele.⁷⁰ Literature in English is taught as a separate subject while Shona/Ndebele language and literature are regarded as one subject and allocated far lesser teaching time notwithstanding that there is sufficient Shona and Ndebele material to teach. This creates the impression that indigenous languages are not as significant.

Section 62(1) of the Education Act arguably discriminates against other official language speakers on the basis of language as envisaged by the constitutional provisions of ss 56(3) and 6 and are not

⁶⁵ K Henrard op cit 10 at 260-261.

⁶⁶ F de Varennes Language, Minorities & Human Rights (1996) 33.

⁶⁷ Education Act, [Chapter 25:05]

⁶⁸ [Chapter 25:05] Clause 1.1 of the Cultural policy of Zimbabwe obliges government to '*... accord protection of mother tongue through usage during the first two years of formal schools.*'

⁶⁹ SJ Hachipola A survey of the minority languages of Zimbabwe 1998.

⁷⁰ Op cit note 69.

afforded the equal protection of the law as stipulated in s 56(1). To remedy this discrimination, the State could introduce affirmative action measures in the form of remedial or restitutive measures⁷¹ as provided for in s 56(6) to ensure that all the 15 languages are used in education. The remedial dimension of substantive equality (affirmative action) should be used to elevate the status of and advance the development and use of historically diminished languages.⁷²

It can be argued that forcing other official language speakers to learn in English, Shona or Ndebele may be regarded as inhuman, degrading and derogatory contrary to the provisions of s 53 of the Constitution. This is especially so considering that, in Africa, language is viewed as a form of identity and as a vehicle of culture.⁷³ By learning in the three majority languages, minority language speakers lose their identity and culture. Accordingly, s 62 of the Education Act could be amended to ensure that there is equitable treatment of languages.

Section 62(2) of the Education Act provides that

"... In areas where indigenous languages other than those mentioned in subsection (1) are spoken, the Minister may authorise the teaching of such languages in schools in addition to those specified in subsection (1)."

This subsection potentially opens room for mother tongue education in minority languages in areas where that language is spoken at the discretion of the Minister of Education.⁷⁴ It does not specify the

⁷¹ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) paras 60-61; *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) para 30.

⁷² *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) para 23. See also para 31 states that only by means of a positive commitment "progressively to eradicate socially constructed barriers to equality and to root out systematic or institutionalised under-privilege" can the constitutional promise of equality before the law and its equal protection and benefit be realised.

⁷³ Webb & Kembo-Sure op cit note 3 argue that in Africa "people are often identified culturally primarily (and even solely) on the basis of the language they speak."

⁷⁴ The other sections that give the minister of Education a wide discretion are sections 62(3) and (4) of the Education Act. Section 62(3) of the Education Act states that "...The Minister may authorise the teaching of foreign languages in schools." In practice, French, Portuguese, Chinese, Arabic has been taught in schools. Similarly, s 62(4) makes it clear that "... Prior to form 1, any one of the languages referred to in subsection (1) and (2) may be used as the medium of instruction, depending upon which language is more commonly spoken and better understood by the pupils."

criteria that the minister uses to authorize mother tongue education in indigenous languages which allows a wide discretion in choice of which language should be taught.⁷⁵

According to Hachipola, nine trends have emerged in practice. First, Barwe, Chikunda, Doma, Sena and Tshwawo have neither been committed to writing nor taught in Zimbabwean schools even during the colonial era. Second, Venda is taught in primary and secondary schools.⁷⁶ However, there is scarcity of teaching materials and shortage of Venda teachers. Third, Tswana has never been taught in Zimbabwe. Fourth, Tonga is currently being taught in Primary and Secondary schools particularly in Binga.⁷⁷

Fifth, Sotho was taught in schools as early as the 1920s and, by the 1960s, Sotho was taught up to standard 6 in the Gwanda and Beitbridge Districts. It would appear though that no material was substantially developed and Sotho is no longer being taught in schools.⁷⁸ However, Sotho is taught in Lesotho and materials can be bought from Lesotho for this language to begin to be taught in schools from primary school to tertiary level.

Sixth, Shangani is taught in elementary education alongside English in the Chiredzi District. Seventh, Nambya is taught in primary schools in the Hwange District. The major challenge though is the shortage of materials and teachers. Eighth, the Fingo language has never been taught in schools in Zimbabwe. Finally, Chewa was taught as a language during the colonial era although it is not being currently taught in schools. The materials for teaching Chewa even up to tertiary level are available in Malawi.

S 62(2) of the Education Act should be amended to achieve two purposes. The first would be to provide for the equitable teaching of all the 16 official languages with two limitations. First, the 16

⁷⁵ Section 62(5) limits the minister's discretion when it makes it peremptory for sign language to be taught as a medium of instruction for the deaf. It provides that "...*Sign language shall be the priority medium of instruction for the deaf and hard of hearing.*"

⁷⁶ SJ Hachipola (n 44 above) 32-33.

⁷⁷ SJ Hachipola op cit note 44 at 41.

⁷⁸ SJ Hachipola op cit note 44 18-19.

official languages need to be developed (in terms of curriculum, course books and teachers) in order for them to be used at different levels of education. Since most of the 16 official language speakers are factually in an economic and political non-dominant position, government financial assistance plays a crucial role in making mother tongue education a reality. Alternatively, teaching materials can be sourced from South Africa, Zambia, Mozambique, Botswana and Malawi where most of our minority languages are major languages that have developed teaching materials. Practically, the sliding scale approach could play a crucial role in determining which official languages should be developed and taught in which areas.⁷⁹ The state would be expected to provide education in a certain official language if the linguistic group is of a certain size and are concentrated in a certain area.⁸⁰

Second, mother tongue education can be denied if the limitation is reasonable and justifiable.⁸¹ The proportionality requirement discussed above would apply.

The second purpose of amending section 62(2) of the Education Act is to qualify the minister's discretion when authorizing the teaching in indigenous languages. The minister should consider the number of speakers of the language, the extent to which the language has been developed, the availability of textbooks and reading material, the availability of resource, the availability of teachers and examiners, etc.

ii. Curriculum content

International law enjoins states to adopt a multicultural approach⁸² where the education curricula should objectively reflect, among others, the culture and language of historically disadvantaged language groups.⁸³ Ideally, the text materials to be used should also be representative of the perspectives of members of different sections of society.⁸⁴ This aspect is not reflected in the Education Act.

⁷⁹ K Henrard op cit note 10 260-261.

⁸⁰ F de Varennes op cit note 66 at 189.

⁸¹ *Belgian Linguistic Case 1* EHRR 252 (1965) 284-254 held that the denial of mother- tongue education may not be for arbitrary reasons but must have an objective and reasonable justification.

⁸² See Article 4 of the 1992 UN Declaration on the Rights of Minorities and Article 12 of the Framework Convention.

⁸³ K Henrard op cit note 10 262-265.

⁸⁴ It is interesting to note that arts 18 and 19 of the African Cultural Renaissance provide that "*African states recognize*

iii. Establishment of independent language institutions

Mother tongue education could easily be effected where language groups are able to establish their own educational institutions at their cost, subject to national standards of quality education. International human rights law does not oblige the state to establish educational institutions for all language groups (majority or minority) nor to financially support private educational institutions.⁸⁵ The State's obligation is to ensure that public education is accessible to all language speakers. However, the state obligation to fund such institution may arise where a language group lacks sufficient financial resources and public schools are not sufficiently pluralistic to give satisfaction to mother-tongue education. Article 5(1)(c) UNESCO Convention⁸⁶ provides that private education should depend "on the educational policy of each state."⁸⁷

c. Language use in media

Section 61 of the Constitution provides for freedom of expression and freedom of the media. In international law, freedom of expression includes the right to linguistic expression.⁸⁸ Language is a means of expression par excellence and people best express themselves in a language they speak. This argument found favour in the Canadian case of *Ford v Quebec (Attorney General)*⁸⁹ where the court held that:

Language is so intimately linked to the form and content of expression that there can be no real need to develop African languages in order to ensure their cultural advancement, and acceleration of their economic and social development. To this end, they should endeavor to formulate and implement appropriate language policies... African states should prepare and implement reforms for the introduction of African languages into the education curriculum. To this end, each state should extend the use of African languages taking into consideration the requirements of social cohesion and technological progress, as well as regional and African integration." This provision is likely going to promote minority language rights in curriculum development if the Charter comes into force.

⁸⁵ See K Henrad op cit note 10. At 266, Henrad argues that if a state gives financial aid to one private school, an equivalent amount should be granted to another private school as well, unless the differential treatment is reasonable and objectively justifiable. At 267, Henrad further argues that "states would be obliged to finance private schools for minorities if state schools are not sufficiently pluralistic, because of their obligation under international law to respect the ideological and philosophical convictions of parents in educational matters."

⁸⁶ See art 5(1)(c) of the UNESCO Convention on the Elimination of Discrimination in Education.

⁸⁷ K Henrad op cit note 10 at 266.

⁸⁸ F de Varennes 'The existing rights of minorities in international law' in Kontra et al (eds) *Language: A right and a resource: Approaching linguistic human rights* (1999) 121.

⁸⁹ [1988] 2 S.C.R. 712.

freedom linguistic expression if one is forbidden to use the language of one's choice.

This argument finds support in *Ballantyne, Davidson & McIntyre v. Canada* where the UNHRC established that freedom of expression entails use of one's language as envisaged in article 27 of the International Covenant on Civil and Political Rights (ICCPR).⁹⁰

Interestingly, international law is silent on whether or not freedom of expression guarantees access to media⁹¹ by language speakers in view of the fact that media is one of the important means of linguistic and cultural maintenance and propagation.⁹²

However, international law obliges states to ensure that language groups have access to media by allocating them frequencies.⁹³ Zimbabwe could use the 'sliding-scale approach' to determine which frequencies to give to linguistic minorities. If the state grants one or several language groups a frequency and or an amount of airtime on radio or television, the same state should also allocate an equivalent grant to the other remaining language groups unless there is reasonable and objective justification for differential treatment.⁹⁴

International law does not place an obligation on the states to support private media institutions.⁹⁵ It has been argued that article 27 of the ICCPR can (on the basis of equality, non-discrimination and the right to identity) be interpreted as guaranteeing the right for members of linguistic minorities to establish their own media.⁹⁶ The state should not interfere with this right except to merely regulate the registration and licencing of media.

⁹⁰ Communications 359/89 & 385/89, *John Ballantyne and Elizabeth Davidson, and Gordon McIntyre v Canada*, UNHR Committee (31 March 1993) UN Doc. U.N. Doc. CCPR/C/47/D/359/1989 and 385/1989/Rev.1 (1993) paras 11.3 and 11.4.

⁹¹ Media in this context includes written press, radio and television.

⁹² See D Gomien, "Pluralism and minority access to media" in A Rosas et al (eds) *The strength of diversity: Human rights and pluralist democracy*, Dordrecht: Nijhoff (1992) 49.

⁹³ F de Varennes op cit note 66 at 223.

⁹⁴ K Henrard op cit note 10 268-269.

⁹⁵ See F de Varennes op cit note 66 at 217-225.

⁹⁶ See K Henrard op cit note 10 at 268.

d. Language use in criminal proceedings

Section 70(1)(j) of the Constitution affords every accused person the right to have trial proceedings interpreted into a language that they understand and is substantially similar to article 14(3) of the ICCPR.⁹⁷

S 70(1)(j) of the Constitution does not however confer a right to be tried in a language of choice or language of the accused or the accused's first language or the language that they speak but merely to be tried in a language that the accused person understands. A language that one understands is different from the language that one speaks. If for instance, a person that primarily speaks Sena and also understands English has proceedings conducted English, the court would have complied with s 70(1)(j) of the Constitution.

International law supports this reasoning and interpretation. Clause 5.3 of the UNHRC General Comment 23 makes it clear that '*[a]rticle 14(3)(f) of the ICCPR does not, in any other circumstances, confer on accused persons the right to use or speak the language of their choice in court proceedings.*' In *Guesdon v France*,⁹⁸ the UNHRC established that the notion of fair trial does not imply that the accused be afforded the possibility to express himself in the language which he normally speaks or speaks with a maximum of ease. If a court is certain that the accused is sufficiently proficient in the court's language, it is not required to find out if he would prefer to use another language. In *Harward v Norway*⁹⁹ the UNHRC held that an essential element of the concept of a fair trial under Article 1 is to have adequate time and facilities to prepare a defence. However, this does not entail that an accused who does not understand the language used in court, has the right to be furnished with translations of all relevant documents in a criminal investigation, provided that the relevant documents are made available to his counsel.

⁹⁷ It provides that "*In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him... f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court...*"

⁹⁸ Communication 219/1986 *Guesdon v France* UNHR Committee (23 August 1990), UN Doc CCPR/C/39/D/219/(1986).

⁹⁹ Communication 451/1991 *Harward v Norway* UNHR Committee (16 August 1994), UN Doc CCPR/C/51/D/451/(1991).

Section 70(1)(j) of the Constitution therefore imposes on the state the duty to provide an interpreter at its expense in criminal proceedings where a person cannot understand the language of the court. The state cannot refuse to provide it even for economic or any other justifications. In Zimbabwe's adversarial legal system, the rationale for affording language rights in criminal proceeding is to facilitate the participation of an accused person in the trial. If language rights are not afforded to an accused person, then justice is denied.

Section 5 of the Magistrates Court Act,¹⁰⁰ s 49 of the High Court Act¹⁰¹ and S 31 of the Supreme Court Act¹⁰² make it peremptory for proceedings in the Magistrates, High and Supreme Courts to be in the English language which creates difficulties for other language speakers to participate in legal proceedings. With poor interpretation of official languages, other language speakers may fail to adequately access justice in Zimbabwean courts.

e. Language use in cultural activities

Section 63 of the Constitution affords every person a right to participate in the cultural life of their choice and implies cultural identity. Language is the soul of culture¹⁰³ and a vehicle of cultural expression.¹⁰⁴ In Africa '*people are often identified culturally primarily (and even solely) on the basis of the language they speak.*'¹⁰⁵ Examples include the Tonga, Ndebele and Shona.¹⁰⁶

¹⁰⁰ [Chapter 7:10].

¹⁰¹ [Chapter 7:13].

¹⁰² [Chapter 7:13].

¹⁰³ N wa Thiongo *Decolonizing the mind, the politics of language in African literature* (1986). S Wright, *Language policy and language planning: From nationalism to globalization* (2004) 2 argues that '[c]ommunities exist because they have the linguistic means to do so. In other words, language is the means by which we conduct our social lives and is foremost among the factors that allow us to construct human communities.' KL Dooley and LB Maruska '*Language rights as civil rights: Linguistic protection in the post- colonial democratic development of Canada and South Africa,*' (2010) 3 *Journal of global change and governance*, 1 at 2 argue that "[l]anguage, in essence, serves as the building bloc of cultural recognition, and it provides communities with the necessary tools to define themselves as particular entities, noticeably set apart from other communities."

¹⁰⁴ S Makoni & B Trudell '*Complementary and conflicting discourses of linguistic diversity: Implications for language planning*' (2006) 22(2): 14-28 *Per Linguam* 21.

¹⁰⁵ V Webb & Kembo-Sure *op cit* note 3 at 5

¹⁰⁶ I Mumpande '*Silent voices*' *op cit* note 44. He further argues that '*a community without a language is like a person without a soul.*'

Section 63 of the Constitution protects the use of languages in cultural activities and, essentially, protects linguistic identity.¹⁰⁷ Again, 'the sliding scale approach' could be used to determine which language is used for which cultural expression.

3. Promotion of Use and Development of All Languages In Zimbabwe

Section 6(4) of the Constitution provides for the promotion of use of all languages (official and non-official) spoken in Zimbabwe and, in the process, obliges the state to create conditions for the development of all these languages. The promotion of language use is yet to be defined and given meaning by the Constitutional Court. Section 6(4) essentially obliges the state to promote the use of all languages but not to actually use all the languages.

There is a vast difference between promotion of use of language and actual use of language. According to De Varennes,¹⁰⁸ there are five distinctions between promotion of the use of an official language and the actual use of an official language. The first distinction is that in the promotion of the use of an official language, the state may or may not use the language concerned whereas use of an official language obliges authorities to actually use the language as prescribed.

Second, with promotion of the use of an official language, the actual use is decided by Administrative or Political Branches of State Apparatus. What is sufficient in terms of promotion is largely permissive (with the usual exception of public education) and determined politically. On the other hand, use of an official language is mandatory and it is usually required by the constitution or legislation.

Third, for the promotion of the use of an official language, the remedies are usually political or

¹⁰⁷ Such an approach is consistent with Clause 1.0 of the Cultural Policy of Zimbabwe which provides that '*People, unlike other living life on earth, have an identity and the main characteristic of this identity is language, which is a God given fit to mankind. Zimbabweans speak a variety of indigenous languages and to add to these languages they also use English. All these languages are important as a means of communication. The languages are a strong instrument of identity be it culturally or otherwise. With language, one has a powerful tool to communicate joy, love, fear, praise and other values. With language we are able to describe cultural issues, effect praise, values and norms. With language you can thwart conflicts, engage in fruitful discourse and foster growth on the spiritual, physical and social state of a being.*'

¹⁰⁸ F de Varennes 'Draft report on international and comparative perspectives' op cit note 32 at 55.

administrative whilst use of an official language attracts legal, political and administrative remedies. Fourth, with the promotion of the use of an official language individuals cannot generally claim a breach before a court of law since they have no right to use an official language. Use of an official language empowers individuals to claim a breach of a right to use an official language before a court of law.¹⁰⁹

Finally, with promotion of the use of an official language, the extent of obligations sufficient to promote the use of an official language is left to the discretion at the political level, as in Language Schemes approved by a Minister or a parliamentary-approved Commissioner. Conversely, with use of an official language, the extent of obligations involved in the use of an official language is largely determined by legislation and regulations. It is therefore clear that the promotion of use of language is weaker than the use of an official language in terms of the protection afforded to the language and its speakers.

Turning to s 6(4) of the Constitution, it is noteworthy that the obligation to promote the use of all languages is mandatory as shown by the use of the word 'must' and the obligation lies with the state – executive, legislature and judiciary. Two deficiencies are glaring in s 6(4). First, there is no clarity regarding the nature of measures that the state should take to promote the use of all languages. These measures could include affirmative action. Second, s 6(4) does not specify the nature of conditions that the state should create for the development of all languages.

4. Lacuna in s 6 of the Constitution

One of the major weaknesses of s 6 of the Constitution is that there is no implementation mechanism in place for the fulfilment of the language rights protected in that section. This makes it very difficult for the language rights norms provided for in the Constitution to be effectively implemented.

¹⁰⁹ See for example *English Medium Students Parents v. State of Karnataka*, 1994 AIR 1702, 1994 SCC (1) 550, *State of Kerala v. Mother Provisional*, 1970 AIR SCC 2079, and more generally *L.M. Wakhare v. The State of Madhya Pradesh*, AIR 1959 MP 208.

De Varennes¹¹⁰ argues that there are three basic mechanisms that should be put in place for the effective implementation of language rights.

The first refers to legal mechanisms¹¹¹ where constitutional provisions on the use of two or more official languages by authorities are elaborated upon through legislation, regulations, directives and guidelines.¹¹² Courts also play a significant role in clarifying these provisions through interpretation. Language legislation should eliminate discrimination based on language, enable minority language speakers to conserve their linguistic characteristics, and allow peaceful interaction with the majority. Language legislation must give members of the minority group the opportunity to deal with the majority in a way that conserves their linguistic distinction.

The current absence of such legislation in Zimbabwe deprives content to the exact scope of official language status and deprives speakers of official languages of practical measures for the implementation of their rights.

The second refers to administrative mechanisms where government sets up institutions to guide, co-ordinate and oversee the implementation of the use of official and non-official languages. Zimbabwe needs administrative institutions to help oversee the implementation of use of official and non-official languages in government and the development of all languages. Such institutions can be built along the lines of the PAN South African Language Board or a specific language commission or a generic Arts and Culture Commission suggested by s 142 of the National Constitutional Assembly Draft Constitution.¹¹³

¹¹⁰ F de Varennes 'Draft report on international and comparative perspectives' op cit note 32 at 47.

¹¹¹ G Turi 'Typology of language legislation' in TS Kangas et al (1994) *Linguistic human rights: overcoming linguistic discrimination* 111-120 argues that "... the fundamental goal of all legislation about language is to resolve the linguistic problems which stem from...language conflicts and inequalities by legally establishing and determining the status and use of the concerned languages."

¹¹² The need for language specific detailed legislation is even more necessary in Zimbabwe where there is currently no case that has been decided on language rights in the new constitution.

¹¹³ Section 142 of the NCA Draft Constitution provides that "An Act of parliament must provide for the establishment, powers and functions of an Arts and Cultural Commission."

The third relates to political mechanisms where language policy is formulated and mechanisms are put in place to monitor such policy through provision of conduits for consultation, communication, and responses involving parliament, parliamentary committees, a department within a ministry, a specific ministry devoted to this issue, the government and other political entities. There can also be mechanisms for resolving official and non-official language disputes by an institution answerable to Parliament, such as an official languages commissioner, language board, ombudsman/public protector or the human rights commission.¹¹⁴ Such political mechanisms are required if language rights provided for in the Constitution are to be promoted, protected and fulfilled.

5. Limitation of Language Rights in s 6

One crucial issue for discussion is whether s 6 is subject to the general limitation clause in s 86 and there are two possible approaches to this. The first approach is restrictive and strictly interprets s 6 as a provision falling outside the Bill of Rights and therefore not subject to the limitation clause that limits rights in the Bill of Rights.¹¹⁵

The second approach is a generous one that purposively interprets s 6 in the context of the constitutional values and other rights¹¹⁶ in the Bill of Rights that are inevitably used when implementing s 6. This approach sees the application of the limitation clause in s 86 to s 6.¹¹⁷

The limitation of rights in s 86 is essentially two-fold. First, a law of general application should limit fundamental human rights. The law of general application refers to the rule of law¹¹⁸ that includes

¹¹⁴ Unpublished: R Dunbar, 'Minority language legislation and rights regimes: A typology of enforcement mechanisms' unpublished paper presented at World congress on language policies, Barcelona 16-20 April 2002 3.

¹¹⁵ This approach was followed in the SA case of *Van Rooyen v S (General Council of the Bar of South Africa Intervening)* 2002 5 SA 246 (CC) [35] where the Constitutional Court held that judicial independence was outside the Bill of rights and was therefore not subject to the general limitation in section 36(1).

¹¹⁶ Examples include equality, non-discrimination, dignity and freedom of expression that require the application of the limitation clause.

¹¹⁷ See JL Pretorius 'The Use of Official Languages Act: Diversity affirmed?' 2013 (16)1PER /PELJ 281 282295.

¹¹⁸ *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC).

legislation,¹¹⁹ common law¹²⁰ and customary law¹²¹ that is impersonal,¹²² applies equally to all and is not arbitrary in its application.

Second, the law of general application should be fair, reasonable, necessary and justifiable¹²³ in an open and democratic society that is based on openness, justice, human dignity,¹²⁴ equality and freedom. This requirement introduces the proportionality principle which is considered as central to a constitutional democracy.¹²⁵

Section 86(2) of the Constitution lists six factors that are used to determine proportionality. The first is the nature of the right or freedom. Here, courts should balance the importance of the language right against the justification of its infringement. Use of a language in government business is arguably very important to the preservation of linguistic identity and access to public service than any justification of its limitation. Courts are likely going to apply a high threshold before accepting any limitation to this right.

The second factor is the purpose of the limitation. Section 86(2)(b) indicates that the limitation should be '*...necessary in the interests of defence, public safety, public order, public morality, public health, regional or town planning or the general public interest.*' The Constitutional Court is yet to be seized with matters that will see it formulating jurisprudence in this regard.

The third factor is the nature and extent of the limitation. Zimbabwean Courts have not yet decided

¹¹⁹ It includes Acts of Parliament and delegated legislation. See *Larbi-Odam v MEC for Education (North West Province)* 1998 1 SA 745 (CC) 27.

¹²⁰ Policy, practice and contractual provisions do not qualify as law of general application. See *Hoffmann v South African Airways* 2001 1 SA (CC) 41 and *Barkhuizen v Napier* 2007 5 SA 323 (CC) 26.

¹²¹ *Du Plessis v De Klerk* 1996 3 SA 850 (CC) 44 & 136.

¹²² *Islamic Unity Convention v Independent Broadcasting Authority* 2002 4 SA 294 (CC).

¹²³ GE Devenish *The South African Constitution* (2005) 181 says the limitation should be reasonable and proportional.

¹²⁴ Section 86(3)(b) of the Constitution makes it clear that human dignity is one of the rights that cannot be limited.

¹²⁵ DM Beatty *Ultimate Rule of Law* (2005) 163 argues that "[t]he fact is that proportionality is an integral, indispensable part of every constitution that subordinates the system of government it creates to the rule of law. It is constitutive of their structure, an integral part of every constitution by virtue of their status as the supreme law within the nation state."

on this aspect. However, South African Courts have established that this factor looks at the effects of the limitation on the right concerned and not on the right holder.¹²⁶ In the context of this paper, what is the effect of the limitation on the right to use an official language? The law that limits the right should not do more damage to the right than is reasonable for achieving its purpose.¹²⁷

The fourth factor is the relationship between the limitation and its purpose. Section 86(2)(b) qualifies this factor to assess whether the limitation "... *imposes greater restrictions on the right or freedom concerned than are necessary to achieve its purpose.*"

The fifth factor concerns the availability of less restrictive means to achieve the stated purpose. South African Courts have established that the limitation is not be proportional if there are less restrictive (but equally effective) means that can be employed to achieve the same purpose of the limitation.¹²⁸

The sixth factor is the need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others.

Clearly, s 86 incorporates the principle of proportionality. Pretorius¹²⁹ argues that the application of proportionality to s 6 demands in general that the principle of inclusive linguistic diversity expressed in the official language clause must be related to other competing values, principles or considerations in a way which is non-reductionist¹³⁰ and non-hierarchical.¹³¹

¹²⁶ *S v Meaker* 1998 8 BCLR 1038 (W).

¹²⁷ *S v Manamela* 2000 3 SA 1 (CC) 34.

¹²⁸ *S v Makwanyane* 1995 3 SA 391 [123] and [128].

¹²⁹ JL Pretorius 'The Use of Official Languages Act: Diversity affirmed?' 2013(16)1 *PER / PELJ* 281 282 299.

¹³⁰ Non-reductionism requires that competing constitutional goods should be related to one another in a way which preserves their plurality without reducing one into another and without lumping all of them together into some common space (like utility) that denies their plurality.

¹³¹ Non-hierarchical relatedness means that constitutional goods must not be pitched against each other in terms of an arbitrary abstract rank order.

6. Conclusion

Even though s 6 of the Constitution potentially affirms linguistic diversity, there is need for language legislation to clarify the scope of official language status, the extent of use of official languages; the obligation to promote the use and development of all languages and provide for the implementation mechanisms if the language rights are to be protected, promoted and fulfilled.

THE PROTECTION OF THE RIGHT TO EMPLOYMENT OF PERSONS WITH DISABILITIES IN AFRICA: LESSONS FROM ZIMBABWE

*Serges Djoyou Kamga*¹

Introduction

Over the past few years, Zimbabwe has been portrayed as a lawless country, a place “characterised by institutional failures” where the rule of law simply does not exist² and therefore a hopeless country especially for the most vulnerable such as persons with disabilities (PWDs). However, on 1 March 2016, the High Court of Bulawayo rendered an important judgement in the *Zimbabwe National League of the Blind v Zimbabwe National Statistics Agency (ZIMSTAT) and Ors*³ case. This judgement dealt with the right of employment of persons who are visually impaired and is important for it sets a direction on the protection of the right to employment for PWDs.

The aim of this paper is to unpack this decision and examine how the right to employment of PWDs should be protected under international human rights law. To this end, the article will deconstruct the concept of equality, non-discrimination, and reasonable accommodation, which are keys in securing the inclusion of PWDs in society in general and at the work place in particular. In understanding the implications of this decision, the article relies on local and foreign jurisprudence on equality, non-discrimination and reasonable accommodation and their significance in securing the right to employment for PWDs.

The article is divided into five parts including this introduction. The second part will present the international and African regional regimes of the right to employment of PWDs. The third part

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² Arthur Gwagwa “Zimbabwe, Human Rights, Rule of Law & Democracy 2013”, Report of the Zimbabwe Human Rights Forum, 2013, page omitted.

³ *Zimbabwe National League of the Blind v Zimbabwe National Statistics Agency (ZIMSTAT) and Others*, High Court of Zimbabwe, Case no 1326/15.

presents the facts and decision of the Court; the fourth part of the article will analyse this decision in line with international human rights standards related to the rights of persons with disabilities and the final part will provide concluding remarks.

The international regime of the right to employment of persons with disabilities: An Overview

This section will be divided into three parts: the first will discuss the normative standards of the right to employment of PWDS under general international law; the second will focus on this same right under the Convention on the Rights of Persons with Disabilities⁴ (CRPD) and the third part will focus on this right in the African human rights system.

2.1 The normative standards of the right to employment of PWDs under general international law

Under the Universal Declaration of Human Rights (UDHR), "Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment".⁵ In this provision, 'everyone' comprises everybody including PWDs, even though it is advisable to mention the ground of exclusion as to ensure its visibility.

Similarly, the International Covenant on Economic Social and Cultural Rights (ICESCR) guarantees the right to work in article 6 and the right to favourable working conditions in Article 7. These rights are guaranteed to all persons, including those with disabilities. Importantly, Article 7 (c) is unequivocal in providing for "Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence". This means that everyone has the right to take up the job that he or she accepts and no one should be discriminated against on the ground of disability.

⁴ Adopted in 2006 and entered into force on and ratified by Zimbabwe under CRPD on 23 September 2013.

⁵ Adopted on 10 December 1948, Art 23.

The right to work for PWDs is also highlighted by the Committee on Economic, Social and Cultural Rights⁶ which promotes the employment of PWDs in mainstream employment and not “reserved” shelter.⁷

In addition, numerous ILO Conventions⁸ provide for the right to employment and fair labour practice for persons with disabilities. In essence, these conventions aim to ensure that state parties adopt national policies for the promotion of the rights of PWDs to access employment; and to be afforded equal opportunity and treatment as far as occupation and employment are concerned. Put differently, at the centre of these Conventions is the need to ensure that PWDs are provided with equal opportunities in the work place; provided with adequate adjustment and reasonable accommodation. This entails the adaptation of the job content, working time and work organization, and the adjustment of the work environment to ensure the recruitment of PWDs. It may also include the modifications in work schedules, sequences of work and in breaking down work tasks to accommodate PWDs.⁹

2.2 The right to employment for persons with disabilities under the CRPD

Article 5(2) and (3) of the CRPD provides that:

“States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.”

Besides the general prohibition of discrimination against PWDs, the substantive provision on the right to employment of PWDs is contained in Article 27 of the CRPD. Accordingly, member states commit to secure the right of PWDs

“to work, on an equal basis with others; this includes the right to the opportunity to gain a living

⁶ General Comments, N05 of 1994, paragraphs 20 to 27.

⁷ Ibid, para 21.

⁸ ILO Vocational Rehabilitation (Disabled) Recommendation (No 99, 1955); ILO Convention No 111 concerning Discrimination in Respect of Employment and Occupation; ILO Convention (No 159, 1983) on the promotion of equal opportunities and equal treatment for men and women with disabilities; ILO Recommendation No 168 Vocational Rehabilitation and Employment (Disabled Persons) Recommendation, 1983 (No 168).

⁹ Leticia De Campos ‘Reasonable accommodation: The new concept from an inclusive Constitutional perspective’ *Sur International Journal on Human Rights*, vol 8, no14, Juin 2011, p 85-112.

by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities”¹⁰

In addition, state parties are obliged to forbid all disability-based discriminations related to employment, especially in matters concerning “conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions”.¹¹ It could be argued that Article 27 of the CRPD provides the guideline of what should be done by the state to ensure equality for PWDs at the work place.

The significance of the right to work for PWDs was further highlighted by the Committee on the Rights of Persons with Disabilities (CRPD Committee) through various Concluding Observations on state reports. For instance, in its Concluding Observations on Hungary (2012),¹² the CRPD Committee expressed its concern at the low level of employment of PWDs and called for the development of “programmes to integrate persons with disabilities into the open labour market and the education and professional training systems”.¹³ Similarly, in the case of Argentina, while the CRPD Committee was happy for the adoption of the labour law which allocates a minimum quota of 4 per cent for the employment of PWDs in the public sector,¹⁴ and numerous programmes adopted for the inclusion of PWDs at the work place, it expressed concern on the cultural barriers and prejudices that close access to the labour market to PWDs.

Moreover, in a CRPD Committee decision – *Gröninger v Germany*,¹⁵ the Committee observed that the CRPD in Article 27 enshrines the rights of PWDs to benefit from appropriate measures of promotion of employment opportunities such as real access to general placement services as well as support or help in finding and obtaining employment. This is to say that the CRPD Committee is useful in providing

¹⁰ CRPD, Art 27, para 1.

¹¹ CRPD, Art 27 1(a)

¹² Concluding Observations on Hungary (2012), para 43.

¹³ *Ibid*, para 44

¹⁴ Public Sector [Act 25].689.

¹⁵ *Liliane Gröninger v. Germany* (Communication No. 2/2010)

guidance on how states should ensure the inclusion of PWDs at the work place.

2.3 Normative standards under the African regional Human rights system

It is important to note that the African human rights system includes all human rights instruments which aim to promote and protect human rights in Africa.¹⁶ It comprises: The African Charter on Human and People's Rights (ACHPR); Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa; the African Youth Charter; and the 2014 Draft African Disability Protocol.

In line with Article 2 of the ACHPR, all these instruments prohibit discrimination on numerous grounds, including disabilities. This also suggests a prohibition of discrimination in the employment sector. In addition, the ACHPR provides for the right to work for everyone. Accordingly, "Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work".¹⁷ Furthermore, in its Article 18(4), the ACHPR, also protects the rights of PWDs and stresses the need to ensure "the right to special measures of protection in keeping with their physical or moral needs". This provision urges the states to ensure the inclusion of PWDs with consideration of their needs.

As for the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, it protects women with disabilities and obliges states to "take specific measures commensurate with their physical, economic and social needs to facilitate their access to employment, professional and vocational training as well as their participation in decision-making".¹⁸ This provision is unequivocal in ensuring the right to employment and fair labour practice to women with disabilities.

As far as the African Youth Charter is concerned, it prohibits discrimination under the theme "every young person, young people [including those with disabilities]" have the right to employment.¹⁹

¹⁶ See generally, Frans Viljoen *International Human Rights Law in Africa*, Oxford University Press, 2012.

¹⁷ Art 15.

¹⁸ Art 23(a)

¹⁹ Art 5.

Although this approach in which PWDs are not expressly mentioned shall not be encouraged, it could be argued that it is quite inclusive of PWDs, under Article 24 of the Youth Charter which specifically compels states to recognise

"... the right of mentally and physically challenged youth to special care and shall ensure that they have equal and effective access to education, training, health care services, employment, sport, physical education and cultural and recreational activities".

In sum, the African human rights system is unequivocal in its protection of the right to PWDs for employment. The next session of this paper will examine how the global and regional framework for the PWDs' right to employment was given effect by the Zimbabwean court.

The right to employment of visually impaired persons in Zimbabwe

The Zimbabwe National League of the Blind v Zimbabwe National Statistics Agency (ZIMSTAT) and others.

3.1 Facts and decisions

The applicant was the Zimbabwe National League of the Blind, a registered Non- Governmental Organization whose membership includes visually impaired persons and the respondents were ZIMSTAT, the Minister of Finance cited in his capacity as the Minister responsible for the administration of the Census and Statistics Act, and the Minister of Public Service, Labour and Social welfare cited in her official capacity as the Minister responsible for fair labour standards, disability and social issues. The applicant brought an application before the High Court of Bulawayo challenging the systemic discrimination of visually impaired persons in the process of recruiting extra personnel by ZIMSTAT.

Mandated by the Minister of Finance to conduct the 2012 population censuses, ZIMSTAT had embarked on a recruitment of extra personal to discharge its mandate. In doing so, it decided to recruit personnel from amongst the ranks of civil servants. To give effect to this decision, ZIMSTAT issued a circular titled

'Recruitment of Level I- IV personnel for the 2012 Population Census (reference number POPC/2/3/A) which provided for four levels of the officers as follows:

- (i) Level 1 – Provincial Supervisors
- (ii) Level 2 - District Level supervisors
- (iii) Level 3 – Enumeration Area Level Supervisors
- (iv) Level 4 – Enumerators

Nevertheless, the circular also set conditions to select the appointees who should be:

- (i) *Physically and mentally fit*. The work is field based and involves a lot of
- (ii) Able to work under pressure in a highly technical environment
- (iii) In possession of, at least, a tertiary level qualification (degree/diploma/certificate from a tertiary institution)
- (iv) Senior enough to be able to supervise and discipline personnel in levels below theirs
- (v) Able to work in a team²⁰

As a result of the first condition above, which is, legally, a disability-based discrimination or imposed by law, Thulani Tavashavira, Simangele Ndlovu and Msoni Mlilo, all blind civil servants at the time and members of the applicant, were simply dismissed or not recruited for being "*physically unfit*" to the job. In fact, they faced barriers erected by the Directive on the assumption that their visual impairment could be equated with inability to work. This was a case of discrimination on the ground of a disability and was in violation of Article 56 of the Constitution which expressly outlaws discrimination on the ground of disabilities.

The applicant sought a declaratory order to the effect that the exclusion of the members of the National League of the Blind and other visually impaired civil servants from being enlisted as personnel in the 2012 population census was discriminatory.

²⁰ *National League of the Blind case*, op cit note 3 p 3.

It also sought an order compelling ZIMSTAT and the Minister of Finance to “immediately facilitate the full participation of persons with disabilities on an equal basis with others in future population censuses or any other such exercise”. In addition to ensuring compliance with the order, the applicants also requested that the order be provided in the form of a “structural interdict that allows the Applicant to monitor the steps taken by the Respondents and allow the applicants to approach court for a decision whether the steps taken are adequate”.

The court found that

“the exclusion of visually impaired persons from recruitment as enumerators and supervisors to which other persons were recruited for the purpose of conducting population census exercises was discriminatory and was a violation of the Constitution” and made an order to that effect.²¹

The High Court ordered ZIMSTAT and the Minister of Finance

“to put in place mechanism and facilities within a reasonable time that will enable the full participation of persons with disabilities, particularly those with visual impairment, as enumerators and supervisors in the conduct of population censuses or any other such exercise”.²²

4. An Evaluation of the Decision

This section evaluates the significance of the decision. In doing so, first, it shows how the declaratory order by the court fosters substantive equality and secondly, that ordering reasonable accommodation measures is also important in strengthening substantive equality.

4.1 Fostering Substantive Equality through the Declaratory Order

The Zimbabwe Constitution²³ recognizes the inherent dignity and worth of each human being as one of its founding principles.²⁴ In other words, this is the affirmation of the right to equality to all.

²¹ Para 1 of the order.

²² Para 2 of the order.

²³ Act No. 20 of 2013

²⁴ Section 3 (1)(e) of the Constitution

Importantly, the Constitution is also explicit in providing for the right of PWDs to treatment with respect and dignity.²⁵ To secure this equality, the Constitution prohibits discrimination on various grounds including on the basis of disabilities.²⁶ It reads:

A person is treated in a discriminatory manner for the purpose of subsection (3) if

a. they are subjected directly or indirectly to a condition, restriction or disability to which other people are not subjected; or

*b. other people are accorded directly or indirectly a privilege or advantage which they are not accorded.*²⁷

Although this provision is significant in guaranteeing the dignity and equality of PWDs, it is weakened by s 83 which submits the achievement of disability rights to the availability of resource test. As correctly argued by Manatsa, this is problematic as the government can rely on this provision to refrain from investing in disability rights.²⁸ In fact, this is how formal or textual equality works. Formal equality is linked with Aristotelian equal treatment idea, which posits that likes must be treated alike.²⁹ Accordingly, there is no need to adopt special measures for the benefit of the marginalized to address systemic inequality. As correctly underlined by Ngwena, formal equality “requires that all persons be evaluated by neutral rules regardless of any disparities on certain individuals or groups.”³⁰

In a formal equality context, the law provides equality and prohibits discrimination but there are various legal loopholes that hinder substantial or real equality. In this perspective, the application of equality does not consider structural elements which hinder substantial equality, but reflects the apparent similarity between persons. In this vein, while Zimbabwe has been credited for the adoption of The Disabled Persons Act (DPA)³¹ which, amongst other provisions, prohibits discrimination against

²⁵ Section 3 (1)(e) of the Constitution

²⁶ Sec 56(3).

²⁷ Section 56(4)

²⁸ Proceed Manatsa ‘Are disability laws in Zimbabwe compatible with the provisions of the United Nations Convention on the Rights of Persons with Disabilities (CRPD)?’ in *International Journal of Humanities and Social Science Invention* pp. 25-34 at 32.

²⁹ Aristotle *The Nicomachean ethics*. Oxford: Oxford University Press. (Translated by D Ross)1980 pp. 113a-113b.

³⁰ Charles Ngwena ‘Equality for people with disabilities in the workplace: An overview of the emergence of disability as a human rights issue’ 2004 in *Journal for Juridical Science*, Volume 29(2): pp 167-197 at 171.

³¹ Adopted in 1992 and amended in 2001

PWDs on access to public premises, services and amenities and employment,³² this legislation has two serious shortcomings which hamper its objectives.

First, the name of the Act “Disabled Persons” is deprecatory and is likely to do more harm to PWDs. This is a clear representation of the medical model of disability which considers PWDs as being sick and in need of medical assistance. Unlike the social model of disability, the medical model does not recognise societal and environmental barriers as disabling factors. Mandipa writes that the DPA “reflects a medical and diagnostic approach to disability which ignores the imperfections and deficiencies of the surrounding society”.³³

Secondly, unlike Article 27 of the CRPD which unambiguously provides for the right to work for PWDs, the DPA does not expressly provide for the right to work of a person with disabilities, but simply prohibits discrimination in employment³⁴ and, as result, as noted by Tsitsi Choruma, “most people with disabilities in Zimbabwe are not accorded the same access to job opportunities as their able-bodied counterparts”.³⁵

However, the court through the declaratory Order recognized that the discriminative nature of the recruitment process by ZIMSTAT unfairly excluded visually impaired persons and bridged the gap between formal and substantive equality.

The South Africa jurisprudence is informative in achieving substantive equality and securing human dignity for all. In *Harksen v. Lane NO and Others*,³⁶ the Court articulated the test for unfair discrimination. According to the decision, three questions are essential: Whether there is a rational and legitimate ground for the policy, law or practice that differentiates between people or groups of people such as the

³² [Chapter 17: 01]

³³ Esau Mandipa “Disabled Persons Act defective”, *The Standard*, January 22, 2012.

³⁴ Proceed Manatsa op cit note 27 pp. 25-34 at 28.

³⁵ Tsitsi Choruma ‘The Forgotten tribe’ persons with disabilities in Zimbabwe 2007, Progression Report, p 17.

³⁶ *Harksen v. Lane NO and Others* 1998 (1) SA 300 (Constitutional Court) para 53.

differentiation that was included in the circular; whether the differentiation is an unfair discrimination; and in case the differentiation is an unfair discrimination, whether it can be justified under section 36 of the Constitution.³⁷

At the centre of the second question is the need to secure dignity for all. In this question the court investigates the impact of the discrimination on the plaintiff and the social group(s) to which the plaintiff belongs. In assessing the impact, the following factors are paramount: (a) What is the position of the complainant in society and the extent to which the complainant belongs to a group that has been the victim of disadvantage or exclusion in the past; the nature of the provision or power and the purpose it seeks to achieve, including consideration whether the provision or power is intended to achieve a worthy and important social goal; and (c) the extent to which the provision or power has affected the rights or interests of the complainant and whether it has caused an impairment of the fundamental human dignity of the complainant in a comparably serious manner.³⁸

In the case under investigation, the second stage enquiry reveals that visually impaired persons are victims of unfair discrimination for they are in a weak position; belong to a group that is generally the victim of exclusion and disadvantage; and the provision or power had affected their rights or interests and violated their fundamental human dignity. Consequently, the court in Zimbabwe was correct in pronouncing the declaratory order condemning the action of ZIMSTATS as discriminatory. This decision was also in line with the Hugo judgment in which the court held:

"The prohibition on unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. At the heart of the prohibition of unfair discrimination lies recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups.

³⁷ For more on this case see Charles Ngwena 'Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa: A case study of contradictions in inclusive education' in African Disability Rights Yearbook 2013, pp.139-164.

³⁸ *Harksen v Lane NO and Others* paras. 51-53.

*The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked”.*³⁹

In other words, the prevention of discrimination seeks to efficiently secure the right to equality and dignity for all as echoed by both the South African and Zimbabwean Constitutions. Therefore, the Bulawayo High Court was correct in issuing the declaratory order which protected substantive equality and demonstrates that Zimbabwe is not a lawless country.

4.2 Fostering substantial equality through reasonable accommodation measures

According to the CRPD, ‘reasonable accommodation’ means

*“necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.”*⁴⁰

In other words, adopting reasonable accommodation measures suggests the adoption of reasonable adjustment measures to secure the inclusion of PWDs. In this context, for the measure to be reasonable, it should not cause undue or disproportionate burden or hardship or unjustified costs.

Reasonable accommodation is essential to advance substantial equality because as noted by Marumoagae,

*“equality for persons with disabilities cannot stop with injunctions to refrain from invidious discrimination, but there must be a practical acknowledgment that persons with disabilities are not fully catered for by existing societal structures and that they have a right to participate fully in society and the labour market in particular”.*⁴¹

³⁹ *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC)

⁴⁰ CRPD, Article 2.

⁴¹ MC Marumoagae ‘Disability discrimination and the right of disabled persons to access the labour market’ in PER Volume 15 (1), 2012 pp.345-428 at 347; also Day, Shelagh, and Gwen Brodsky. ‘The Duty to Accommodate: Who Will

Thus the CRPD provision compels the employer to adjust the work environment to ensure the inclusion of PWDs,⁴² at the work place for example. Nevertheless, the duty bearer of the right can show that the requested modifications cause undue burden, and will not be bound to provide such accommodation. In the Canadian case of *Central Alberta Dairy Pool v Alberta*⁴³ the Supreme Court listed criteria for consideration in identifying whether the provision of accommodation would create undue burden.

These criteria include:

- (a) Financial costs;
- (b) Impact on collective bargaining agreements;
- (c) Disruption of service to the public;
- (d) Effects on employee morale;
- (e) Interchangeability of workforce and facilities;
- (f) Size of the employer's operations;
- (g) Safety;
- (h) Overall economic climate; and
- (i) Financial resources required for the accommodation

The inviolability of reasonable accommodation was further strengthened through another Canadian case, *Eldridge v British Columbia*⁴⁴ where the Supreme Court held that the right to disability non-discrimination (under the Canadian Charter of Fundamental Rights) is not only a negative right but also a positive right that compels the state to take positive measures to ensure that PWDs enjoy rights as all other members of the society. In clarifying its position, the court held as follows:

"The principle that discrimination can accrue from a failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public is widely accepted in the human rights field. It is also a cornerstone of human rights jurisprudence that the duty to

Benefit?' Canadian Bar Review Volume 75:433-473.

⁴² CRPD, Article 2.

⁴³ *The Central Alberta Dairy Pool v Alberta* [1990] 2 SCR 489.

⁴⁴ *Eldridge v British Columbia (Attorney General)* [1997] 3 SCR 624.

take positive action to ensure that members of disadvantaged groups benefit equally from services offered to the general public is subject to the principle of reasonable accommodation".⁴⁵

On the employment terrain, reasonable accommodation boils down to "any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities".⁴⁶ According to the Americans with Disabilities Act of 1990, there are three types of "reasonable accommodations" at the work place:

"(i) modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or

(ii) modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or

(iii) modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities".⁴⁷

However, as indicated earlier, 'reasonable accommodation' should not cause "undue hardship" to the employer. This was clarified through the US case of *Norcross v Sneed*⁴⁸ where the complainant, who was blind, had his application to work as school librarian rejected on the ground that once a year the librarian would have to take learners on a field trip. The court was of the view that possessing a driving license for the position was neither reasonable nor essential. Driving ability was necessary for the job for it was required only once a year. Alternative transport could be arranged by the employer without suffering undue hardship or burden.

⁴⁵ As above, para 79.

⁴⁶ Title I of the Americans with Disabilities Act of 1990 (the 'ADA').

⁴⁷ Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act available at <http://www.eeoc.gov/policy/docs/accommodation.html> (accessed on 21 September 2016).

⁴⁸ *Norcross v Sneed* 755 F2d 113 (8th Cir 1983)

In Europe, the European Council Directive aiming to provide a general framework for equal treatment in employment and occupation calls for the reasonable accommodation for PWDs in these terms:

"In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided.

This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned."⁴⁹

The requirement of reasonable accommodation is also part of the South African law under the Promotion of Equality and Prevention of Unfair Discrimination Act,⁵⁰ which directs all persons and entities to reasonably accommodate PWDs. In addition, the South African Employment Equity Act 55 of 1998 defines 'reasonable accommodation' to be "any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access or to participate or advance in employment".⁵¹ In addition, the recently adopted White Paper on Disability Rights⁵² also relies on reasonable accommodation to secure the dignity of PWDs. Accordingly, in removing barriers to ensure access and participation for PWDs, amongst others, the White Paper's Strategy includes the need to focus on reasonable accommodation measures,⁵³ which include adjustments to:

- Make the physical environment accessible;
- Provide persons with disabilities with access to information and communication;
- Redress stress factors in the environment;
- Accommodate specific sensory requirements such as those relating to light, noise and spatial stimuli;

⁴⁹ Council Directive 2000/78/EC, art 5.

⁵⁰ Act 4 of 2000.

⁵¹ Employment Equity Act section 1.

⁵² The White Paper on The Rights of Persons with Disabilities adopted on 9 December 2015, Government Gazette, No 39792 of 9 March 2016.

⁵³ Ibid, para 6.1.1.6.

- Improve independence and mobility of persons with disabilities;
- Guarantee participation and supported decision-making by persons with disabilities; •

Provide access and participation to quality education and work.

In sum, under international law employers are compelled to adopt reasonable accommodation measures to ensure the substantial equality of PWDs. In Zimbabwe, the National Disability Board is mandated to issue adjustment orders needed for the full inclusion of PWDs in the public services; and to formulate and develop measures and policies to secure equal opportunities for PWDs in the education and employment sector.⁵⁴ Nevertheless, a person served with an adjustment order has thirty days of the service of the order to appeal to the Administrative Court if the order is unreasonable or imposes undue burden on the appellant.⁵⁵ This is the formulation of reasonable accommodation in Zimbabwe, where failure to comply with the adjustment order is penalised by a fine.⁵⁶ Manatsa observes that the criminalisation of non-compliance with an adjustment order is “a bold step” in an attempt to ensure full accessibility and services to PWDs.⁵⁷

However, the Zimbabwe National League of the Blind case showed how a recruitment Directive was discriminatory of visually impaired persons and the National Disability Board had not intervened. Nonetheless, the court was firm in ordering the respondents to

*“put in place mechanisms and facilities within a reasonable time that will enable the full participation of persons with disabilities, particularly those with visual impairments, and enumerators and supervisors in the conduct of future population censuses or any other such exercise”.*⁵⁸

This was indeed a call for the adoption of reasonable accommodation measures by the respondents in future recruitments processes. Moreover, the court did not consider whether the adjustment to

⁵⁴ Disabled Persons Act, of 2001, section 5.

⁵⁵ Disabled people Act of 2001, section 6 (5).

⁵⁶ As above, section 6(8).

⁵⁷ Proceed 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 Volume 4 Issue 4 (2015) 28.

⁵⁸ Ibid, para 2.

be effected will create undue burden or not, but simply urged the respondents to take action within reasonable time. This is a positive development which indicates that discrimination against PWDs and those who are visually impaired in particular cannot be tolerated, and that reasonable accommodation measures should be adopted to secure their substantial equality. This decision was in line, with the CRPD Committee's Concluding Observations on China (2011) in which the Committee expressed its concerns on the practice of reserved employment, which discriminated against PWDs in their vocational training and career. It went on to recommend that China adopt all necessary measures to ensure that PWDs have freedom to choose their careers and vocational training.⁵⁹

Although the verdict of the *Zimbabwe National League of the Blind* calls for celebration, its rationale was not clarified by the court which, besides refusing to grant a structural interdict, simply agreed with plaintiff without indicating reliance on foreign and international law as empowered by the Constitution,⁶⁰ or any other rationale. In fact under s 326 of the Constitution, not only is customary international law part of the law of Zimbabwe, when it is consistent with the Constitution, or an Act of Parliament,⁶¹

*'When interpreting legislation, every court and tribunal must adopt any reasonable interpretation of the legislation that is consistent with customary international law applicable in Zimbabwe, in preference to an alternative interpretation inconsistent with that law.'*⁶²

This provision clearly empowers the court to rely on customary international law in providing reasoning for the judgment. Similarly, under section 327(20) of the Constitution, (2)

'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.'

⁵⁹ Concluding Observations on China (2011), paras 41 and 42.

⁶⁰ See section 46 (c) and (e) of the 2013 Zimbabwean Constitution.

⁶¹ Section 326(1)

⁶² Section 326(2).

Put differently, Zimbabwe subscribes to the monist theory of international law which requests parliamentary approval for a ratified treaty and its incorporation into national law by an Act of parliament. It is only when these conditions are met that the international treaty has force of law at the domestic level.

In Zimbabwe, the court could have relied on the force of law provided by the CRPD through the Disability Act to motivate its decision. This could have been done by the court to clarify its position. Left with no clarity, the reader of the judgment has to guess, read and interpret the decision in line with international law and foreign jurisprudence. Notwithstanding this shortcoming, the Bulawayo High Court has demonstrated that the judiciary in Zimbabwe is inclined to protect disability rights.

5. Concluding Remarks

The aim of this article was to unpack the implications of the decision of the Bulawayo High Court in the matter between *Zimbabwe National League of the Blind v Zimbabwe National Statistics Agency (ZIMSTAT)* and Ors on the protection of disability rights in Zimbabwe in particular, and in Africa broadly. The paper began with an exploration of the global and regional standards for protection of the right to employment of PWDs before focusing on the case under discussion. It was found that at all these levels; PWDs enjoy a normative protection of their right to employment and should not be discriminated against on the job market on the ground of disabilities.

As for the implication of the *National League of the Blind* decision on the disability rights discourse, it echoed the fact that the social model of disability has gained dominance over the medical model on the imperative of realising significant or substantial equality. This positive development was illustrated by the declaratory order affirming that "*the exclusion of visually impaired persons from recruitment*" for positions afforded to other was discriminatory and was unconstitutional,⁶³ and subsequently ordered the adoption of mechanisms or reasonable accommodation measures within

⁶³ Para 1 of the Order

reasonable time to ensure the inclusion of visually impaired persons in such future recruitments. Notwithstanding the insufficiency of this decision, namely the lack of substantive reasoning of the Court that could have relied on ss 326 and 327 of the Constitution to clarify its decision, the latter itself is a testimony that disability rights are now taken seriously and this positive lesson from Zimbabwe should be emulated by other courts across the African Continent.

PUBLIC STATEMENTS PREJUDICIAL TO THE STATE

Chilling freedom of expression to the bone with a chilling offence:

Case note on *Chimakure & Others v Attorney-General* 2013 (2) ZLR 466 (S)

Geoffrey Feltoe and John Reid-Rowland

Overview

This case note examines the reasoning of the Supreme Court leading to its conclusion that s 31(a) (iii) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the "Criminal Law Code") is unconstitutional and therefore null and void. The note also looks at the implications of this ruling in respect of the rest of s 31 of the Criminal Law Code, as well as other provisions in the Code.

Background to the Case

Some human rights activists and some members of a political party were abducted from different places at different times, following a number of bomb explosions around Harare. The identities of the abductors and places where the abductees were taken were kept secret. No-one knew what had happened to the abductees. These abductions were widely reported in the media and the question of who had kidnapped the people concerned became a matter of public discussion. The law enforcement agencies claimed that they had no knowledge of who the abductors were and what their motive was.

After 27 days, the victims appeared at various police stations in Harare and were later charged with various security crimes. Indictments, lists of witnesses and summaries of their evidence were served on them. The witnesses were all members of law enforcement agencies.

The *Zimbabwe Independent* newspaper then published an article in which it stated that the Attorney-General's Office "... revealed the names of some members of the Central Intelligence Organisation

[CIO] and the police who were allegedly involved in the abduction of human right and MDC activists last November”, and went on to name the members. The Attorney-General was of the view that the articles contained false statements about the involvement of the law enforcement agencies and its members in the abduction of the human rights activists and members of the political party. He concluded that the articles contained statements which were materially false and prejudicial to the State, and authorised the institution of criminal proceedings against the applicants. On the other hand, the accused consistently denied that anything in the articles in question was false.

The *Zimbabwe Independent’s* editor and a senior journalist were arrested and charged, together with a representative of the newspaper company, under s 31 of the Criminal Law Code. Section 31 of creates an offence styled “*publishing or communicating false statements prejudicial to the State*”, and provides for the imposition of a fine of up to \$5000 or imprisonment of up to twenty years, or both, on anyone convicted.

The alleged prejudice to the State in this case was the undermining of public confidence in the police and the CIO, so the specific charge was contravening s 31(a)(iii), the part of s 31 dealing that particular type of prejudice to the State. Section 31(a)(iii) in effect prohibits the publication or communication to any other person of a wholly or materially false statement with the intention, or realising that there is a real risk or possibility, of undermining public confidence in a law enforcement agency (which would include the police force and the CIO), the Prison Service or the Defence Forces of Zimbabwe.

The provision did not (it has since been amended by Act 3 of 2016) require proof by the State that the false statement actually undermined public confidence in the security service institution concerned or that the accused had knowledge of the falsity of the statement.

Referral of case to Supreme Court

The magistrate originally presiding over this matter referred it to the Supreme Court to determine

the constitutionality of s 31(a)(iii) of the Criminal Law Code.

Arguments

The applicants sought a declaration from the court that the criminal provision in question was void because it was inconsistent with the freedom of expression guarantee in s 20 of the former Constitution (the 1980 Constitution.) They accepted that the right to freedom of expression is not absolute and that, in exercising this right, there is a duty not to infringe the rights of others or the public interests listed in s 20(2). They argued that the restriction imposed by s 31(a)(iii) of the Criminal Law Code on the exercise of freedom of expression exceeded what was reasonable in a democratic society.

The applicants further argued that, although the restriction was contained in a law passed by Parliament, the provision did not constitute a rule of law because the essential elements of the crime did not define the scope of the prohibited acts in a language which was sufficiently clear and adequately precise.

The prosecution defended the provision as constitutional, essentially arguing that the provision was reasonably required in a democratic society in the interests of defence, public safety and public order.

Judgment of Constitutional Court

A. The Applicable Law

Vital Importance of freedom of expression

Citing United Nations instruments and decided cases from the United States, Canada and India, as well as the leading Zimbabwean Supreme Court decision in *Chavunduka & Anor v Minister of Home Affairs & Anor* 2000 (1) ZLR 552 (S), the Court (per Malaba DCJ, with whom Chidyausiku CJ, Ziyambi JA, Garwe JA & Cheda AJA concurred) explained in detail the democratic importance of freedom of expression and why it must be constitutionally protected. The State must ensure that people are able

fully to enjoy their right to freedom of expression. What follows is a résumé of the unusually long (53 printed pages) judgment.

Does freedom of expression encompass the making of false statements?

The Court decided that the protection provided by s 20(1) does not have regard to the truth or falsity of the meaning of the information published or communicated. Truth is not a required condition for the protection of freedom of expression. The content of a statement does not therefore determine whether it falls within s 20(1)'s protection. The Constitution recognises the fact that people tell lies in a variety of social situations for different reasons. Lies are not necessarily without intrinsic social value in fostering individual self-fulfilment and discovery of truth. The only limitation on the "freedom" or "liberty" is the duty not to injure the rights of others or the collective interests listed in s 20(2) (a). It is the rights of others or the public interests and actual or potential harm thereto that help to determine whether a restriction on the expression is valid.

The fact that a person has told lies to others on any subject matter should not be of concern to the State. The Government is not a monitor of truth. Anyone has a right to impart or receive ideas and information about the activities of security service institutions, regardless of the falsity or truth of the message conveyed, provided no harm or real likelihood of harm to the rights of others or public interest results in breach of law. No exercise of the right to freedom of expression can, without more, be restricted on the ground that the message conveyed is false, offensive or not favourable.

Permissible restrictions on freedom of expression

Freedom of expression is not an absolute right and may be restricted if the objective of its enactment is the protection of a public interest listed in s 20(2)(a), which include the maintenance of public order and protection of public safety. The recognition of the power of Government to limit the exercise of freedom of expression arises from the fact that the constitutional freedom of expression can be abused for the purposes of harming the rights of others or the public interest.

Restriction on freedom of expression necessary because of demonstrable direct, obvious and serious harm to public interest.

Section 20(2) prescribes strict requirements for any measure in the exercise of State power which has the effect of restricting the exercise of the right to freedom of expression. The restriction may only be imposed if it is reasonably justifiable in a democratic society. The State may interfere with the exercise of freedom of expression only when the activity or expression poses a real danger of causing direct, obvious and serious harm to the rights of others or the public interests listed in s 20(2). The restriction must be narrowly drawn and specifically tailored to achieve the objective so as not to inhibit unduly freedom of expression. Restriction of the exercise of freedom of expression is a measure so stringent that it is inappropriate as a means for averting a relatively trivial harm to society.

It should be borne in mind that the State has sufficient resources to refute wrong statements and this means can be used by a public institution to effectively protect a public interest against the publication or communication of false statements about its activities without having to curtail freedom of expression.

Rational connection between restriction and objective

There must be a rational connection between the restriction and the objective for imposition the restriction. A restriction which is not rationally connected with the objective pursued is an unreasonable, unnecessary and arbitrary interference with the exercise of freedom of expression.

Restriction must be proportionate

Even if there is a rational connection, the restriction must be proportional to the objective sought to be achieved by it. The court will examine whether there are other less restrictive and intrusive means available which the legislature which would be equally effective to achieve the same objective. It will also examine whether the restrictive measure so severely affects the right to freedom of

expression that the legislative objective sought to be achieved is outweighed by the extent of the restriction. The law should not in its design have the effect of overreaching and restricting expression which is not necessary for the achievement of the objective concerned. Not every case of actual or potential harm to the public interests listed in s 20(2)(a) justifies the imposition of restrictions on the exercise of freedom of expression.

Restriction must be imposed by law

Section 20 of the Constitution requires that any restriction must be "*contained in ... any law*" or "*done under the authority of any law*", that is, that the restriction must have all the universally recognised characteristics of a legal norm. A criminal law must define its essential elements and the law must not be unconstitutionally vague. The rationale underlying the principle of unconstitutionality of vagueness of a statute is that it is essential in a free and democratic society that people should be able, within reasonable certainty, to foresee the consequences of their conduct in order to act lawfully. This is a fundamental element of law and order and therefore peace. If arbitrary and discriminatory enforcement of criminal law is to be preventable laws must provide explicit standards for those who apply them. The discretion of those entrusted with law enforcement should be limited by clear and explicit legislative standards. The standard is one of sufficient clarity. It is not one of absolute clarity. A criminal law imposing restrictions on the exercise of the right to freedom of expression will be unconstitutionally vague if it fails to provide a clear basis for deciding whether a particular conduct violates that law.

B. Application of law to offence in question

Does the offence in question serve to protect a public interest?

The court held that the offence of making a false statement intended to undermine public confidence in a security service clearly restricts freedom of expression and therefore the issue was whether it fell under any of the permissible grounds for imposing restrictions.

The protecting public confidence in a security service institution is a means of ensuring that the

institution performs efficiently and effectively its constitutional mandate to maintain public order and protect public safety. The offence is rationally connected to this objective. Whilst the media are entitled to criticize unlawful activities on the part of security agencies, making of false statements about their lawful activities will impair their ability to carry out their mandate as this may lead to withdrawal of support for law enforcement. Therefore, although the offence does not state this explicitly, its legitimate aim is to protect the interests of public order and public safety and this falls within the scope of permissible restrictions listed in s 20(2). The public interest is in ensuring that the exercise of freedom of expression does not cause direct, serious and proximate harm to lawful performance by the security service institutions of the functions for which they were constitutionally established.

Alleged unconstitutionality vagueness of provision

Real risk or possibility

The applicants argued that the phrase "*real risk or possibility*" referred to anything which could scientifically happen without it necessarily being probable.

The Court found that the words "*real risk or possibility*" in s 31(a)(iii) of the Code denote a test to be used to establish a subjective state of mind accompanying the publication or communication of a false statement relating to the security service institution. The concept of "*realisation of a real risk or possibility*" of the occurrence of a specific event as a consequence of the proscribed conduct has been used in the definition of crimes for many years to denote a subjective state of mind of crimes to the extent that it has now acquired a special meaning in criminal law jurisprudence. It has a clear meaning.

Falsity

The applicants argued that the word "*false*" was wide enough in meaning to embrace a statement which was merely incorrect or inaccurate. They maintained it is always difficult to conclusively determine total falsity. The Court found that this word was sufficiently precise in its meaning.

Undermining public confidence

The applicants argued that the concept of "*public confidence*" was nebulous and was so susceptible to change as to render the offence unconstitutionally vague. They contended that it was almost impossible to measure "*public confidence*" in a public institution, as it depended on such factors as the political and economic conditions of a country at any given time.

The Court decided that the words "*public confidence*" were not so vague as to be incapable of definition by the courts. These words were to be interpreted in the context of the performance by a security service institution of their constitutional functions and, in that context, refers to the trust reposed in the institution by the public. The basis of the trust is a belief that members of a security service institution will be able to execute their duties in accordance with the purposes for which the institution was established.

The Court therefore decided that the contention that the provision as framed is unconstitutionally vague as to fail the test of legality is clearly unsustainable. The concepts of "*false*"; "*real risk or possibility*" and "*public confidence*" do not in themselves cause insurmountable problems of interpretation. The meaning to be given to each word or phrase as used in the offence is clear. Thus, the restriction is contained "in law" within the meaning of s 20(2) of the Constitution.

With respect, the Court's decision in regard to the concept of "*public confidence*" is questionable. As contended by the applicants, it is a very vague and elusive concept. It is difficult to ascertain and measure. How does the court ascertain whether a published statement has in fact weakened public confidence in a law enforcement agency to such an extent that it impedes the agency in fulfilling its duty to maintain public order and preserve public safety? Must the State prove that the statement undermined public confidence and trust in the agency to such an extent that it significantly and demonstrably prevented the agency from carrying out its duties? Must the statement have this effect in the public as a whole or simply a significant portion of the public?

The restriction imposed by the offence is not necessary and proportionate to the achievement of its legitimate objective

This offence is unconstitutional because it is overbroad and has an unacceptable chilling effect on freedom of expression.

Over-broad nature of offence

The offence is not narrowly drawn and carefully tailored to achieve the objective pursued. It substantially restricts freedom of expression and it is questionable whether it is effective in achieving its objective.

Nature of offence

The court held that for the protection of public confidence in a security service institution to have any connection with the legitimate aim of protecting the interests of public order and public safety, the false statement must relate to the performance by the security service institution of its functions. But the offence does not provide that the false statement must relate to an important aspect of the performance of the functions of the security service institution of its functions. There are many activities by security service institutions which are unrelated to their efficient performance of the functions of maintaining public order or preserving public safety. False news that is harmless to the effectiveness of a security service institution in maintaining public order or preserving public safety would be covered by the offence as long as it is accompanied by an intention to undermine public confidence in the security service institution.

Offence does not require that statement must reach significant number of people

The offence does not even require that the statement must reach a significant number of people. It would cover even a conversation between two people in a private home.

Offence covers remote possibilities

The offence is committed when the statement is not wholly but only materially false. "*Materially false*" denotes that the statement does not have to be completely false. The provision has the effect of shielding the public interest from every possibility of harm, even harm which is only remotely possible. A remote possibility of harm to the maintenance of public order or preservation of public safety cannot be a reasonable basis for the legislative imposition of a restriction on the exercise of freedom of expression.

Offence does not require that conduct poses real danger to public interest

The offence does not make reference to the maintenance of public order or protection of public safety. Thus the State has no obligation to prove that the conduct posed any real danger to the public interest concerned. Nothing in the language of the statute limits its applicability to situations where the prohibited acts directly and proximately cause harm to the maintenance of public order or preservation of public safety. An enactment which is capable of being construed and applied to cases where no danger to the listed public interests could arise cannot be held to be constitutional and valid to any extent.

Criminalising statements made without knowledge of their falsity

The offence does not require that the maker of the statement had knowledge of the falsity of the statement that is being made. The State should not penalise people who make false statements in good faith about a matter of public concern where the statement is published without knowledge of its falsity or without reckless disregard as to whether the statement is false or not. A person who, at the time of publication of the statement, sincerely believes that it is true does not have the state of mind justifying the imposition of criminal liability. Liability must be based on the notion of personal responsibility inherent in the concept of the exercise of freedom of expression.

The provision also covers a person who, at the time he or she publishes or communicates a statement,

sincerely believes that it is true, although it happens to be false. It is assumed in every case that the accused person had reasonable opportunity to investigate the accuracy of the statement and knowing that it was false, deliberately chose to publish it. This assumption ignores the fact that news media often work in situations in which information changes fast, denying even the most responsible journalist time to verify the accuracy of the information received.

An accused person may not be in a position to prove at the trial the facts that gave rise to his belief that the statement is true. This could lead to the inference that he knew or "*must have known*" that the statement was false and intended to use it to undermine public confidence in the security service institution concerned. A person who voices a genuine concern about selective or discriminatory enforcement of the law by the law enforcement agency may find himself charged and convicted of the offence because of the difficulty of proving the truth of the allegation in a court of law. Genuine criticism of the way law is enforced may be suppressed. The suppression may be justified by labelling the statement a false statement published or communicated with intent to undermine public confidence in the law enforcement agency. Information confirmatory of the truth of a statement may in some cases be in the possession of the institution, which may withhold the information, resulting in a situation where the statement is labelled as false. A statement may also be regarded as false because a journalist feels compelled to uphold the principle of confidentiality protecting the sources of his information within the institution from disclosure.

Draconian penalty for offence

The maximum penalty for this offence (a fine of "*up to or exceeding [sic] level fourteen or imprisonment for a period not exceeding twenty years or both*") is, the Court said, draconian and disproportionate in relation to the harm to the public interest which the offence seeks to prevent. Every penalty imposed must be proportionate to the legitimate aim pursued and the seriousness of the offence. The only inference is that the punishment is intended to have a chilling effect on the exercise of freedom of expression, as opposed to merely deterring the occurrence of the prohibited acts. Because of the

severity of the punishment applicable it is bound to have a severe inhibiting effect on the exercise of freedom of expression. The level of the maximum penalty of imprisonment the law is not justified by the objective it is intended to serve. Freedom of expression is peculiarly more vulnerable to the "chilling effects" of criminal sanctions than any other fundamental right and the UN Special Rapporteur on freedom of opinion and expression has argued that penal sanctions, particularly imprisonment, should never be applied to offences of publishing false news.

Final ruling by Supreme Court

The Constitutional Court unanimously declared unconstitutional s 31(a)(iii) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. It decided that this provision was *ultra vires* s 20(1) of the 1980 Constitution that was in operation prior to the 2013 Constitution and it was therefore a nullity.

Pursuant to s 24(5) of the former Constitution, the Court issued a rule *nisi*, calling on the Minister of Justice to show cause, on the return day, why this provision should not be declared to be *ultra vires* s 20(1) of the former Constitution and accordingly invalid. The Minister submitted a document criticising the legal reasoning in the court's judgment, but failed to provide any evidence of factors, not previously brought to the court's attention, which might have shown that the provision was in fact justifiable in a democratic society. The court was subsequently informed that the Minister no longer opposed an order declaring the provision unconstitutional and void. The court therefore, in *Chimakure & Anor v A-G* 2014 (2) ZLR 74 (CC), made a final ruling that the provision was void.

Implications of judgment for other offences contained in s 31

Section 31 deals with the making of wholly or materially false statements prejudicial to the State.

The ruling by the Constitutional Court that the maximum penalty of twenty years is draconian and will have a serious chilling effect of freedom of expression must surely apply to all the types of offence set out in s 31.

First sub-species

The first sub-species is publishing or communicating a false statement to any other person intending or realising that there is real possibility of the prejudicial consequences occurring. This offence is committed whether or not the publication or communication actually results in the prejudicial consequences. The prejudicial consequences to the State intended are:

- inciting or promoting public disorder or public violence or endangering public safety; or
- adversely affecting the defence or economic interests of Zimbabwe; or
- undermining public confidence in a law enforcement agency, the Prison Service or the Defence Forces of Zimbabwe; or
- interfering with, disrupting or interrupting any essential service.

Implications for first sub-species of Constitutional Court ruling

There are various grounds for concluding that as currently formulated this sub-species (apart from the provision relating to undermining public confidence in a security service agency) is unconstitutional. The following rulings by the Constitutional Court pertaining to the undermining public confidence provision would appear to apply with equal force to the provisions on the other prejudicial effects.

- a) The ruling that this offence must have the requirement that the maker of the statement must know that the statement being made is false.
- b) The ruling that the falsity requirement for this offence should be confined to a statement that is wholly false.
- c) The implied ruling that the offence should only be committed if the statement is published to a significant number of persons, rather than just one other person.

Second sub-species

The second sub-species is publishing to any other person a wholly or materially false statement knowing that the statement is false or not having reasonable grounds to believe that it is true, if the publication of the false statement actually results in any of the prejudicial consequences. This

offence is committed both when the maker intended and realised that there is a real possibility of the prejudicial consequences occurring **and even when he or she had no such intention**. The prejudicial consequences that occur are these:

- promoting public disorder or public violence or endangering public safety; or
- adversely affecting the defence or economic interests of Zimbabwe; or
- undermining public confidence in a law enforcement agency, the Prison Service of the Defence Forces of Zimbabwe; or
- interfering with, disrupting or interrupting any essential service.

Implications for second sub-species of Constitutional Court ruling

The following rulings by the Constitutional Court pertaining to the undermining public confidence provision would appear to apply with equal force to the provisions on the other prejudicial effects.

- a) The ruling that the falsity requirement for this offence be confined to a statement that is wholly false.
- b) The implied ruling that the offence should only be committed if the statement is published to a significant number of persons rather than just one other person.
- c) This sub-species requires that the maker of the statement must know that the statement is false or not have reasonable grounds to believe that it is true. The ruling of the Constitutional Court requires that the maker of the statement **must know** that the statement is false. The offence should not be committed if the State proves simply that the maker did not have reasonable grounds to believe that the statement was true.
- d) To make the maker of the statement liable even where he or she had no intention to cause the prejudicial consequence is to make the maker strictly liable and cuts across the normal principles that there must be a blameworthy state of mind which for serious crimes must normally be intention; it is not sufficient to prove merely that he or she knew he or she was making a false statement.

Prejudicial effects of both sub-species

The prejudicial effects that both sub-species purport to prevent are almost identical. As pointed out previously, the main differences between the two offences are:

- The first sub-species does not require that the maker of the statement should know that the statement is false and the State does not have to prove that the prejudicial consequences ensued, but only that the maker intended them to occur.
- The second sub-species requires the maker knew that the statement was false or had no reasonable grounds for so thinking and the prejudicial consequence in question must have ensued and will apply whether or not the maker had actual or legal intention to cause the prejudicial consequence.

The prejudicial consequences for both sub-species are almost identical and they will be dealt with together. In respect of the prejudicial effects other than undermining confidence in a security service agency, the Constitutional Court ruling will require a careful examination of

- whether the offence is defined with sufficient precision;
- whether the restriction on freedom of expression is rationally connected with one of the permissible constitutional grounds for imposing a restriction, the relevant grounds being the interests of defence, public safety and public order and the economic interests of the State;
- whether the restriction is strictly necessary to protect against a direct, obvious and serious harm to the public interest;
- whether the restriction on freedom of expression is disproportionate in respect to the objective and whether the objective can be achieved by less invasive means.

Each of the prejudicial consequences to the State will be examined in turn.

Promoting or inciting public disorder or public violence or endangering public safety

This ground directly relates to the permissible restriction of freedom of expression in the interests of maintaining public order or protecting public safety. However, the section does not specify that the false statement must cause or must be intended to promote or incite public disorder or public violence on a scale that will significantly threaten public order or endanger public safety. Surely incitement of minor public disorder cannot be prejudicial to the State. The offence of public violence (s 36 of the Criminal Law Code) requires that the accused act in concert with one or more other persons, forcibly and **to a serious extent**, disturb the peace, security or order of the public. A person who incites public violence could be charged with incitement to commit the offence of public violence. The need for the offence in s 31 of the Criminal Law Code is highly questionable.

Adversely affecting the defence of Zimbabwe

This ground directly relates to the permissible restriction of freedom of expression in the interests of defence. But "*defence of Zimbabwe*" covers a wide spectrum of matters and the offence does not specify that there must be direct, obvious and serious prejudice to Zimbabwe's defence interests. Without this limitation the chilling effect on the right to criticise aspects of the defence sector will be considerable.

Adversely economic interests of Zimbabwe

This ground directly relates to the permissible restriction of freedom of expression in the economic interests of the State. Again, "*economic interests of Zimbabwe*" cover a wide spectrum of matters and the offence does not specify that there must be direct, obvious and serious prejudice to Zimbabwe's economic interests. Without this the chilling effect on the right to criticise aspects of such matters as the management of the economy will be considerable.

Interfering with, disrupting or interrupting any essential service.

This ground does not specifically fall under any of the permissible grounds for restricting freedom

of expression. It would have to be argued that interference or disruption of such essential services posed a threat to public safety or could result in public disorder. Additionally, the offence does not specify that the conduct caused serious interference or disruption and not just minor prejudice.

When deciding on the constitutionality of the first sub-species of this offence it must be borne in mind that this first sub-species does not require that the prejudicial consequences actually occur; all that is required is that the maker of the statement had actual or legal intention to cause these consequences. This in effect is an offence that can be merely an intentional attempt to cause the consequence. For the second sub-species, the prejudicial consequence must have occurred but the State does not have to prove that the maker intended such consequence; all that has to be proven is that the maker knew that the statement was false or did not have reasonable grounds for believing it to be true.

Section 177 of the Criminal Law Code

A similarly vague offence – though admittedly the penalties are appreciable lower – is to be found in s 177, which reads:

"Undermining of police authority

Any person who

(a) in a public place and in the presence of

(i) a police officer who is present on duty; or

(ii) a police officer who is off duty, knowing that he or she is a police officer or realising that there is a risk or possibility that he or she is a police officer;

makes any statement that is false in a material particular or does any act or thing whatsoever; or

(b) in a public place and whether or not in the presence of a police officer referred to in subparagraph

(i) or (ii) of paragraph (a), makes any statement that is false in a material particular or does any act or thing whatsoever;

with the intention or realising that there is a risk or possibility of engendering feelings of hostility

towards such officer or the Police Force or exposing such officer or the Police Force to contempt, ridicule or disesteem, shall be guilty of undermining police authority and liable to a fine not exceeding level seven or imprisonment for a period not exceeding 2 years or both.”

It is submitted that the constitutionality of this provision should also be considered on the basis of whether there is a real possibility of promoting or inciting public disorder or public violence on a scale that will significantly threaten public order or endanger public safety. The statement or act would also have to be made or done in the presence of a significant number of persons. Being abusive to a police officer in a police station would be very unlikely to have that effect: see *S v Jekanyika* HH-298-14. Here, the appellant and another person entered the complainant's office. The complainant, who was the Officer Commanding Mutare Police District, greeted the two and offered them seats. Immediately upon taking his seat, the appellant hurled certain accusations against the complainant which included the allegations that the complainant had forced the appellant to give a statement to police. There was also an allegation that the complainant had sent his officers to arrest him instead of protecting him. The applicant is said to have accused the complainant of being a corrupt officer who wined and dined with thieves. He threatened to air his grievances against the complainant with the President. The appellant was drunk at the time. Hungwe J held that there had to be an intention to or realisation of the risk or possibility of engendering feelings of hostility towards such officer or the police force to contempt, ridicule or disesteem. In the circumstances, it could hardly be said that the appellant intended to engender feelings of hostility towards either the complainant or the police force or that he intended to expose the complainant or the police force in general to contempt or ridicule or disesteem.

The police are not delicate flowers that must be protected against the smallest of slights: they should be able to put up with fairly robust remarks and treat them with indifference.

Conclusion

The judgment in the *Chimakure* case goes a long way in upholding the fundamental right to freedom

of expression. This freedom is vitally important as it is a sine qua non of the enjoyment of many of our other fundamental rights. The judgment exposes how the offence charged devastates the right to express views on security sector institutions. It shows systematically the disproportionate overreach of this offence. The grounds for criticising the specific offence charged apply with equal force to the other offences contained in s 31. As the Court pointed out, the UN Special Rapporteur on Freedom of Opinion and Expression has argued that penal sanctions, particularly imprisonment, should never be applied to offences of publishing false news because of the chilling effect that such provisions have on freedom of speech. There is much merit in this view. The whole of s 31 must be reconsidered and, if a penal provision is to be retained at all, it must not destroy the right to freedom of expression; it must be one which is justifiable in a democratic society where freedom of expression is greatly valued.

CRIMINAL LAW DEFENCES AND THE RIGHT TO LIFE IN THE NEW CONSTITUTION

Geoffrey Feltoe

This article explores the status of defences to criminal liability for causing the death of another person in the light of the nature of the right to life guarantee in section 48 of the 2013 Constitution.¹

Defences in Criminal (Codification and Reform) Act [Chapter 9:13]

The Criminal Law (Codification and Reform) Act [Chapter 9:13] (“the Criminal Law Code”) provides that where stringent requirements are met a person has a defence to criminal liability where he or she causes the death of another—

acting in self-defence; [s 253]

acting in defence of a third party;

acting in defence of property; [s 258]

acting under necessity where he or she has been threatened that he or she will be killed unless he or she kills the other person. [s 264]

acting under lawful superior orders [s 268].

Defence in the Criminal Procedure and Evidence Act [Chapter 9:07]

42 Resisting arrest

(1) If any person who is authorized or required under this Act or any other enactment to arrest or assist in arresting another person attempts to make the arrest and the person whose arrest is attempted—

(a) resists the attempt and cannot be arrested without the use of force; or

(b) flees when it is clear that an attempt to arrest him is being made or resists the attempt and flees;

the person attempting the arrest may, in order to effect the arrest, use such force as is reasonably justifiable in the circumstances of the case to overcome the resistance or to prevent the person

¹ Constitution of Zimbabwe (Amendment Act 20) of 2013 (“2013 Constitution”)

concerned from escaping.

(2) Where a person whose arrest is attempted is killed as a result of the use of reasonably justifiable force in terms of subsection (1) the killing shall be lawful if the person was to have been arrested on the ground that he was committing or had committed, or was suspected on reasonable grounds of committing or having committed an offence referred to in the First Schedule.

Implied defence in the Prisons Act [Chapter 7:11]

30 Use of weapons by prison officers

(1) Subject to this section, a prison officer may use a weapon against—

(a) a prisoner who is—

(i) escaping or attempting to escape; or

(ii) engaged in a combined outbreak or in an attempt to force, break open or scale the outside door, gate, fence or enclosure wall of the prison; or

(iii) using violence to him or another prison officer or other person;

(b) a person who—

(i) whilst assisting a prisoner to escape, is using violence to him or another prison officer or other person; or

(ii) is engaged in a combined break-in or in an attempt to force, break open or scale the outside door, gate, fence or enclosure wall of the prison or an inside door, gate, fence or wall of the prison; or

(iii) whilst so engaged, is using violence to him or another prison officer or other person.

(2) Resort shall not be had to the use of a weapon—

(a) in terms of subparagraph (i) of paragraph (a) of subsection (1), unless—

(i) the prison officer has reasonable grounds to believe that he cannot otherwise prevent the escape; and

(ii) the prison officer gives a warning to the prisoner that he is about to use the weapon against him; and

(iii) the warning given by the prison officer is unheeded;

(b) in terms of subparagraph (iii) of paragraph (a) or subparagraph (i) or (iii) of paragraph (b) of subsection (1), unless the prison officer has reasonable grounds to believe that he or the other prison officer or other person, as the case may be, is in danger of suffering grievous bodily harm.

(3) No prison officer shall in the presence of a prison officer senior to himself make use of a weapon in terms of subsection (1), except on the orders of the senior prison officer.

(4) The use of weapons in terms of this section shall be, as far as possible, to disable and not to kill.

Constitutional provisions on the right to life in pre-2013 Constitution

Section 12 of the pre-2013 Constitution explicitly qualified the right to life guarantee by providing that various forms of killing would not be regarded as a violation of the right to life. The full provisions read as follows:

12 Protection of right to life

(1) No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence of which he has been convicted. (2) A person shall not be regarded as having been deprived of his life in contravention of subsection (1) if he dies as the result of the use, to such extent and in such circumstances as are permitted by law, of such force as is reasonably justifiable in the circumstances of the case—

(a) for the defence of any person from violence or for the defence of property;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) for the purpose of suppressing a riot, insurrection or mutiny or of dispersing an unlawful gathering; or

(d) in order to prevent the commission by that person of a criminal offence;

or if he dies as the result of a lawful act of war.

(3) It shall be sufficient justification for the purposes of subsection (2) in any case to which that subsection applies if it is shown that the force used did not exceed that which might lawfully have been used in the circumstances of that case under the law in force immediately before the appointed day.

Provisions in the 2013 Constitution

By contrast the 2013 Constitution has no explicit provisions setting out the circumstances in which killing will be regarded as lawful and therefore not in violation of the right to life. This appears to be a serious oversight on the part of the drafters of the Constitution. Section 48 reads as follows—

48 Right to life

- (1) Every person has the right to life.
- (2) A law may permit the death penalty to be imposed only on a person convicted of murder committed in aggravating circumstances, and—
 - (a) the law must permit the court a discretion whether or not to impose the penalty;
 - (b) the penalty may be carried out only in accordance with a final judgment of a competent court;
 - (c) the penalty must not be imposed on a person—
 - (i) who was less than twenty-one years old when the offence was committed; or
 - (ii) who is more than seventy years old;
 - (d) the penalty must not be imposed or carried out on a woman; and
 - (e) the person sentenced must have a right to seek pardon or commutation of the penalty from the President.
- (3) ...

Under the 2013 Constitution the permissible limitations on rights and freedoms in the Bill of rights are contained in section 86, the relevant portions of which are set out below -

86 Limitation of rights and freedoms (1)The fundamental rights and freedoms set out in this Chapter must be exercised reasonably and with due regard for the rights and freedoms of other persons.

...

- (3) No law may limit the following rights enshrined in this Chapter, and no person may violate them—
 - (a) the right to life, except to the extent specified in section 48;

...

The previous Constitution thus explicitly provided for the situations where causing of death will be lawful and will not violate the right to life. It laid down that without violating the right to life provision, the State may by law provide for defences to the causing of death in circumstances where the use of force was reasonably justifiable in the circumstances—

for the defence of any person from violence or for the defence of property;

in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

for the purpose of suppressing a riot, insurrection or mutiny or of dispersing an unlawful gathering; or

in order to prevent the commission by that person of a criminal offence; or the death results from a lawful act of war.

Section 48 of the 2013 Constitution has no such provisions. The only circumstance it provides in which the right to life does not apply is if the legislature provides for the imposition of the death penalty for the crime of murder committed in aggravating circumstances.

The limitation clause, section 86 provides that the right to life may not be limited by law except to the extent allowed for in section 48, that is, for murder in aggravating circumstances. It does, however, also provide that the fundamental rights in the Bill of Rights (which includes the right to life) must be exercised reasonably and with due regard for the rights and freedoms of other persons.

Implications of sections 48 and 86

Significant problems arise from the failure by the drafters of the 2013 Constitution explicitly to exempt from the right to life guarantee situations where the causing of death is reasonably justifiable under one of the defences contained in the Criminal Law Code. The best solution to overcome these problems would be to amend section 48 to incorporate these defences as exceptions to the right to life guarantee. Until this is done, the courts will have to try to find ways of dealing with cases in which the person causing death would otherwise have had a defence under the Criminal Law

Code. As will be seen below, it is difficult to see how the courts can find a satisfactory way of allowing these defences to operate in the absence of explicit incorporation of these defences into section 48.

Self-defence

Everyone should have the right to use force to defend himself or herself against an attacker who is intending to kill him or her or cause him or her serious injury. Section 52 of the Constitution provides that every person has the right to bodily integrity which includes the right to freedom from all forms of violence. As Burchell points out in *Principles of Criminal Law* 4th Ed p 117 where the State has failed to provide protection against such an attack "*it is the individual's inherent right accepted by all law, both natural as well as civil' to resort to private defence.*"

Under section 253 of the Criminal Law Code where X causes the death of Y who is murderously attacking him, X can rely on the defence of self-defence providing that the causing of death was reasonably necessary to defend himself or herself against such an attack. But section 48 of the 2013 Constitution provides that everyone has a right to life except a person convicted of murder in aggravating circumstances. Thus the person under attack has the right to life but, taken at face value, even a person who is unlawfully attacking another also has the right to life. This would mean that the person defending against a murderous assault would not be permitted to deprive the attacker of his constitutionally guaranteed right to life. This, of course, would lead to a completely ridiculous result that the person defending himself could be charged with murder or culpable homicide.

If, as is often the case, there is a dispute as to whether in fact the person who caused death did so in self-defence the prosecution can't simply decline to prosecute that person. Even where it is evident that the accused person caused death when he or she was under attack, there may still be doubt as to whether the causing of death was reasonably necessary to ward off the attack. If, however, the accused is charged with culpable homicide the court may be able to find that a reasonable person under attack would have acted no differently from the way in which the accused acted and thus the

accused has not negligently caused death.

In a case of self-defence the court could seek to rely upon section 86(1) of the 2013 Constitution which provides that the fundamental rights in Chapter 4, which includes the right to life, must be exercised reasonably and with due regard to the rights of other persons. The problem with this is that the murderous attacker is not exercising his right to life; he is in fact threatening the life to the person he is attacking so it is not a matter of the attacker being obliged to exercise his rights reasonably. Another approach might be for the court to interpret the right to life guarantee as impliedly being subject to a common law doctrine of necessity. Thus it could be ruled that where a person is under murderous attack and the only way that he can save his life is to kill the attacker, he was obliged to act out of necessity. The right to life of the person murderously attacking must surely be subordinate to the life of the attacker. Additionally, section 52 provides that every person has the right to bodily integrity which includes the right to freedom from all forms of violence from public or private sources. This right adheres to a person who is under a murderous attack. The courts would surely adopt a common sense interpretation of the right to life so as to provide that a person is entitled to defend his or her life against a person who is trying to kill him or her. In other words, there is a natural right to act for the purposes of self-preservation against an unlawful attacker.

The defence of self-defence can also apply where a person uses reasonable means to avert a violent attack which will cause serious injury but not death. Here it might be contended that the right to life of the unlawful attacker outweighs the threat of bodily injury to person attacked but, of course, there is often a thin dividing line between injury and death.

Killing in Defence of Property

The Criminal Law Code also provides in sections 257 and 258 that in extreme circumstances a person has a defence where he kills in defence of property. Some would argue that the law should not allow this defence on the basis that the right to life is more important than the protection of property. Be

that as it may, it is difficult to see how a court could use the doctrine of necessity to allow some sort of defence to the killing of a person as a last resort to defend property.

Killing under Compulsion

The problems with some of the other defences, such as compulsion, are even more acute. Under sections 243 and 244 of the Criminal Law Code where all the stringent requirements for the defence are satisfied, X has the defence of compulsion where he kills Z because Y has threatened to kill X unless he kills Z. Even though X was forced to kill the third person to save his own life, the fact remains that the person who dies is an innocent individual who has a constitutionally guaranteed right to life.

Killing to Arrest

The provision in section 42 of the Criminal Procedure and Evidence Act previously laid down that a person authorized to arrest a person may lawfully kill a person who is resisting arrest or is fleeing, provided that the person was being arrested on the ground that he was committing or had committed, or was suspected on reasonable grounds of committing or having committed a First Schedule offence. It was arguable that the use of lethal force to effect an arrest is not justifiable but even if lethal force is justifiable in extreme circumstances, that provision was surely too wide.

A First Schedule offence is any offence in terms of any enactment in respect of which a punishment of a period of imprisonment exceeding six months is provided and may be imposed without the option of a fine. This would cover relatively trivial offences and killing to prevent escape is not justifiable for such offences. Secondly, it covered killing where there is only a reasonable suspicion that such an offence has been committed. If we are going to have an exception to the right to life on this ground the ambit of lawful killing must be drastically narrowed down.

However, section 14 of Act 2 of 2016 has replaced this section with a new section 42 that substantially restricts the right to use lethal force to effect an arrest or prevent an escape. The force

used must be reasonably justifiable and proportionate in the circumstances to overcome the resistance to the arrest or to prevent the escape. The person attempting the arrest is only justified in using force if the person being arrested has committed, is committing or was suspected to have committed a First Schedule offence and the person attempting the offence believes on reasonable grounds that—

the force is immediately necessary to protect the person trying to arrest from immediate death or grievous bodily harm; or

if the arrest is delayed there is a substantial risk that the suspect will cause imminent or future death or grievous bodily; or

the offence for which the arrest is sought is in progress and is of a forcible and serious nature and involves the use of life-threatening violence or a strong likelihood that it will cause grievous bodily harm.

Commendable though this provision is restricting the use of lethal force, the problem still exists that section 48 of the Constitution does not explicitly provide for this exception to the right to life.

Other Constitutional Provision

Until there is a constitutional amendment to provide explicitly for these defences the courts could possibly have resort to section 327(6) of the 2013 Constitution which provides as follows:

(6) When interpreting legislation, every court and tribunal must adopt any reasonable interpretation of the legislation that is consistent with any international convention, treaty or agreement which is binding on Zimbabwe, in preference to an alternative interpretation inconsistent with that convention, treaty or agreement.

It is, however, questionable whether this provision can be used to read into the section 48 provisions

that are absent from that section.

Offences Attracting the Death Penalty

Finally it should be noted that there are various offences that previously attracted the death penalty that are now inconsistent with section 48 which only allows the imposition of the death penalty for murder committed in aggravating circumstances.

- Criminal Law Code Treason (Section 20)
- Insurgency, banditry, sabotage or terrorism which results in death (Section 23) (but this could be charged as murder)
- Defence Act [*Chapter 11:02*] Mutiny in terms Section 8 First Schedule.

HOUSE DEMOLITIONS IN ZIMBABWE: A CONSTITUTIONAL AND HUMAN RIGHTS PERSPECTIVE

Tinashe Stephen Chinopfukutwa¹

*'We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.'*²

Abstract

Since 2015 local authorities, particularly in Harare and Chitungwiza have embarked on a spree of house demolitions. The local authorities have contended that the demolished houses were built "illegally" either on land that was reserved for other purposes or without the necessary procedures having been adopted. The Constitution of Zimbabwe³ has a number of provisions against arbitrary eviction, and provision of adequate shelter as well as the standards against which administrative decisions and conduct is to be measured. The following paper will therefore investigate if the ongoing demolitions pass the human rights standards imposed by the Constitution of Zimbabwe as well as international human rights law.

Introduction

It is trite that the Constitution is the supreme law of the land⁴ and any law, practice, custom or conduct

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² Chaskalson P F in *Soobramoney v Minister of Health KwaZulu-Natal* 1998(1) SA 765 (CC) at 24H.

³ Amendment No.20 of 2013

⁴ Section 2 of the Constitution of Zimbabwe

inconsistent with it is invalid to the extent of the inconsistency. Therefore, as a starting premise this paper will interrogate whether or not the ongoing house demolitions comply with the standards and procedures set out in the constitution. Thereafter, it will investigate whether or not the demolitions pass the muster of international human rights law, particularly rules of customary international law and the various international and regional treaties to which Zimbabwe is party.

The Constitutional Standard

There are numerous constitutional provisions that should be complied with in order to bring the ongoing house demolitions within the scope of the Constitution. More specifically, s 74 provides protection against arbitrary eviction in the following terms;

"No person may be evicted from their home, or have their home demolished without an order of court made after considering all the relevant circumstances."

Arbitrary eviction may be defined as the

"... permanent or temporary forceful removal individuals, families and or communities from their homes or land which they are occupying."⁵

Invariably, arbitrary evictions occur when there is no regard paid to due process and there is no mechanism followed to hear those who will be affected.⁶ Likewise, in the context of demolitions, a demolition would occur when a part or whole of a dwelling is destroyed against the will of the occupants and without following due process.

It is therefore clear that for any home demolition to comply with s 74 there should be a court order sanctioning the demolition of the house which court order should be made after the court has considered all "*relevant circumstances*". This provision mandates that substantive requirements should

⁵ The UN Committee on Economic, Social and Cultural Rights, General Comment No.7 On the Right to Housing (1997) para 4

⁶ See also Zimbabwe Lawyers for Human Rights Fact Sheet No.2 of 2015.

be met through a court order sanctioning the demolition⁷ before a person's home is demolished as was confirmed in the case of *Mavis Marange v Chitungwiza Municipality and Glory to Glory Housing Co-operative*,⁸ a judgment handed down by the Chitungwiza Magistrates Court.

Therefore, where homes are demolished without a court order the demolitions will be a direct breach of s 74 and any law that authorises the demolition of houses without a court order contravenes s 74. In this respect, it is common cause that where local authorities have carried out demolitions without court orders, and the municipal bye-laws under which the demolitions are taking place and make no provision for the obtaining of a court order as a pre-requisite, are in direct breach of s 74.

However, s 74 does not define what exactly the term 'home' entails and no judicial interpretation of the provision by the Zimbabwean Courts has been made. The South African Constitution in s 26(3) frames and creates a similar right to the one provided in terms of s 74. In interpreting this section in *Despatch Municipality v Sunridge Estate and Development Corporation*,⁹ the South African South East High Court Division held that the term 'home' relates to a dwelling that an occupant will be living in or intends to live in either in the short or long term. The Court also extended the term to cover shacks or informal settlements to fall within the purview of structures that may be described as homes.¹⁰

In this vein it is submitted that the so called 'illegal' structures demolished or targeted for demolition fall within the purview of 'homes' as envisaged by s 74 of the Constitution and are therefore protected from arbitrary demolition. It is further submitted that in terms of s 74 it is immaterial whether or not the dwelling being used for residential purposes is legal or whether its construction was and is sanctioned by the local authorities. It is this writer's view that, once the criteria set out in *Despatch Municipality v Sunridge Estate and Development Corporation* is met, then the dwelling or structure qualifies as a home and therefore qualifies for protection in terms of s 74.

⁷ Justice Mavedzenge and Douglas J.Coltrat, A Constitutional Law Guide Towards Understanding Zimbabwe's Fundamental Socio-Economic and Cultural Human Rights ,2014 , page 101

⁸ Case No 106/2014

⁹ 1997(4) SA 596 (SE)

¹⁰ See also J. Mavedzenge and D.J Coltrat, op cit note 7 at p 103

Further, s 74 imposes a duty on the courts to consider “relevant circumstances” before granting an order of eviction or demolition of a home although the constitution does not provide any indication of what an enquiry into relevant circumstances entails. In this respect, the South African Court jurisprudence would be helpful in ascertaining the relevant circumstances given the similarities between our s 74 and s 26 of the South African Constitution which provides for freedom from arbitrary eviction.

In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties Pty (Ltd)*¹¹ the South African Constitutional Court held that relevant circumstances included legal status of the occupants; the period of occupation; and whether the eviction or demolition will leave the affected people homeless. It is however of crucial importance to note that the relevant circumstances can vary from case to case and the Court will therefore have to make a value judgment.

On the same trajectory, the Constitution in its national objectives in s 28 provides that

“The State and all institutions and agencies of government at every level must take reasonable legislative and other measures, within the limits of the resources available to them, to enable every person to have access to adequate shelter.”

It is important to note that the right to housing is not provided in the Declaration of Rights but reference to adequate housing is made only in the national objectives in terms of the aforementioned section. Logically, one cannot seek to enforce a right in terms of s 28 which does not offer substantive justiciable rights. However, in this author’s view, the matter does not end there. The national objectives can still be invoked as an aid in the holistic interpretation of s74 in ascertaining the constitutionality of the ongoing demolitions. The Indian Supreme Court in the case of *Francis Coralie Mullin v Administrator, Union Territory of Delhi*,¹² where the court broadly interpreted the right to life by reading into it the right to health, stated as follows;

¹¹ 2012 (2) SA 104 (CC)

¹² (1981) 2 SCR 516

"The right to life includes the right to live with human dignity and all that goes with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and comingling with fellow human beings. The magnitude and components of this right would depend upon the extent of economic development of the country, but it must, in any view of the matter, include the bare necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human self".

Similarly, the Zimbabwean Supreme Court sitting as a Constitutional Court in the case of *Rattigan and Ors v Chief Immigration Officer and Ors Gubbay CJ*, observed as follows;

*"This Court has on several occasions in the past pronounced upon the proper approach to constitutional construction embodying fundamental rights and protections. What is to be avoided is the imparting of a narrow, artificial, rigid and pedantic interpretation; to be preferred is one which serves the interest of the Constitution and best carries out its objects and promotes its purpose..."*¹³

Similarly, the South African Constitutional Court in *Government of the Republic of South Africa and Others v Grootboom and Others* observed as follows;

*"Our Constitution entrenches both civil and political rights and social and economic rights. All the rights under the Bill of Rights are inter related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied to those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined under Chapter 2. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential."*¹⁴

¹³ 1994 (2) ZLR 54 (S) at 57 F-H , see also the case of *Daniel Madzimbamuto v Registrar General & Ors* [2014] ZWCC 5 in which Ziyambi JA followed with approval the passage in *Rattigan*.

¹⁴ *Government of the Republic of South Africa & Ors v Grootboom and Others* CCT/00,Para 23

It is submitted that from the foregoing authorities the national objectives, in particular s 28, provide the textual background against which the content and scope of the right of freedom from arbitrary evictions and demolitions is to be understood.¹⁵ It is submitted that the expressly stated right from arbitrary eviction should be constructed in conjunction with the constitutional values and objectives in order to give fuller effect to other missing rights. In this spectrum, it is submitted that the national objective to housing enshrined in s 28 implies that the right to freedom from arbitrary eviction should be interpreted broadly and thus greatly restrict demolitions of people's homes in order to give effect to the national objective to adequate housing.

Furthermore, s 68 of the Constitution provides for the right of every person to administrative justice through judicial conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair. It is apparent from the above section that a number of duties are imposed upon the administrative authorities who are obligated constitutionally to perform for their conduct to pass the muster of s 68.¹⁶ Further s 3 of the Administrative Justice Act imposes the same obligations on administrative bodies.¹⁷ Each of these duties shall be considered below in turn

¹⁵ See *Keshavananda Bharati v. State of Kerala* (1973) 4 SCC 225 para. 1714, p. 881

¹⁶ See also the preamble to the Administrative Justice Act

¹⁷ An administrative authority which has the responsibility or power to take any administrative action which may affect the rights, interests or legitimate expectations of any person shall—

- (a) act lawfully, reasonably and in a fair manner; and
 - (b) act within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to take the action by the person concerned; and
 - (c) where it has taken the action, supply written reasons therefore within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to supply reasons by the person concerned
- 2) In order for an administrative action to be taken in a fair manner as required by paragraph (a) of subsection (1), an administrative authority shall give a person referred to in subsection (1)— (a) adequate notice of the nature and purpose of the proposed action; and (b) a reasonable opportunity to make adequate representations; and (c) adequate notice of any right of review or appeal where applicable.
- (3) An administrative authority may depart from any of the requirements referred to in subsection (1) or (2) if—
- (a) the enactment under which the decision is made expressly provides for any of the matters referred to in those subsections so as to vary or exclude any of their requirements; or
 - (b) the departure is, under the circumstances, reasonable and justifiable, in which case the administrative authority shall take into account all relevant matters, including
 - (i) the objects of the applicable enactment or rule of common law;
 - (ii) the likely effect of its action;
 - (iii) the urgency of the matter or the urgency of acting thereon;
 - (iv) the need to promote efficient administration and good governance;
 - (v) the need to promote the public interest

and will be measured against the administrative decisions by local authorities to conduct demolitions.

Administrative bodies, local authorities included (my emphasis) have a duty to dispense their administrative duties lawfully. This therefore means that their conduct should be authorised by law and should be done within the confines of the law. The current home demolitions are not in conformity with the law as they do not adhere to the procedure and formalities prescribed by s 74. The local authorities' administrative conduct therefore fails on this basis and it is submitted that the demolitions are not authorised by any law but are rather carried out in direct breach of the Constitution.

Section 68 of the Constitution and s3 of the Administrative Justice Act also place an obligation on administrative bodies to act promptly.

This connotes two elements; first that the administrative body should act within the period specified by law or, if there is no such period, within a reasonable timeframe.¹⁸ The first element does not create any problems because if an administrative body is obliged to act within a specific period by statute or any other law and subsequently fails to act within such a period then it will be a clear breach of the statute concerned. However, the duty to act within a reasonable time warrants more attention as this is a value judgment that is exercised on a case by case basis. In *N & B Ventures (Pvt) Ltd v Minister of Home Affairs & Anor*¹⁹ the High Court held that;

"Where in the absence of an adverse reason an administrative authority fails to act, the courts have a duty to interfere in order to safeguard the financial and social interests of the applicant and the public respectively. Where an administrative authority is seized with a duty to perform a certain act, which act is a condition for another party to act, it cannot be allowed to penalise the

¹⁸ See Section 3(1)(b) of the Administrative Justice Act. See also G. Feltoe, *A Guide to Administrative Law in Zimbabwe*, 2012, page 24

¹⁹ The facts of the case were as follows "the applicant ran a hotel for which it held the appropriate liquor licence. It applied timeously for the renewal of the licence but the Liquor Licensing Board did not issue a new licence promptly, in spite of reminders. The licence was finally renewed some 18 months after the application for renewal was made. In the meantime, the applicant paid two admission of guilt fines and the police thereafter obtained a court order to seize the applicant's stock of liquor. The licence was renewed a few days later." Cited by G Feltoe ibid

*other party on the basis of non-performance when it has not itself performed its own part. It must first perform its part before it penalises the other party for non-performance.*²⁰

In this vein, it is common cause that a significant part of the people affected by on-going demolitions have been living in the so-called 'illegal' structures for some considerable time and have even been paying their rates and municipal charges to the authorities. The local authorities are the administrative bodies charged with town planning and design of urban settlements by the Regional Town and Country Planning Act. Local authorities have the power to stop and prohibit the erection of any unplanned structure or the development of such unplanned settlements.

It is submitted that in the present circumstances, the local authorities have failed to act promptly and within a reasonable time to demolish and stop the erection of unplanned dwellings. It is submitted that waiting for a number of years before determining whether a settlement is planned or not constitutes a breach of the duty of administrative bodies to act promptly and within the reasonable time frame. The homes which have been demolished and are being demolished were built in full view of the local authorities but they did not take any active steps to stop the development of the settlements, and only acted after a considerable amount of time has lapsed. The local authorities had failed to perform their part timeously and thus cannot penalise the residents of the unplanned settlements for their own non-performance. The administrative conduct by the city fathers does not meet the requirement that administrative conduct be prompt as prescribed by s68 of the constitution.

Section 68 of the Constitution also provides that every person has a right to administrative conduct that is procedurally and substantively fair. Procedural fairness connotes that the people who will be affected by the administrative conduct should be given an opportunity to make representations before the administrative authority. This is known as the *audi partem* rule which means to hear the other side.²¹ The position was aptly captured by *Chatukuta J in Mtizira v Epworth Local Board and*

²⁰ 2005 (1) ZLR 27 (H) cited by G. Feltoe, *ibid* at page 25

²¹ See Section 2 of the Administrative Justice Act, see also G. Feltoe, *ibid* page 54

Ors²² where the learned judge made the following observation;

*"The rules of natural justice as embodied in the audi alteram partem rule require that a person be given reasonable notice to make representations where another takes action which adversely affects his/her interests or rights. The rule as espoused in the Administrative Justice Act [Chapter 10:28] (the Act) require that an administrative authority such as the first respondent, with the responsibility to take an administrative action which may adversely affect the rights or interest of any person, to give that person an opportunity to make adequate representations."*²³

Principles of natural justice such as the audi alterum partem principle are meant to ensure that fundamental tenets of fairness are observed in administrative decisions. Professor G. Feltoe summarises the position very well when he observes that;

*"The principles of natural justice embody fundamental notions of procedural fairness and justice. As applied to administrative decisions, these principles seek to ensure that such decisions are only taken after fair and equitable procedures have been followed. In essence, natural justice tries to guarantee that the parties who will be affected by the decisions receive a fair and unbiased hearing. By required adherence to standards of procedural fairness, not only is justice seen to be done, but also these principles assist administrative decision-makers to reach substantively correct decisions."*²⁴

In this respect, it is of paramount importance to note s 68 of the Constitution has shifted the situations in respect of which principles of natural justice apply. It is useful to briefly restate the old position relating to the application of the principles of natural justice which were to be applicable in situations whereby the affected party had a legitimate expectation to be heard. The concept of legitimate expectation was defined by the South African Appellate division in *Administrator, Transvaal & Ors v Traub*²⁵ in the following terms;

"The legitimate expectation principle, instead of insisting that an individual be affected in his liberty,

²² HH 37/2011

²³ See *U-Tow Trailers (Private) Limited v City of Harare & Anor* HH 103/09

²⁴ G Feltoe Ibid.

²⁵ 1989 (4) SA 731 (A)

property or existing rights before he may be heard in his own interest, lays down that an individual who can reasonably expect to acquire or retain some substantive benefit, advantage or privilege must be permitted a hearing before a decision affecting him is taken. The proper question to ask in any given case is therefore whether the person complaining is entitled to expect, in accordance with ordinary standards of fairness, that the rules of natural justice will be applied.”

Thus, under such circumstances, it will be unfair to proceed and make the administrative decision without hearing the affected party first.²⁶

There are two related but distinct points which arise. First, it is clear that hundreds of residents whose houses have been demolished had substantive rights or benefits which stood to be affected by the local authorities' decision to demolish the houses. Consequently, it is submitted that they had a legitimate expectation to be heard before any decision affecting their rights was to be taken. The city fathers were bound by rules of natural justice to invite the residents whose houses were to be demolished to make representations before the local authorities before proceeding to raze down their houses. It is common cause that no such opportunity was ever accorded to the residents thereby violating the principles of natural justice. In most cases, the residents were merely given twenty-four hour notice to vacate. Accordingly, the house demolitions fail to satisfy the administrative conduct standards set by s 68 of the Constitution and are therefore potential violations of the affected people's right to administrative justice.

Further and in any event in light of the new constitutional dispensation it is submitted that the legitimate expectation principle is no longer a requirement for the applicability of the principles of natural justice. Section 68 states that every person has a right to administrative conduct that is procedurally and substantively fair whether or not they have a legitimate expectation (my emphasis). In this regard, it is put forward that the applications of the principles of natural justice have been entrenched by s 68 of the Constitution. It follows then that any administrative conduct has to fall

²⁶ See also Taylor v Minister of Higher Education & Anor 1996 (2) ZLR 772 (S)

within the scope of s 68 and thus has to observe the principles of natural justice whether or not the administrative authority deems that there is no legitimate expectation. In other words, the application of the principles of natural justice no longer flows from the existence of a legitimate expectation to be heard but arises as a matter of law from the constitution itself. Viewed along these lines, it is all the more apparent that the failure by the local authorities to hear the representations of residents who were to be affected by the demolitions is in clear breach of the principles of natural justice and consequently their right to administrative justice as enshrined in terms of the Constitution.

In light of the foregoing, it is submitted that the ongoing house demolition exercise in its present format falls foul of s 68 of the Constitution and s 74 of the Constitution. It is in breach of the affected resident's fundamental rights and freedoms as set out in the abovementioned constitutional provisions.

The Demolitions *vis a vis* International Human Rights Law

"Public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which [the Bill of Rights] can be evaluated and understood"
Chaskalson²⁷

Section 46 provides an interpretive guide on the fundamental rights and freedoms enshrined and entrenched in terms of the Constitution. In particular, S46 (1)(c) provides that when interpreting the Bill of Rights a Court, tribunal, forum or body must take into account international law and all treaties and conventions to which Zimbabwe is a party. This only serves to fortify the position that any investigation into a potential or alleged breach of the Bill of Rights will be incomplete without the guidance of international law norms.

In this section, the on-going house demolitions *vis-a vis* the international human rights law standards are examined. The scope of investigation shall, however, be confined to treaties and conventions to

²⁷ In *S v Makwanyane* 1995 (3) SA 391 (CC) para 35

which Zimbabwe is a party. This paper therefore examines the provisions of the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Universal Declaration of Human Rights, the African Charter on Human and People's Rights (ACHPR), and how the provisions have been interpreted by international judicial bodies.

Article 11 of the ICESCR obligates State Parties to progressively realise people's right to an adequate standard of living for themselves and their families, including adequate housing and the continuous improvement of living conditions. It is therefore discerned that adequate housing is a constituent element of the right to an adequate standard of living and that, conversely, where there is no adequate housing adequate standards of living are unattainable.²⁸

ECOSOC, the treaty body charged with the implementation of the ICESCR, in its General Comment Number 4 stated that adequate housing envisaged in terms of Article 11(1) of the Covenant had elements including legal security of tenure; availability of services; materials and infrastructure; affordability; habitability; accessibility; location; and cultural adequacy. In the present discussion, reference will be made to the first element listed above, that is, legal security of tenure. In the words of the Committee, security of tenure;

*"... takes a variety of forms, including rental (public and private) accommodation, cooperative housing, lease, owner-occupation, emergency housing and informal settlements, including occupation of land or property. Notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees against forced eviction."*²⁹

In this regard, it is submitted that arbitrary evictions are at face value a violation and breach of State Party's obligations in terms of the Covenant. In General Comment Number 7, the Committee noted that;

²⁸ Article 11 ICESCR "The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on

²⁹ See ECOSOC General Comment No.4 para 8

"The State itself must refrain from forced evictions and ensure that the law is enforced against its agents or third parties who carry out forced evictions."³⁰

It is clear that no issue of progressive realisation arises despite the right to adequate living standards being a socio-economic right. This is due to the wording of General Comment 7 which suggests that the State should refrain from carrying out forced or arbitrary evictions. In this regard the state has a negative duty to ensure that there are no forced or arbitrary evictions.³¹

This position is also supported by Article 17 (1) of the International Covenant on Civil and Political Rights (ICCPR) and complements the right not to be forcefully or arbitrarily evicted. Article 17 (1) of ICCPR provides as follows;

"No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation .2. Everyone has the right to the protection of the law against such interference or attacks."

In *M v Germany*, the Human Rights Committee held that the right enshrined in terms of Article 17 of the Covenant, that an interference is only legally justifiable where it cumulatively meets three conditions, that is,

"it must be provided for by law, be in accordance with the provisions, aims and objectives of the Covenant, and be reasonable in the particular circumstances of the case."³²

In our particular context, it is clear that the demolitions are not being done in terms of any law but are actually being done in clear contravention of ss 68 and 74 of the Constitution. Invariably therefore, the demolitions are not being done within the objects, letter, purpose and spirit of the ICCPR. In this respect therefore, it is submitted that the house demolitions amount to breaches of rights guaranteed

³⁰ See ECOSOC General Comment No 7 para 9

³¹ Note that the State's obligation to ensure respect for that right is not qualified by considerations relating to its available resources. ECOSOC General Comment 7, para 9

³² *M v Germany*, Human Rights Committee, Communication No.1482/2006. See also Communication No. 903/1999, *Van Hulst v. The Netherlands*, Views adopted on 1 November 2004, at para 7.3, para 9

in terms of the ICESCR and the ICCPR.

Furthermore, from a continental perspective, it is conceded that a reading of the ACHPR reveals that it does not have a specific and expressly provided right to housing. Despite this, it is submitted that a right to housing may be read into the ACHPR if the rights protecting the right to the best state of attainable health, right to property, right to protection of the family provided under Article 16, 14 and 18 of the Charter are construed conjunctively and read in *pari materia*.

This was in fact the approach adopted by the ACHPR in the case of *SERAC v Nigeria*³³ in which the Commission adopted an innovative interpretation of the Charter provisions and read into it the right to housing despite the fact that it is not expressly provided therein, as stated above. The Commission observed as follows:

"Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, cited under article 16 above, the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health and family life are adversely affected. It is thus noted that the combined effect of articles 14, 16 and 18(1) reads into the Charter a right to shelter or housing which the Nigerian government has apparently violated."

The Commission went further and observed thus;

"At a very minimum, the right to shelter obliges the Nigerian government not to destroy the housing of its citizens and not to obstruct efforts by individuals or communities to rebuild lost homes. The state's obligation to respect housing rights requires it, and thereby all of its organs and agents, to abstain from carrying out, sponsoring or tolerating any practice, policy or legal measure violating the integrity of the individual or infringing upon his or her freedom to use those material or other resources available to him or her in a way he or she finds most appropriate to satisfy individual,

³³ (2001) AHRLR 60 (ACHPR 200)

family, household or community housing needs. Its obligations by any other individual or non-state actors like landlords, property developers, and landowners, and where such infringements occur, it should act to preclude further deprivations as well as guaranteeing access to protect obliges it to prevent the violation of any individual's right to housing legal remedies. The right to shelter even goes further than a roof over one's head. It extends to embody the individual's right to be left alone and to live in peace whether under a roof or not"

It is clear that in the context of the demolitions, the State has a duty, at a minimum, not to destroy the houses of its citizens whether legal or "illegal" (my emphasis). This duty therefore imposes a duty on the State and its institutions including local authorities not to destroy and demolish people's homes without following due process. This principle is in fact in tandem with s 44 which obliges the State, every person, state agencies and institutions to respect, protect, promote and fulfill the rights and freedoms set out in the Bill of Rights.³⁴

Through engaging in unlawful demolitions, local authorities have breached the duty imposed on them by the Constitution to respect fundamental freedoms and rights. Accordingly also, by tolerating and even sanctioning the unlawful conduct of the local authorities, the State has breached its obligations in terms of the ACHPR.

Conclusion

In summation, it is apposite to borrow the words of Justice Mathonsi in the case of Peter Makani v Epworth Local Board in which the learned judge observed that;

"There can be no doubt whatsoever in the minds of all well-informed persons that this country currently faces extremely serious problems relating to poverty, unemployment and more importantly housing... local authorities are now waking up and, by force and power, demolishing the structures

³⁴ Section 44 of the Constitution reads as follows "The State and every person, including juristic persons, and every institution and agency of government at every level must respect, protect, promote and fulfill the rights and freedoms set out in this Chapter." See also national objective of fostering fundamental rights and freedoms in Section 11 of the Constitution. It reads as follows "The State must take all practical measures to protect the fundamental rights and freedoms enshrined in Chapter 4 and to promote their full realization."

*without regard to law and human dignity.*³⁵

These words summarise the obtaining situation in respect of the spate of demolitions that have occurred in the country. The mere fact that the homes were not constructed in accordance with the Municipal By-laws does not erode the rights and the procedures prescribed by the Constitution.

³⁵ *supra*, page 1 of the cyclostyled judgment

THE NKANDLA JUDGMENT: LESSONS FOR ZIMBABWE

Sekai Saungweme

One of the most progressive judgments made in 2016 by the Constitutional Court of South Africa was the 'Nkandla judgment' wherein the court dealt definitively with matters important to the evolution and application of constitutional democracy, such as:

- The separation of powers among the executive, legislature and judiciary.
- The role and tasks of the executive, especially the President of the Republic.
- The role and tasks of the National Assembly.
- The role and tasks of the Judiciary.
- The role and tasks of the public protector.

The constitutional court had to decide whether the President of the Republic of South Africa had a constitutional duty to comply with recommendations made by the public protector and whether – in failing to do so – the President had failed to uphold, defend and respect the constitution. It found in favour of the applicants that the President, indeed, had a duty to uphold, defend and respect the constitution; and that, further, there was a clear duty on the National Assembly to hold under scrutiny the conduct of the executive on behalf of the public.

This decision not only gave life to the reconciliatory and purposive interpretation of South Africa's constitution but it also indicates a trend of how the judiciary – through constitutional activism when properly applied in a democratic context – acts as a legitimate and successful defender of the core fundamental values that constitute a democracy.

The decision also demonstrates what it means for South Africa to be living as a 'constitutional democracy', as opposed to a parliamentary democracy. It reinforced the fact that whilst parliament

has the duty and obligation to make and debate laws, these laws still have to pass constitutional muster because the constitution is the supreme law.

This paper articulates the relevance of the Nkandla judgment for Zimbabwe and the lessons which, if applied locally, would ensure that Zimbabwe begins to live up to the expectations required of a genuine constitutional democracy.

Introduction

On 31 March 2016, the Constitutional Court of South Africa made legal history when it found that the President of the Republic of South Africa had failed to uphold, defend and respect the Constitution¹ by failing to comply with the recommendation for remedial action made by the public protector.² This case has become known as the 'Nkandla judgment' and the ruling was unanimously celebrated by the legal fraternity, civil society and politicians alike in South Africa as being an affirmation of the supremacy of the constitution, the effectiveness of the principles of transparency and accountability, and the enforcement of the rule of law.

The primary issue brought before the constitutional court was whether the President of the Republic of South Africa had a constitutional duty to comply with recommendations made by the public protector and whether, in failing to do so, the President had failed to uphold, defend and respect the constitution.³

The Constitutional Court further had to decide whether the National Assembly, in exonerating the President from complying with the recommendations provided by the public protector, had failed in its constitutional obligations to scrutinise and oversee executive action and to hold the President accountable as a member of the executive.

¹ The Constitution of the Republic of South Africa as adopted on 8 May 1996 and amended on 11 October 1996 by the Constitutional Assembly.

² See also s 182 of the Constitution of South Africa which establishes the office of the public protector No. 23 of 1994: Public Protector Act, 1994.

³ Ibid

The general constitutional principles which influenced the court's decision had to do with transparency, accountability and the ethical conduct of the executive branch of government. The courts' opening judgment noted that

"... One of the crucial elements of our constitutional vision is to make a decisive break from the unchecked abuse of State power and resources that was virtually institutionalised during the apartheid era. To achieve this goal, we adopted accountability, the rule of law and the supremacy of the constitution as values of our constitutional democracy. For this reason, public office-bearers ignore their constitutional obligations at their peril. This is so because constitutionalism, accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck".⁴

Another key issue expounded in the Nkandla judgment was the role of independent institutions and, in this case, the office of the Public Protector.⁵ The Nkandla judgment effectively reinforced the constitutional powers of the public protector to investigate any conduct in State affairs and public administration in any sphere of government and to provide remedial action had been undermined by the subsequent actions of both the National Assembly and the President of South Africa after receiving the recommendations of the public protector.

The effect of the Nkandla judgment has great constitutional and institutional significance locally as it provides an opportunity to interrogate constitutional democracy especially in respect of accountability and transparency mechanisms provided by the Constitution of Zimbabwe as well as national legislation and institutional frameworks. It provides an opportunity to question the extent to which institutions, meant to be independent, risk or have been compromised due to the political landscape in Zimbabwe. It further provides an opportunity to assess the extent to which the unchecked abuse of State power and resources has been institutionalised in Zimbabwe thus undermining an already fragile constitutional democracy.

⁴ Paragraph 1 of the judgment

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This paper juxtaposes the practice of constitutionalism and constitutional democracy prevailing in Zimbabwe against the fundamental active principles of democracy that were brought to light by virtue of the Nkandla ruling. Opportunity to strengthen transparency and accountability systems in light of specific constitutional provisions coupled with brief comparisons concerning the manner in which constitutional principles are executed in other countries are discussed in this paper followed by a conclusion which comprises a summary of the key points made in the Nkandla judgment relevant to Zimbabwe.

Background and Critique of The Nkandla Judgment

As a result of several complaints lodged with the public protector concerning certain “security upgrades” made at President Zuma’s private residence in Nkandla, the public protector in accordance with her constitutional powers⁶ investigated allegations related to improper conduct or irregular expenditure. The basis of the complaints and subsequent investigation was that the improvements were non-security features and that the State was only under an obligation to provide security features for the President at his private residence. Therefore, it was argued any improvements unrelated to security features amounted to undue benefit or unlawful enrichment.

The public protector concluded that the President failed to comply with specific constitutional and ethical obligations by knowingly deriving undue benefit from the irregular deployment of State resources and directed that the President, duly assisted by certain State functionaries, should work out and pay a portion fairly proportionate to the undue benefit that had accrued to him.

The public protector produced a report arguing that the President had acted in breach of his constitutional obligations in terms of section 96 (2) (b) and (c) of the Constitution which refers to the conduct of Cabinet members and Deputy Ministers and states as follows:

“(2) Members of the Cabinet and Deputy Ministers may not;

⁶ Section 182 South Africa Constitution

(b) act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or
(c) use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person.”

The report was submitted not only to the President, but also to the National Assembly with the intention that the National Assembly would facilitate compliance with the remedial action in line with its constitutional obligations to hold the President accountable.

The National Assembly responded to the report of the public protector by setting up two *ad hoc* committees to examine the report as well to examine a further report compiled by the Minister of Police which essentially exonerated the President from any wrong doing. The National Assembly proceeded to endorse the report by the Minister exonerating the President from any liability which led to its resolve to absolve the President of all liability. Consequently, the President did not comply with the remedial action taken by the public protector.

Dissatisfied with the resolution of the National Assembly, members of Parliament –specifically the Economic Freedom Fighters (EFF) and the Democratic Alliance (DA) –launched an application with the constitutional court to seek direct access to it concerning whether the failure to comply with the remedial action set out in the public protector’s report constituted a breach of the constitutional duties by the National Assembly and the President.

The public protector also took part in the applications in order to defend her powers and argue on their ambit. The public protector and both applicants sought clarity from the court on the nature and extent of the power to take remedial action that the public protector was granted under s 182 (1) (c) which prescribes the functions and powers of the public protector.

The applicants submitted that the public protector's remedial actions were binding and enforceable unless set aside by a court of law and could not be diluted, ignored or circumvented by other organs of State which are constitutionally obliged to ensure the protection of the public protector's dignity and effectiveness.

In reaching its findings, the constitutional court had to address preliminary issues relating to the powers of the public protector; the powers and functions of Parliament in holding the executive accountable for its conduct; and the powers of the courts regarding its jurisdiction to preside over such proceedings.

The Court's Jurisdiction

Using a contextual and purposive interpretation of s 167, the constitutional court affirmed its powers and exclusive jurisdiction to decide that Parliament or the President had failed to fulfil a constitutional obligation⁷ and further that only the constitutional court could decide whether or not the conduct of the President was constitutional.⁸ However, the determination of whether or not the President had failed to fulfil a constitutional obligation was dependant on whether there existed an obligation specifically imposed on the President to observe or refrain from a certain conduct.

The Duty of the President

That there did exist a specific obligation on the President of the Republic of South Africa imposed by the constitution of South Africa was recognised by the constitutional court in its reliance on s 83 (b) which refers to the duty of the President to uphold, defend and respect the constitution. The court then linked the constitutional obligation imposed by s 83 (b) to s 182 (c) which empowers the public protector to take appropriate remedial action in respect of any conduct by government officials or public administrators which is improper or results in any impropriety or prejudice. Even more specific is the fact that the President as an organ of the State is required to promote and protect State institutions

⁷ Section 167 (4) Constitution of South Africa

⁸ Section 167 (5)

including that of the public protector to ensure amongst other things its dignity and effectiveness.⁹

Having established that there was such a duty the next question determined by the court was whether there had been any violation by the President of his constitutional obligations.

Regarding the office of the President and his executive role the court stated that;

"The President is the Head of State and Head of the national executive. His is indeed the highest calling to the highest office in the land. He is the first citizen of this country and occupies a position indispensable for the effective governance of our democratic country. Only upon him has the constitutional obligation to uphold, defend and respect the Constitution as the supreme law of the Republic been expressly imposed. The promotion of national unity and reconciliation falls squarely on his shoulders. As does the maintenance of orderliness, peace, stability and devotion to the well-being of the Republic and all of its people. Whoever and whatever poses a threat to our sovereignty, peace and prosperity he must fight. To him is the executive authority of the entire Republic primarily entrusted. He initiates and gives the final stamp of approval to all national legislation. He is a constitutional being by design, a national pathfinder, the quintessential commander-in-chief of State affairs and the personification of this nation's constitutional project".¹⁰

The court added that;

"The President thus failed to uphold, defend and respect the constitution as the supreme law of the land. This failure is manifest from the substantial disregard for the remedial action taken against him by the public protector in terms of her constitutional powers. The second respect in which he failed relates to his shared section 181(3) obligations. He was duty-bound to, but did not, assist and protect the public protector so as to ensure her independence, impartiality, dignity and effectiveness by complying with her remedial action."¹¹

⁹ Section 181 (3)

¹⁰ Paragraph 20 of the judgment

¹¹ Paragraph 83

The court acknowledged that the President might have been following wrong legal advice and therefore acting in good faith, however it still concluded that;

*"It does not detract from the illegality of his conduct regard being had to its inconsistency with his constitutional obligations in terms of sections 182(1)(c) and 181(3) read with 83(b)."*¹²

The court in this instance demonstrated that a breach of a constitutional duty remains a breach whether or not it occurs as a result of a genuine error.

The National Assembly

The constitutional court of South Africa found further that the National Assembly had failed in its constitutional obligation to scrutinise and oversee executive action and to hold the President accountable as a member of the executive.¹³

Regarding the role and tasks of the National Assembly, the court emphasised the importance of the oversight role that the National Assembly has over the executive and other State organs and further that this watch dog role meant that the National Assembly was instrumental in ensuring accountability and transparency in respect of the governance of the country.¹⁴

The Public Protector

The constitutional court's assessment was that the public protector was clearly acting within the powers of her constitutional mandate and further that such powers were legitimately derived from the constitution. She had conducted proper investigations of the allegations brought before her, produced a report and provided remedial actions which the President and the National Assembly saw fit to disregard and that was the constitutional crisis which objectors brought before the court.

¹² *ibid*

¹³ *Economic Freedom Fighters v Speaker of the National Assembly and Ors; Democratic Alliance v Speaker of the National Assembly and Ors* (2016) ZACC 11.

¹⁴ Paragraph 22

In her findings, the public protector relied on the provisions of s 96 which is the main constitutional provision that seeks to curb corrupt conduct of members of the executive branch of government by explicitly prohibiting them from behaving in a certain manner or engaging in conduct which is likely to bring its office into disrepute. The provision further seeks to curb abuse of power in recognition of the positions of influence and power that members of the executive obviously hold by virtue of their offices.

Executive powers and their sphere of influence if left unabated poses a threat to constitutional democracy, hence the need to ensure transparency and accountability through independent institutions and systems that can provide the necessary checks and balances.

For this reason, the constitutional court observed that;

"The rule of law requires that no power be exercised unless it is sanctioned by law and no decision or step sanctioned by law may be ignored based purely on a contrary view we hold. It is not open to any of us to pick and choose which of the otherwise effectual consequences of the exercise of constitutional or statutory power will be disregarded and which given heed to. Our foundational value of the rule of law demands of us, as a law-abiding people, to obey decisions made by those clothed with the legal authority to make them or else approach courts of law to set them aside, so we may validly escape their binding force".¹⁵

The court in its ruling acknowledged that the work of the public protector was sanctioned by law and that the executive did not have discretion as to whether or not to comply with the decisions made by those "clothed with the legal authority to make them..."¹⁶

The Declaratory Order

¹⁵ Paragraph 75 of the judgment

¹⁶ *ibid*

The relief granted by the constitutional court was wide ranging; it was declaratory, mandatory and supervisory in nature.

Regarding the President the court found that

"... consistent with this constitutional injunction, an order will thus be made that the President's failure to comply with the remedial action taken against him by the public protector is inconsistent with his obligations to uphold, defend and respect the Constitution as the supreme law of the Republic; to comply with the remedial action taken by the public protector; and the duty to assist and protect the office of the public protector to ensure its independence, impartiality, dignity and effectiveness".¹⁷

Regarding the National Assembly the court found that

"... the failure by the National Assembly to hold the President accountable by ensuring that he complies with the remedial action taken against him, is inconsistent with its obligations to scrutinise and oversee executive action and to maintain oversight of the exercise of executive powers by the President. And in particular, to give urgent attention to or intervene by facilitating his compliance with the remedial action".¹⁸

The order made by the court was definitive and effective because it had the following legal consequences;

- It affirmed that the public protector's remedial powers were legally binding.
- It affirmed the constitutional courts mandate to declare conduct inconsistent with the constitution unlawful.
- The supervisory powers of the constitutional court were invoked to ensure that the President pay back what he owed.
- A structural interdict was imposed requiring that i) the national treasury report back to the court within 60 days with the amount to be repaid and ii) within 45 days thereafter the President must

¹⁷ Paragraph 103

¹⁸ Paragraph 104

repay.

The court noted that declaring law or conduct inconsistent with the constitution and invalid was plainly an obligatory power vested in the court as borne out by the word “must”. Unlike the discretionary power to make a declaratory order in terms of s 38 of the constitution, the court had no choice in this particular matter but to make a declaratory order where s 172(1) (a) applied.

Transparency and Accountability

The standard set by the Constitution of Zimbabwe

Although it remains far from being a perfect system, the practice of constitutional democracy in South Africa has enjoyed far greater success than Zimbabwe in holding members of the executive to account for alleged violations of the constitution which they are duty bound to uphold. This, in spite the fact that the constitutional and institutional frameworks prevailing in both countries are similar to the extent that both advocate for the democratic principles of transparency, accountability and the existence of independent institutions that ought to facilitate the advancement of such democratic principles.

However, the question posed in this section is whether these frameworks in the case of Zimbabwe are adequately designed to ensure that members of the executive are subject to the principles of transparency and accountability enshrined in the constitution.

Accountability of the President and Cabinet Members

Similar to the South Africa context, the Constitution of Zimbabwe places a specific obligation on the President of Zimbabwe to “*uphold, defend, obey and respect this Constitution.....*” and so serious an obligation is it that the President may be removed from office for failure to uphold the same.¹⁹

Section 97 as an accountability mechanism

¹⁹ See s 90(1) as well as s 97(d) Inability to perform the functions of the office because of physical or mental incapacity is the fourth ground of removal.

Section 97 of the constitution of Zimbabwe prescribes the legal standard and procedural requirements for removal of the President and in so doing it provides means by which the President may be held accountable; three of which are:

- a) Serious misconduct
- b) Failure to obey, uphold or defend this constitution
- c) Wilful violation of this constitution

The fact that there exist grounds of removal for the President in the constitution reinforces the principle highlighted in the Nkandla judgment that the President is a subject and creature of the constitution; indeed it is the constitution which dictates how the President may come into office, how the President may or must leave office, and the conduct of the President during the tenure in office as President.

The constitutional court in the case of the President of the *Republic of South Africa v Hugo* described the President as follows;

*"Ultimately, the President as the supreme upholder and protector of the constitution is its servant. Like all other organs of State, the President is obliged to obey each and every one of its commands".*²⁰

However, the grounds for removal regarding the reference to "*serious misconduct*" of the President (s 97) is, at best, open-ended and provides little clarity as to what those particular grounds actually constitute.

Does it refer to specific criminal acts, neglect of official duties, or generally conduct which undermines the integrity of the office of the President? At the same time it may also be argued that defining the grounds of removal is not necessary because allegations of constitutional violations will generally be based on the circumstances and that it is the courts which will then make its finding after assessing the circumstances of the particular violation alleged to have been committed. Is s 97 in itself sufficiently embodied to hold the president of Zimbabwe accountable in the same manner that the South African

²⁰ [1997] ZACC 4; 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at para 65

constitution holds the president of South Africa accountable?

Section 106 as a means of ensuring accountability

Similar to the constitution of South Africa, the constitution of Zimbabwe contains provisions found under section 106 that can be described as negative obligations on senior public officials such as Ministers requiring that they refrain from certain types of conduct. The section prohibits vice presidents, ministers and deputy ministers from;

- a. Directly or indirectly holding any other public office or undertaking any other paid work.
- b. Acting in any way that is inconsistent with their office or exposing themselves to any situation involving the risk of conflict between their official responsibilities and private interests; or
- c. Using their position or any information entrusted to them, to enrich themselves or improperly benefit any other person.

Section 106 also contains elements of the criminal offence of corruption which may be defined as acts involving the misuse of entrusted power for personal or sectional gain.²¹

The absence of the office of the President from s 106 is alarmingly conspicuous, especially when one considers the very critical public interest a properly functioning constitutional democracy would have in ensuring that constitutional mechanisms to curb corruption and abuse of powers by the executive should apply just as much to the Head of State as they would to other members of the executive. Corrupt practices in government undermine democracy, because they distort normal decision-making processes and subvert the policy objectives of legitimate democratic government and the President of any nation should be playing a leading role at both a policy and individual level in fighting conduct by public officials which is contrary to public interest and constitutional values.

Another point of observation relevant to s 106 and as also highlighted in the Nkandla judgment is

²¹ See UNCAC definition of corruption. And also Towards a national integrity strategy for Namibia : A national discussion paper, Technical Committee on the Promotion of Ethics and the Combating of Corruption, Windhoek, 1998, p 7

that when alleging a breach of a constitutional obligation it must surely relate to an obligation which is specifically imposed on the President or Parliament. In contrast to the silent approach of s 106, s 96 of the Constitution of South Africa places a specific constitutional obligation on the President to refrain from certain conduct. The provision is clearly designed to curb corrupt practices, abuse of power and unethical conduct not only by the executive but by the President as well. Section 96 accordingly prohibits members of the cabinet²² (which includes the President) and deputy ministers from;

- b. acting in any way that is inconsistent with their office, or exposing themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or
- b. using their position or any information entrusted to them, to enrich themselves or improperly benefit any other person.

The relevance of s 96 5 to the Nkandla judgment is that it formed the basis of the public protectors finding that the South African President had failed to comply with specific "*constitutional and ethical obligations by knowingly deriving undue benefit from the irregular deployment of State resources*". The public protector was propelled to investigate alleged corrupt practices on the basis that the constitution of South Africa prohibited the President from unjust enrichment and improperly benefiting from State resources and this was enabled by specific constitutional provisions which prohibit the President from engaging in certain kinds of conduct.

The effect of the omission of the President from s 106 of the constitution of Zimbabwe is that there is no clear and specific obligation on the President to avoid conflict of interest situations but this invariably creates an obvious and specific problem when addressing transparency and accountability measures for the highest public office. The standard set by the constitution of Zimbabwe to ensure that President can be refrains from conflict of interest activities (whether real or perceived) is at a lower bar than that set by the constitution of South Africa.

²² Section 91 of the Constitution of South Africa states that *The Cabinet consists of the President, as head of the Cabinet, a Deputy President and Ministers.*

Transparency and accountability as a regional necessity

The Nkandla judgment is relevant not just for Zimbabwe²³ but has a far-reaching effect on other African countries including Zambia and Kenya whose constitutions and democratic practices espouse the democratic principles of ensuring accountability at the highest level of government.

These two examples demonstrate that measures to provide for transparent and accountable conduct which seeks to deter elements of corrupt practices and abuse of office by members of the executive (including the President) is not an unusual constitutional provision; in fact it is a necessary constitutional safeguard found in most progressive democracies.

The constitution of Kenya,²⁴ for example, prescribes the conduct of a State officer, and specifically prohibits any conflict between personal interests and public or official duties including a prohibition on receiving certain gifts.²⁵ The constitution goes on to define State office to include the office of the President which means that the President of Kenya has a specific obligation to avoid conflict of interest because there is no exemption from the requirements of s 75.

The constitution of Zambia²⁶ provides for the impeachment of the President under the following circumstances;

- (a) a violation of a provision of this constitution or other law;
- (b) a crime under international law; or
- (c) gross misconduct.

The constitution of Zambia recognises that the President can violate not only the constitution but also any other 'law'. Such a provision effectively creates a broader context of prohibited conduct and widens the circumstances under which a President can be removed from office.

²³ See s 46 (1) (e) where the constitution of Zimbabwe clearly expresses the need to have regard to foreign law

²⁴ Constitution of Kenya 2010 s 75

²⁵ Section 76 "State officer" means a person holding a State office

²⁶ Section 108

Zambia's constitution does not define the term 'law'; however, the Zimbabwe constitution defines law to mean;

- a) Any provision of the constitution or an Act of Parliament
- b) Any provision of a statutory instrument
- c) Any unwritten law in force in Zimbabwe including customary law.

Section 266 of the definitions section found under the constitution of Zambia proceeds to define gross misconduct to mean;

- (a) Behaviour which brings a public office into disrepute, ridicule or contempt;
- (b) Behaviour that is prejudicial or inimical to the economy or the security of the State;
- (c) An act of corruption; or
- (d) Using or lending the prestige of an office to advance the private interests of that person, members of that person's family or another person;

The definition of offences which constitute serious misconduct provides for a clearer process for the removal of the President of Zambia which differs distinctly from the state of the Zimbabwean constitution.

Zambia has also demonstrated an impressive institutional and constitutional capacity to enforce the principles pertaining to the rule of law, separation of powers, and transparency and accountability through its most recent ruling.

In the case of a petition brought before the constitutional court of Zambia by Steven Katuka, Law Association of Zambia against the Attorney-General, Ngosa Simbyakula and sixty three others²⁷ the second and the third petitioners challenged the continued stay in office of the Cabinet and Provincial Ministers. The issue was whether the Vice-President and Cabinet Ministers of the Government of the Republic of Zambia could continue holding their ministerial positions and continue to enjoy benefits

²⁷ Selected Judgment NO. 29 OF 2016 P.957 in the constitutional court of Zambia held at Lusaka (Constitutional Jurisdiction) 2016/CC/0010/ 2016/CC/0011

associated with their portfolios and draw salaries and allowances when Parliament was dissolved.

The second petitioner averred that the Vice President and Cabinet Ministers held their Cabinet portfolios by virtue of being Members of Parliament and that they could not be a Vice-President or Cabinet Minister without first being elected or nominated as Member of Parliament. It was argued further that the failure by the President of the Republic of Zambia to dissolve his Cabinet following the dissolution of Parliament was a deliberate infringement of the Constitution and that, in so doing, the President had failed in his duties to, among others, respect, uphold and safeguard the Constitution and the sovereignty of the Republic and to promote democracy and enhance the unity of the nation and to uphold the rule of law.

The petitioners submitted that upon dissolution of Parliament on the 11 May 2016 all Members of Parliament ceased to hold their positions by operation of law.²⁸ Counsel for the petitioners argued that Article 81(8) of the Constitution only allowed for the President to continue in office until the President-elect assumes office. For that reason, it was only the President, the Speaker and the First Deputy Speaker who could survive the dissolution of Parliament and that the constitution did not provide for the Vice-President and Cabinet Ministers to continue in office upon the dissolution of Parliament.

The constitutional court ruled that the Ministers and their Deputies were in office illegally following the dissolution of Parliament and they were therefore ordered to pay back all the salaries and other allowances which they had illegally accrued and vacate office with immediate effect. In its land mark ruling, the constitutional court added that President Edgar Lungu was wrong to maintain

²⁸ Article 72(1) of the Constitution of Zambia provides that with the exception of the Speaker and the First Deputy Speaker, a Member of Parliament shall vacate the seat in the National Assembly upon the dissolution of Parliament. And that, while by definition, Parliament includes the President and the National Assembly, the dissolution of Parliament only affects Members of Parliament as specified in Article 68(2) with the exception of the Speaker and the First Deputy Speaker.

the Ministers in office after the dissolution of Parliament.

Similar to the Nkandla judgment, this case demonstrates the intervening role the court plays in respect of interpreting the law without fear, favour or prejudice because the democratic principles of separation of powers and the twin principles of transparency and accountability were in operation.

Available Legal Remedies

One of the key principles derived from the Nkandla judgment is that where a person, irrespective of status, commits an alleged offence the full course of the law must be allowed to take place because no one is above the law. This principle was also recognised by the Supreme Court in *Chavunduka & Anor v Commissioner of Police*²⁹ when the full bench of the Supreme Court stated that:

"The entitlement of every person to the protection of the law, which is proclaimed in s 18(1) of the constitution³⁰, embraces the right to require the police to perform their public duty in respect of law enforcement. This includes the investigation of an alleged crime, the arrest of the perpetrator provided the investigation so warrants and the bringing him or her for trial before a court of competent jurisdiction".

The laws of Zimbabwe do provide constitutional, legislative and institutional frameworks which have been established to ensure that, amongst other situations, the executive are held to account for any conduct in breach of their constitutional and legislative obligations as high ranking public officials although not at the same success rate as South Africa. The poor success rate is attributable to the fact that the executive have often refused to comply with certain court orders that they deem to be unfavourable to the State or particular political interests.³¹

²⁹ 2000 (1) ZLR 418 (S) at pages 421-422 B

³⁰ Constitution of Zimbabwe as amended at 30 November 2007

³¹ The Executive has not enforced Court orders in the following cases inter alia, *Mark Chavunduka and Ray Choto v Ministry of Defence* (1999 case); *Andrew Meldrum v The Chief Immigration Officer and Ors* (May 2003); *Associated Newspapers Of Zimbabwe v Chief Superintendent Madzingo & The Commissioner Of Police* HC8191/2003; *Dorothy Kumunda & 7 others v District Administrator Chikomba District & Anor* HC9481/03; *Charles De Kock v Mike Madiro and 4 Ors* HH 217/03, *Cuthbert Chivhunze & Ors v John Chitozho & Ors* Mutare Court Case No.416/02; *Commercial Farmers Union v Minister Of Lands & Ors* 2000 (2) ZLR 469; see also article by Arnold Tsunga 'The legal profession and the judiciary as human rights

In respect of the constitutionality of the conduct of the President or Parliament, it is only the constitutional court³² which can make a final decision in regards thereof.

Recourse Against the President

As a general rule, the President enjoys immunity meaning that whilst in office the President cannot be sued for civil or criminal proceedings for any act of a personal nature. Although, if relating to acts done in an official capacity there lies no privilege of immunity.

Outside of this right to immunity there are two courses aggrieved parties may take against the President. The first recourse is to approach the courts for an order declaring that the President has failed to fulfil a constitutional obligation, as was the case in the Nkandla judgment. According to the constitutional court rules³³ of Zimbabwe an application can be made to the constitutional court by way of a court application supported by an affidavit which details the constitutional obligation in question which the President has failed to uphold.

The other resource remains a preserve for the political arena as it relates to the prerogative of Parliament under s 97 to institute the prescribed procedure for the removal of the President from office. It is in essence an impeachment process designed to investigate any alleged violations of the constitution listed in s 97. This entails the passing of a joint resolution by the Senate and the National Assembly passed by at least one-half of their total membership. The political aspect of this process stems from the fact that the participants are elected officials who serve as representatives of specific constituencies and not as representatives of the court.

However, it should be pointed out that the mere fact (as in the case of the Nkandla judgment) that

defenders in Zimbabwe in 2003: separation or consolidation of powers on the part of the state?'

³² Section 167 (3)

³³ Statutory Instrument 61 of 2016 section 27

the constitutional court makes an adverse finding against the President does not necessarily mean that the President will be impeached and, even if that were the case, there is no guarantee that the motion to impeach will be successful due to the reality of majority politics. As was discovered to the bitter disappointment of the DA party of South Africa, when it tried to impeach the president just days after the Nkandla judgment, the motion failed as they required 160 votes to pass, but lost by 243-133.

The vote may have been political, and the ANC's numerical advantage effectively doomed it but that doesn't make it illegal. Although the Constitution provides that the National Assembly may remove the president if he commits a "*serious violation of the Constitution*," it is the National Assembly which decides whether or not to do so; indeed similar to the Zimbabwe context.

Recourse Against a Cabinet Minister

Section 106 of the Constitution of Zimbabwe provides for a constitutional standard in respect of what Ministers are prohibited from doing; however, it does not in itself create offences. The section merely provides that Ministers are, for example, prohibited from enriching themselves or improperly benefiting other persons. Section 106 contains elements of criminal conduct and is aimed at curbing corruption, abuse of power and abuse of State resources.

In the event of such constitutional violations by Ministers, recourse may be found through the ordinary courts of law either using the criminal justice system or the civil courts.

The criminal justice system specifically provides for recourse to be taken against a public officer under the Criminal Law (Codification and Reform) Act.³⁴

The Criminal Law (Codification and Reform) Act³⁵

Section 174 of the Act deals with criminal abuse of duty by public officers and states as follows;

³⁴ [Chapter 9:23] of Act 23 of 2004

³⁵ Section 174

(1) If a public officer, in the exercise of his or her functions as such, intentionally

(a) does anything that is contrary to or inconsistent with his or her duty as a public officer;

or

(b) omits to do anything which it is his or her duty as a public officer to do; for the purpose of showing favour or disfavour to any person, he or she shall be guilty of criminal abuse of duty as a public officer and liable to a fine not exceeding level thirteen or imprisonment for period not exceeding fifteen years or both.

(2) If it is proved, in any prosecution for criminal abuse of duty as a public officer, that a public officer, in breach of his or her duty as such, did or omitted to do anything to the favour or prejudice of any person, it shall be presumed, unless the contrary is proved, that he or she did or omitted to do the thing for the purpose of showing favour or disfavour, as the case may be, to that person.

(3) For the avoidance of doubt it is declared that the crime of criminal abuse of duty as a public officer is not committed by a public officer who does or omits to do anything in the exercise of his or her functions as such for the purpose of favouring any person on the grounds of race or gender, if the act or omission arises from the implementation by the public officer of any Government policy aimed at the advancement of persons who have been historically disadvantaged by discriminatory laws or practices.

Unfortunately, s 174 only deals with conduct which amounts to “showing favour or disfavour to any person” and does not comprehensively address all aspects of corruption related activities and abuse of office those public officials should be held liable for when in violation of such laws.

Institutional Mechanisms as a Means for Redress

There are several institutional mechanisms existing in Zimbabwe with the constitutional mandate to promote the rule of law and hold those responsible for criminal conduct and conduct in violation of the constitution to account.

The Zimbabwe Anti-Corruption Commission (ZACC)³⁶ is constituted under s 255 and is primarily empowered to investigate and expose cases of corruption in the public and private sectors. Therefore, an infringement of s 174 of the Criminal Law (Codification and Reform) Act may be brought to the ZACC because its powers of investigation are criminal in nature.

The National Prosecuting Authority (NPA) was established under s 258 and is empowered to institute criminal prosecutions on behalf of the State. Similar to ZACC, it is constituted as an independent body for the purposes of ensuring that it exercises its duties impartially, without fear or favour.

The Auditor General is a public and independent office established under s 309. It plays a pivotal role in the detection of crime including corruption-related offences as one of its core functions is to audit the accounts, financial systems and financial management of all departments, institutions and agencies of government, all provincial and metropolitan councils and all local authorities.

The Zimbabwe Human Rights Commission (ZHRC) was also established under s 242 and has powers to investigate all human rights abuses as well as act as a guardian for the public by protecting the public against abuse of power and maladministration by State and public institutions.

The ZHRC took over the functions of the public protector³⁷ an office which existed in terms of the old constitution. The functions of the public protector under the old constitution were to investigate administrative action taken by any officer, person or authority who was a member of any government ministry or department. Formerly, a complainant could allege that they had suffered injustice but there was no remedy reasonably available by way of court proceedings.

³⁶ See also the Anti Corruption Commission Act: [*Chapter 9:22*] section 12-13 which describes the functions and powers of the Commission.

³⁷ Section 107.

The functions of the public protector under the old constitution demonstrated that there existed a public office solely mandated to investigate and hold to account abusive conduct by those in public office but under the new constitution this is no longer the case. The role of the public defender and human rights defender has become blurred and indistinguishable; yet there is a distinction. Human Rights are universal legal guarantees protecting individuals and groups against actions which interfere with fundamental freedoms and human dignity.³⁸

The public protector as a missing link?

Unlike the constitution of South Africa, the constitution of Zimbabwe no longer recognises the office of the public protector as an independent office.

The public protector of South Africa played a critical role in the investigation of allegations of misuse of power by the President of South Africa: she acted in the public interest and her functions as a key player strengthening constitutional democracy was clearly recognised and applauded by the courts in the Nkandla judgment.

The constitutional court in its judgment described the powers, functions and purpose of the public protector and specifically addressed the office of the public protector as being;

*"One of the most invaluable constitutional gifts to our nation in the fight against corruption, unlawful enrichment, prejudice and impropriety in State affairs and for the betterment of good governance."*³⁹

It noted that:

"The tentacles of poverty run far, wide and deep in our nation. Litigation is prohibitively expensive and therefore not an easily exercisable constitutional option for an average citizen. For this reason, the fathers and mothers of our Constitution conceived of a way to give even to the poor and

³⁸ See the Universal Declaration of Human rights (UDHR) adopted by the 56 members of the United Nations on 10 December 1948

³⁹ Paragraph 52

marginalised a voice, and teeth that would bite corruption and abuse excruciatingly. And that is the public protector”.

The court added further that

“The purpose of the office of the public protector is therefore to help uproot prejudice, impropriety, abuse of power and corruption in State affairs, all spheres of government and State-controlled institutions. The public protector is a critical and indeed indispensable factor in the facilitation of good governance and keeping our constitutional democracy strong and vibrant.”

Zimbabwe does not have an independent office of the public protector because it was repealed by the 2013 Constitution. Its functions have been incorporated into the ZHRC. This means that there is a gap in respect of a public office which is solely designed for the purposes of investigating allegations of corruption or abuse of powers by public officials on behalf of the public.

Relevance of The Nkandla Judgment for Zimbabwe

The Nkandla judgment draws many political, institutional and legislative parallels for Zimbabwe in respect of how to hold to account members of the executive for conduct that the constitution of Zimbabwe expressly prohibits them from doing.

For example, the action taken by the National Assembly of South Africa to undermine the public protector’s recommendations also signifies a similar problem in Zimbabwe pertaining to majority politics where decisions are made to protect political and party interests rather than to ensure the adherence to the rule of law and the principles of transparency and accountability.⁴⁰

Additionally, a point to consider is that whilst both countries appear to have similar constitutional

⁴⁰ For example, the Local Government Bill which was pushed through both houses of Parliament in July 2016 and sent for presidential assents to become an Act of Parliament within twenty one days. Zanu-PF took advantage of the vulnerable MDC-T as Deputy Ministers, Ministers and the two Vice Presidents are the only ones who have constitutional powers to bring in bills which require support from treasury.

and institutional frameworks, only South Africa has effectively used its mandated authority to hold the executive accountable for alleged violations of its constitution and public office duties.

Analogous to South Africa's constitution, the constitution of Zimbabwe is the supreme law of the land which accordingly states under s 2 that;

(1) This constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency.

(2) The obligations imposed by this constitution are binding on every person, natural or juristic, including the State and all executive, legislative and judicial institutions and agencies of government at every level and must be fulfilled by them.

Subsection 2 reinforces the fact that no person, law, practice or conduct is exempt from constitutional scrutiny and section 2 effectively makes every person accountable and answerable to the constitution.

This demonstrates that Zimbabwe is as a nation subject to a constitutional democracy and the practice of constitutional democracy presupposes the recognition of the Constitution as the supreme law of the land.

As reiterated earlier, there are several legal principles emanating from the Nkandla judgment which Zimbabwe must learn from especially considering that the judgment was a strong endorsement of the rule of law, the principle of separation of powers, and transparency and accountability as well as the supremacy of the constitution over every act of the executive and legislative arm of Government.

First, all persons including the President and members of his cabinet (the executive) are subject to the constitution. Secondly, not only are they subject to the constitution but the President in particular is the primary defender of the Constitution as is seen in s 90 which confers on the President the responsibility "to uphold, defend, obey and respect this constitution..".

Thirdly, constitutionally, the President can be held accountable for any conduct where he fails to uphold, defend, obey and respect the constitution, and for any wilful violation or serious misconduct.

Fourthly, the judgment demonstrated that whether or not the President and Parliament had acted in bad or good faith was irrelevant because the courts' enquiry into whether any constitutional obligations had been breached was an objective assessment which was not dependant on the motive of any of the actors.

Finally, the rule of law requires that the different constitutional arms of government – especially the executive, legislative and judiciary – function in accordance with the principle of separation of powers which must be observed and respected. When this rule of law is functional it protects, ensures and enforces the constitutional values of transparency and accountability of government officials including the executive.

The principle of upholding the rule of law and separation of powers was alluded to in the matter between *Commissioner of Police v Commercial Farmers' Union*⁴¹ relating to a court order obtained by the Respondent which had been issued by consent and which, among other things, declared the land invasions of 2000 to be unlawful and required the police within seventy two hours of the issue of the order to inform the invaders that the invasions were unlawful and to remove them if they did not leave the farms. The order also required the police to disregard any executive instructions to the contrary. However, six days after the order was issued, the applicant applied to the court to delete the paragraphs of the court order requiring the police to disregard contrary instructions from the executive and requiring the police to evict the invaders.

The court held that a court order must be obeyed until it is set aside and that the rule of law meant that everyone must be "*subject to a shared set of rules that are applied universally and which deal*

⁴¹ 2000 (1) ZLR 503 (HC) 2000 (1) ZLR p503

on an even-handed basis with people and which treat like cases alike”.

In its judgment the court noted further that

“... under a constitutional democracy such as Zimbabwe there is recognition that society’s power is dangerous to its members if it is exercised by one group of individuals. It is recognised therefore that there must be a separation of powers to perform the three jobs which have to be done - that of making the law (by Parliament) that of applying the law to particular cases (by the judiciary) and that of enforcing the laws and decisions of the courts (by the executive)”.

Similar to the Nkandla judgment, the court in this case concisely drew imperative distinctions necessary for a true democracy and also cautioned against the danger of majority politics as representing a threat to democratic and constitutional principles.

Conclusion

The constitutional principles of separation of powers, rule of law, transparency and accountability which were defended in the Nkandla judgment serve as examples of how the rule of law ought to apply in Zimbabwe. The measure by which a nation esteems and values its constitution is not found in the mere existence of a constitution. It achieves that quality or status of a constitutional democracy only when the constitution acquires a practical significance, in other words, when the principles and rights enshrined in it can be translated into practice. The South African courts including the constitutional court have demonstrated repeatedly that separation of powers is not mere rhetoric but a lived reality; that the rule of law is not an unattainable concept but can be practically applied for the benefit of all; and that transparency and accountability apply as much to the political elite as they do to the majority of ordinary South Africans and the Nkandla judgement reaffirmed these principles.

However, this is not the case in Zimbabwe for a number of reasons; constitutional democracy

becomes much more difficult to achieve if the constitutional safeguards in terms of clear provisions that support the underlying values and principles of the constitution, corresponding legislation and institutional frameworks are lacking. In respect of Zimbabwe, there is a process of not only constitutional alignment but also constitutional amendments which must take place in order to have the legal and democratic fundamentals which justified the Nkandla judgment delivered by the Constitutional Court of South Africa.

This process also needs to be enabled by a change in the political culture of the nation which must begin to interact with the President and all executive powers and representatives as constitutional beings, subject to the constitution, bound by the constitution and the democratic systems that it introduces. The lines have never been drawn more clearly as to the duties and responsibilities of the three branches of government as what unfolded in the unanimous Nkandla ruling and Zimbabwe can, and must, learn from those lessons and should hasten to follow regional trends of democracy in practice seen through the examples of other countries such as Zambia and Kenya.

