



## **The Zimbabwe Electronic Law Journal**

Commentary on Contemporary Legal Issues

**2016**

The Editorial Board of this new electronic journal comprises:

Dr T. Mutangi, Professor L. Madhuku and Dr. I. Maja (co-Chief editors) and Professors J. Stewart and G. Feltoe.

The primary objective of this journal is to post regularly online articles discussing topical and other important legal issues in Zimbabwe soon after these issues have arisen. However, other articles on other important issues will also be published.

The intention is to post at least two editions of this journal each year depending on the availability of articles.

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All articles must be typed preferably using 11 point Arial typeface and with 1.15 spacing. Text should be in justified format.

Footnotes should be used rather than endnotes and footnotes must be numbered consecutively.

The basic style to be used for references to books, articles and case law is set out below:

**References to books**

Maja, I *The Law of Contract in Zimbabwe* (2016) Maja Foundation, Harare.

**References to journal articles**

Feltoe, G "The press and the law of defamation; achieving a better balance" (1993) Vol 11 *Zimbabwe Law Review* 129

**Reference to cases in Zimbabwe**

*S v Dube* 1992 (2) ZLR 65 (S)

*Mudzuru & Anor v Minister of Justice, Legal and Parliamentary Affairs N.O. & Ors* CC-12-2015

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# A Reflection on the Domestic Violence Act [*Chapter 5:16*] and Harmful Cultural Practices in Zimbabwe

By Slyvia Chirawu-Mugomba<sup>1</sup>

## Part 1

### Introduction

Thoughts or discussions on African culture conjure up horror stories – female genital mutilation, (FGM), wife inheritance, homicide brides and early marriages. African culture is often viewed as homogeneous. This is not the case. Cultural practices and beliefs differ from place to place. Without falling into the trap of the emissary position<sup>2</sup>, not all cultures or cultural practices are negative. For instance, in Zimbabwe, there is the *Zunde Ramambo* concept. This entails, especially in the context of HIV and AIDS and climate change which brings with it drought or poor harvests, the growing of food crops that are stored in a granary overseen by a traditional leader. The food so stored is used to feed the vulnerable to mitigate the effects of poverty or drought. Under the traditional Shona culture, when a child (regardless of age) loses a parent, a replacement parent *sara pavana* (literal translation remain with the children), is chosen. The role of this replacement parent is to step into the shoes of the deceased and perform functions that the deceased would have played in relation to their children. This cultural norm is meant to ensure that a child does not feel the gap left by the death of a parent. However, certain cultural and customary practices have been recognized as being harmful to women and children.

Although harmful cultural practices has been viewed as a violation of women's rights for a long time, it was only with the Beijing Conference of 1995 that the issue gathered momentum when it stated in its mission statement in relation to the girl child that,

“They are often subjected to various forms of sexual and economic exploitation, pedophilia, forced prostitution and possibly the sale of their organs and tissues, violence and harmful cultural practices such as female infanticide and prenatal sex selection, incest, female genital mutilation and early marriage, including child marriage.”<sup>3</sup>

The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa calls on state parties to condemn all forms of harmful practices that negatively affect the human rights of women and which are contrary to recognized international standards.<sup>4</sup> Harmful practices are defined in the Protocol as “all behavior, attitudes, and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health,

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<sup>2</sup> See Sujata Warrier: *Culture: What it is, who owns it, Claims It, Changes It* available on [www.apiahf.org/apidvinstitute/criticalissue/culture.htm](http://www.apiahf.org/apidvinstitute/criticalissue/culture.htm)(last accessed 16 January 2017). She describes the emissary position as proclamation of how wonderful each of our cultures and its traditions are.

<sup>3</sup> See Fourth World Conference on women, Beijing 1995 Mission statement Clause 40 available on [www.un.org/womenwatch/daw/beijing/platform/plat\\_1.htm](http://www.un.org/womenwatch/daw/beijing/platform/plat_1.htm) ( last accessed on 17 January 2017)

<sup>4</sup> Article 5

dignity, education and physical integrity.”<sup>5</sup> The only harmful cultural practice specifically mentioned in the protocol is FGM.<sup>6</sup>

CEDAW,<sup>7</sup> to which Zimbabwe is a signatory, calls on State parties to:

“Take all appropriate measures to: (a) modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of inferiority or the superiority of either of the sexes or on stereotypes roles for men and women.”<sup>8</sup>

CEDAW also calls on State parties to eliminate discrimination in matters related to marriage and to ensure that women and men have the same rights freely to choose a spouse and to enter into marriage only with their free and full consent;<sup>9</sup> that the betrothal and marriage of a child shall have no legal effect and further that there should be a minimum specified age for marriage.<sup>10</sup> In Zimbabwe, the first attempt to deal with cultural practices was through the Customary Marriages Act [*Chapter 5:07*]. The act prohibits pledging of girls and women in marriage and makes this practice a criminal offence.<sup>11</sup> Compelling an African woman to marry against her consent is also prohibited.<sup>12</sup> Section 11 and 15 of the Customary Marriages Act were re-enacted in Section 94 of the Criminal Law (Codification and Reform) Act.<sup>13</sup> The Code went on further to prohibit the customary law practice of noxal surrender of a female person to settle a debt or delict.

However, it was only with the promulgation of the Domestic Violence Act<sup>14</sup> (hereinafter called the Act) that the law made specific reference to cultural or customary rites or practices as being discriminatory or degrading to women. In other words, the practices so identified are harmful to women. The Act was signed into law on 26 February 2007 and became operational on 25 October 2007. The Act thus went a step further than the Code or the Customary Marriages Act. The practices specified are; forced virginity testing, female genital mutilation, pledging of women or girls for the purposes of appeasing spirits, forced marriage, child marriage, forced wife inheritance or sexual intercourse between father-in-law and newly married daughter-in-law. These constitute acts of domestic violence.

In passing specific legislation on harmful cultural practices, Zimbabwe complied with the CEDAW Committee recommendation number 157.<sup>15</sup> The outlawing of harmful cultural practices finds resonance in the Constitution which states that, “all laws, customs, traditions and cultural

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<sup>5</sup> Article 1 definition section

<sup>6</sup> Article 5(b)

<sup>7</sup> The Convention on the Elimination of all Forms of Discrimination Against Women

<sup>8</sup> Article 5 ( a)

<sup>9</sup> Article 16 ( b)

<sup>10</sup> *Ibid* 16 (2)

<sup>11</sup> Section 11

<sup>12</sup> Section 15

<sup>13</sup> [*Chapter 9:23*]: The Criminal Code came into operation on 1 July 2006.

<sup>14</sup> [*Chapter 5:16*]. The Act was promulgated on 26 February 2007 and came into operation on 25 October 2007.

<sup>15</sup> Zimbabwe ratified CEDAW in 1991 and filed its first report in 1996. This report was considered by the CEDAW Committee in May 1998. In its concluding observations, the committee expressed its concern that discriminatory traditional practices are still accepted and it called on Zimbabwe to codify only those customary practices that promote gender equality.

practices that infringe the rights of women conferred by this Constitution are void to the extent of the infringement”.<sup>16</sup>

As momentum was raised by the Beijing Conference of 1995 and the twelve critical areas of action identified, women in Zimbabwe began advocating for a law that could protect them from violence. In 2003 a draft bill titled, ‘Prevention of Domestic Violence and Protection of Victims of Domestic Violence Act’, was produced. Significantly that Bill also recognized harmful cultural practices as acts of domestic violence.

Although that Act is not the best piece of legislation, it is a significant step towards eradicating domestic violence and moving the issue from the private to the public arena. However, the issue of harmful cultural practices potentially presents the greatest challenge to the implementation and acceptance by society of the Act. As postulated by Anika Rahman and Nahid Toubia;

“One of the highly debated issues is the role – if any – of legislative action against a pervasive social practice (referring to female genital mutilation) that is strongly linked to cultural norms and beliefs.”<sup>17</sup>

Cultural practices, whether harmful or not, have existed in Zimbabwe since time immemorial. History has revealed that “legislation alone cannot change social behavior”<sup>18</sup> but the fact of passing legislation to deal with cultural issues “creates a *de facto* role for legislation.”<sup>19</sup> To enable Zimbabwean society to fully embrace the specification of harmful cultural practices as acts of domestic violence, the debate has to shift from the purely legal, that is criminalization and other legal sanctions, to the broader context of human rights. Whilst the law is a good starting point it is not “by law alone” that harmful cultural practices will be eradicated from Zimbabwean society.

This introduction will be followed by part two of this article that will put the Domestic Violence Act and cultural relativism into context. Part three will discuss harmful cultural practices specified in the act. This chapter will conclude by suggesting that an opportunity for more engagement on harmful cultural practices has been created.

## **Part Two**

### **Putting the Domestic Violence Act into Perspective**

#### **Cultural relativism**

In the context of human rights and violence against women, UN Women has recognised the tensions between universality of human rights and proponents of cultural relativism;

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<sup>16</sup> Section 80(2) of the Constitution of Zimbabwe Amendment ( No. 20) Act 2013

<sup>17</sup> In female genital mutilation. A guide to laws and policies worldwide at page xiii

<sup>18</sup> *Ibid*

<sup>19</sup> *Ibid*

“Cultural relativists have questioned the overall relevance of the human rights framework for addressing the subordination of women, claiming that some traditions are central to people’s cultural history and must be respected”<sup>20</sup>

UN Women further states that this is not a new argument and that cultural arguments are often used to justify practices that are detrimental to women.<sup>21</sup>

The then Special Rapporteur on Violence stated that “it is only with regard to women’s rights, those rights that affect the practices in the family and the community, that the argument of cultural relativism is used.”<sup>22</sup>

Perhaps more significant, however, is the bold assertion that,

“...although traditional practices such as virginity tests, ‘crimes of honor’ and widowhood rites are specific to certain cultures and undermine women’s human rights, in all cultures violence persists because it is culturally acceptable. Around the world, most perpetrators of violence against women count on the fact that their community will not censure them for their behavior. Challenging this impunity and the almost universal acceptance of a culture of violence against women is central to diminishing the problem.”<sup>23</sup>

Cultural relativism views all beliefs as equally valid and that truth itself is relative depending on the situation, environment and individual.<sup>24</sup> In Zimbabwe, nowhere did cultural relativism play out more than in debates and opinions expressed during the Bill stage. These issues, despite promulgation of the law, continue playing out in Zimbabwean society.

### **Debates on the Domestic Violence Bill**

In Zimbabwe, the face of cultural relativism on domestic violence is a former Member of the House of Assembly who boldly stated in Parliament that,

“I stand here representing God, the Almighty. Women are not equal to men. ...It is a dangerous Bill and let it be known in Zimbabwe that the rights, privilege and status of men are gone. I stand here alone and say this Bill should not be passed in this House. It is diabolic.”<sup>25</sup>

It became apparent that he was not alone in his views. The prospect of making the private public was one that frightened patriarchy and forced it to hide behind culture and tradition. Another former Member of the House of Assembly stated that “There are certain cultural values that shape every family which are likely to be at stake with this legislation and many families are going to break up.”<sup>26</sup>

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<sup>20</sup> UNIFEM; Not a minute more; Ending violence against women page 76

<sup>21</sup> *Ibid* at note 20

<sup>22</sup> *Ibid* at note 20.

<sup>23</sup> *Ibid*, note 20 at page 77

<sup>24</sup> See [www.cultural-relativism.com](http://www.cultural-relativism.com) (last accessed on the 16 January 2017)

<sup>25</sup> See: *The Independent* of 20 October 2006 article by Ray Matikinye: *Domestic violence Bill stirs fiery debate* available on [www.kubatana.net/html/archive/legisl/061020zimind.asp.sector](http://www.kubatana.net/html/archive/legisl/061020zimind.asp.sector)

<sup>26</sup> *Ibid* note 25

In defense of virginity testing, one traditional leader argued that “Virginity testing is not conducted by just anyone. There are selected elderly women in the villages that are responsible for that.”<sup>27</sup> Therefore the issue to him was not the harmfulness of the practice but in who conducted it.

Two clauses in the draft bill were the subject of much controversy. Obsessive jealousy and unreasonable denial of conjugal rights were listed under emotional, verbal and psychological abuse as acts of domestic violence. A commentator surmised as follows,

“The Bill on domestic violence seeks to make jealousy and possessiveness about your wife or husband an offence. It is difficult to fathom what lay in the mind of the person contemplating such a piece of law. Are we not stretching civilization too far? While you commit an offence of being ‘too possessive’ of your spouse, you are still expected to fulfill his or her ‘conjugal rights.’ How does one reconcile the two? Isn’t the law seeking to be intrusive on issues that ordinarily should be resolved by two consenting adults or in the family setting with friends and relatives?”<sup>28</sup>

Even some males who supported promulgation of the Bill into law were against the issue of unreasonable denial of conjugal rights. One prominent male journalist stated as follows;

“However, while by and large there is very little that is offensive about the bill, the point should be made that the State has no right to go into bedrooms of this nation. We all abhor domestic violence. But it does seem that the institution of marriage is at risk from the legal consequences from the issue of the denial of conjugal rights.”<sup>29</sup>

Not surprisingly, the two issues were removed from the Bill and the only reference to possessiveness is found in the definition section of domestic violence under emotional, verbal and psychological abuse which is defined as a

“pattern of degrading or humiliating conduct towards a complainant, including but not limited to among other indicators, the repeated exhibition of obsessive possessiveness which is such as to constitute a serious invasion of the complainant’s privacy, liberty, integrity or security.”<sup>30</sup>

At stake, however, were essentially two bigger issues that were not given credence. The act of jealousy is viewed as a sign of love and culturally acceptable. Alice Armstrong postulates that;

“Although jealousy, as an emotion, is universal, there is another factor present .....that suggests that ‘culture’ and ‘tradition’ are used as arguments to excuse behavior which produces jealousy and violent reactions to jealousy. First, jealousy in women is not

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<sup>27</sup> *Ibid* note 25

<sup>28</sup> *Jealousy and possessiveness in the Domestic Violence Bill*. Comment in The Zimbabwean Independent dated 20 October, 2006 available on [www.kubatana.net/html/archive/legisl/061020zimind1/asp/sector](http://www.kubatana.net/html/archive/legisl/061020zimind1/asp/sector)

<sup>29</sup> *Domestic Violence; A very good law*. Article by Bornwell Chakaodza in the *Financial Gazette* dated the 19<sup>th</sup> of October 2006 available from [www.kubatana.net.html/archive/opn/061019bc.asp?sector](http://www.kubatana.net.html/archive/opn/061019bc.asp?sector)

<sup>30</sup> Section 3 ( 2 ) ( C ) (iii)

culturally condoned. ....Secondly, jealousy in men is culturally condoned because men - particularly husbands - are expected to have exclusive rights over women's sexuality ...."<sup>31</sup>

That it can lead to disastrous consequences such as murder, infliction of harm or mental anguish is ignored. The unreasonable denial of conjugal rights proved to be a double edged sword. While marriage imposes duties of *consortium onmis vitae*,<sup>32</sup> this clause flies in the face of marital rape which in Zimbabwe is a criminal offence.

Of concern to many activists was the fact that the bill seemed to be taking a dangerous dimension as a law meant to protect women only. This could not have been further from the truth as the definition of complainant is neutral. However, perhaps the emphasis on women was the realization that women are more affected by domestic violence than men.

It is easy to paint all men as being against the Bill. However, there are men who realize the real benefits of laws that enhance the rights of citizens especially women. PADARE- Men's Forum<sup>33</sup> is one such organization that supported the passage of the Bill into law. PADARE acknowledged that gender based violence was an existing problem based on patriarchal beliefs. Some men expressed negative sentiments against the Bill because they were afraid that their sphere was being taken over by women. This conception, according to PADARE, was based on ignorance since there is no excuse for violence. The use of culture and religion to perpetrate violence was therefore misguided.<sup>34</sup>

The Bill also generated unprecedented coverage not only in the media but was the subject of debate by Zimbabweans from all walks of life. By the time the Bill was signed into law, there were strong views for and against it.

### **Implications of the domestic violence law on women in Zimbabwe**

The greatest strength of the Act lies in its comprehensive definition of domestic violence to include any unlawful act, omission or behavior which results in death or the direct infliction of physical, sexual or mental injury to any complainant by a respondent and includes : physical, sexual, emotional, verbal, psychological and economic abuse, intimidation, harassment, stalking, malicious damage to property, forcible entry into complainant's residence where the parties do not share the same residence, depriving the complainant of or hindering the complainant from access to or a reasonable share of the use of the facilities associated with the complainant's place of residence, the unreasonable disposal of household effects or other property in which the complainant has an interest, abuse derived from the cultural or customary practices that discriminate against or degrade women, abuse done because of complainant's physical or mental incapacity, abuse done because of complainant's physical, mental, sensory, visual, hearing or speech disability and abuse done because of complainant's mental illness,

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<sup>31</sup> Culture and choice: Lessons from survivors of gender violence in Zimbabwe at page 16

<sup>32</sup> Essentially companionship, love, affection, comfort, mutual services and exclusive sexual intercourse

<sup>33</sup> PADARE is a men's organization advocating a social movement towards a gender-just society.

<sup>34</sup> *Domestic violence bill: 2007 and beyond*. Article by Fungai Machirori dated January 18 2007 available on [www.kubatana.net/html/archive/gen](http://www.kubatana.net/html/archive/gen)

arrested or incomplete development of the mind, psychotic disorder or any other disorder or disability of the mind.<sup>35</sup>

The wide definition of domestic violence takes a cue from international instruments such as the UN 1993 Declaration of Violence against Women which defines gender based violence as;

“Any act of gender based violence that results in, or is likely to result in physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivations of liberty, whether occurring in public or private life. Violence against women shall be understood to encompass but not limited to: Physical, sexual and psychological violence occurring in the family and in the community, including battering, sexual abuse of female children, dowry related violence, marital rape, female genital mutilation and other traditional practices harmful to women...”

The effect of the wide definition of domestic violence is that no longer is it seen as just the visible act of physical violence but it covers all other aspects. The Act gives powers to a complainants' representative defined as a police officer, a social welfare officer, an employer of complainant, a person acting on behalf of a church or other religious organization, a private voluntary organization concerned with the welfare of victims of domestic violence, a relative, neighbour or fellow employee, a counselor and any other person so appointed to apply for a protection order on behalf of the complainant.<sup>36</sup> This provision was put in the law after the realization that many victims of domestic violence, especially women, were afraid to file cases due to socio-cultural, economic and other factors. However the complainants' representative in the absence of consent by the complainant must seek leave of the court to apply for a protection order. This provision will result in domestic violence becoming everyone's responsibility. No longer can any person afford to take a hands off approach domestic violence.

One of the major reasons for not reporting cases is also the real fear by women that they will be left destitute if they file for a protection order. The Act took this into account by providing for a wide ranging protection order that *inter alia* makes provision for payment of emergency monetary relief in respect of the complainant's needs and those of any child or dependant, including household necessities, medical expenses, school fees and mortgage bond or rent repayments.<sup>37</sup> The act also makes provision for temporary custody and regulation of access to a child or dependant.<sup>38</sup> Custody has always been a thorny issue but the provisions of the Act will entail that a complainant who is awarded temporary custody can also get temporary maintenance. This means that the designated courts for domestic violence will act as 'one stop' courts<sup>39</sup> in the sense that a complainant who applies for relief does not have to go to the Maintenance court, civil cases and Children's Court for relief but will have to file one all-encompassing application.

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<sup>35</sup> Section 3 of the Act.

<sup>36</sup> See Section 2 of the Act.

<sup>37</sup> Section 11 (d)

<sup>38</sup> Section 11 (e)

<sup>39</sup> The Act defines court as meaning a magistrates court, the High Court or local court. The latter, essentially Chiefs and Headman's courts, can only hear cases of emotional, verbal, psychological and economic abuse.

The Act puts in place an anti-Domestic Violence Council that will keep under constant review the problem of domestic violence and will monitor the implementation of the Act among other terms of reference. On paper therefore, the act provides a good starting point for the elimination of violence against women.

### **Part Three**

#### **Harmful cultural practices and domestic violence**

While the specific singling out of certain harmful practices including acts of domestic violence should be celebrated, this aspect poses the greatest challenge in implementation. The following cultural practices were specified as acts of domestic violence:

*(a) Forced virginity testing*

It is apparent that the act of virginity testing itself is not an act of domestic violence unless it is a forced act. However, there is a fine line between force and consent. This is a result of compromise between those who out rightly believed that it is an integral part of Zimbabwean culture and those who are against the practice.

*(b) Female genital mutilation*

While the practice of FGM has attracted a lot of attention over the years, in Zimbabwe it is relatively unknown. Nonetheless the law makers thought it prudent to include it in the act lest it becomes an issue.

*(c) Pledging of young women or girls for the purposes of appeasing spirits*

This act involves the surrender of a woman or girl to appease an avenging spirit.

*(d) Forced marriage*

This act involves the marriage of persons who may be above the age of marriage which is 18 years but is as a result of force.

*(e) Child marriage*

Child marriage is defined as a situation where one or both parties to a marriage, whether under customary or general law, is below the age of 18 at the time of the marriage. The Constitution defines a child as any person below the age of 18 years. In *Mudzuru and Anor v Minister of Justice, Legal and Parliamentary Affairs & Ors*,<sup>40</sup> the Constitutional Court outlawed child marriages and struck down section 22(1) of the Marriage Act [Chapter 5:11] and any law, practice or custom authorizing a person under the age of 18 years to marry or be married and that with effect from 20 January 2016, no person male or female, may enter into any marriage, including an unregistered customary law union or any other union including one arising out of religion or religious rite, before attaining the age of 18 years.

*(f) Forced wife inheritance*

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<sup>40</sup> CCZ-12-15

Women and Law in Southern Africa WLSA) states that the referring of remarriage within a deceased man's family as widow inheritance may be misleading as "a widow is not inherited as a mere object without any say or control. She has the choice whether to accept the union or not."<sup>41</sup> However:

"In some situations, the notion of consent may be misleading as the widow may be technically able to refuse but if she wants to retain her relationship with her children, have access to her husband's land allocation and to continue to live among his people, she may have little option but to accept the new husband."<sup>42</sup>

Realizing that this issue would derail progress, a compromise was reached on the word "forced". The act of wife inheritance in itself is not an act of domestic violence unless it is accompanied by force. There are no indicators to denote what forms of force will suffice.

*(g) Sexual intercourse between fathers-in-law and newly married daughters-in-law*

This practice entails a newly married daughter-in-law having sexual intercourse with her father-in-law before she does so with her husband.

## **Part 4**

### **Conclusion**

Whilst cases of domestic violence, mostly physical abuse, have been heard in the courts, so far the author is not aware of any cases of domestic violence related to harmful cultural practices that have come before the courts. Perhaps this is because such cases are hard to bring before the courts as they touch on customary law and cultural practices. What the Act has done, however, is to open dialogue on such issues and has created an opportunity for introspection. The law is certainly important but, for some issues, the presence of a legal framework will not result in immediate change.

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<sup>41</sup> In *Widowhood, inheritance laws, customs and practices in Southern Africa* page 42

<sup>42</sup> *Ibid* at note 41.

## **An Analysis of Constitution of Zimbabwe Amendment (No. 1) Bill 2016**

**A presentation by Justice M.H. Chinhengo<sup>43</sup> to the workshop organised by the Southern African Parliamentary Support Trust:**

**Bulawayo, 8 February 2017**

No legislative act contrary to the Constitution can be valid. To deny this, would be to affirm that the deputy is greater than his principal, that the servant is above the master, that the representatives of the people are superior to the people themselves, that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid.<sup>44</sup>

Alexander Hamilton

### **Introduction**

At independence, Zimbabwe adopted a constitution prepared at Lancaster House in England. That constitution was amended nineteen times before it was repealed and replaced by the current Constitution in 2013. The 2013 Constitution (“the Constitution”) was agreed upon by the major political parties in the country. While it necessarily had to be a compromise document, it was adopted against the background and experience in the governance of the country over thirty-three years as well as against the background of many grievances held by the people of Zimbabwe, as represented by their political parties. It was intended by many involved in crafting it to be a move towards a more democratic State, and a move to correct all that was undesirable in the Lancaster House Constitution, in particular its inconsistency with the aspirations of the people of Zimbabwe, their culture, traditions and practices.

The Preamble to the Constitution recognises the need “to entrench democracy, good, transparent and accountable governance and the rule of law”; it reaffirms the people’s commitment to “upholding and defending fundamental human rights and freedoms” and their resolve “to build a united, just and prosperous nation, founded on values of transparency, equality, freedom, fairness, honesty and the dignity of hard work.” Among the foundational values and principles set out in s 3 of the Constitution, which are relevant to us today, are the supremacy of the constitution, observance of the principle of the separation of powers and principles of transparency, accountability and responsiveness. The constitutional process leading to the adoption of the new Constitution was therefore informed by a transformative ideology, which is rooted in the need to change the lives of the ordinary man and woman; to

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<sup>44</sup> [www.constitution.org](http://www.constitution.org)

make a difference. It is therefore an established tenet of the new Constitution that the Constitution is the supreme law and any law; practice, conduct or custom inconsistent with it is invalid to the extent of its inconsistency.<sup>45</sup>

There are many clauses in the Constitution that are controversial and even disliked by political parties, either together or individually, and by ordinary people or organized groups of people. That, I think, is as it should be. It speaks to the fact that the Constitution does not serve one constituency only. One or other of the negotiating parties may have scored a major victory on some provisions in the Constitution but overall it is a document that largely took into account all the views of the participating individuals and groups. The people of Zimbabwe endorsed or approved the Constitution in a referendum. Because of the ongoing discussion over the appointment of the Chief Justice, we can now say that s 180 of the Constitution is one of the controversial provisions<sup>46</sup>. That controversy not only led to the current litigation on the appointment of the Chief Justice, but it has also led to the current proposal to amend the Constitution as now appears in Constitution of Zimbabwe Amendment Bill No.1 of 2016 (“the Amendment Bill”) published under General Notice 1 of 2017 on 3 January, 2017.<sup>47</sup>

Two provisions of the Amendment Bill are at the heart of my presentation today. The first is s 180 (2) relating to the appointment of the Chief Justice (CJ), Deputy Chief Justice (DCJ) and the Judge President (JP). The second is s 180 (4) which provides for the holding of public interviews by the Judicial Service Commission (JSC) in the appointment of all other judges.

This presentation will analyse the Bill against four fundamental principles of constitutional law - the rule of law, judicial independence, the need for transparency in governmental public processes, and respect for the separation of powers. With these provisions in mind, I shall endeavor to show that, upon a close analysis, the Bill may not be faithfully reflective of some of the foundational principles and values of the Constitution, namely the principles of transparency and respect for the separation of powers. I shall suggest the way in which I think the Bill should be improved to accord and fully comply with these principles. I consider my contribution to be a part of this workshop’s efforts to feed into the consultative process required under s 141 (a) and (b) of the Constitution.<sup>48</sup>

The rule of law, which is one of the main foundational values of the Constitution as set out in s 3(b) of the Constitution, eschews any tendencies or leanings towards despotic approaches in the governance of the country in that it seeks to eliminate wide and untrammelled discretionary power and authority in governmental processes and decision making. The principle assumes the existence of liberties, values and principles, which the government should not violate. Simply put, it restricts the arbitrary exercise of power by subordinating it to requirements of transparency and accountability, among others.

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<sup>45</sup> Section 2(2) of the Constitution of Zimbabwe (Amendment No 20) Act

<sup>46</sup> *Zibani v Judicial Service Commission and Ors* HH-797-16

<sup>47</sup> Constitution of Zimbabwe Amendment Bill No.1 of 2016

<sup>48</sup> Section 141 (a) and (b) provides for public access to and involvement in parliament and states-  
... “Parliament must –

facilitate public involvement in its legislative and other processes and in the processes of its committees; ensure that interested parties are consulted about Bills being considered by Parliament, unless such consultation is inappropriate or impracticable;”

The existing provision in relation to the appointment of the CJ, the DCJ and the JP is of course s 180. They are appointed in the same way as all the other judges by a process involving advertisement of the positions, nominations of candidates, public interviews of the candidates and the submission of a list of qualified persons as nominees for the offices by the Judicial Service Commission (JSC) to the State President. If the President considers that none of the people on the list are suitable for appointment, he is enjoined to require the JSC to submit a further list of qualified persons from whom the President must appoint one of the nominees to the office concerned. This provision vests the power of selecting and appointing the CJ and all judges not in one person but in two authorities, the JSC and the President with the former selecting and the latter appointing. It ensures that the person appointed to any of these high offices is not beholden to one person. Such an outcome enhances the independence and impartiality of the courts as provided in s 164(2) of the Constitution, a provision that is central to the rule of law and democratic governance.

The appointment of the CJ must therefore conform to the dictates of the rule of law and not in any way compromise judicial independence and the role of the courts. The appointment must also be based on considerations of merit, which the process at JSC level is designed to procure. Chapter 9<sup>49</sup> of the Constitution, to which little or no reference is made these days, sets out the basic values of and principles governing public administration, among them, the promotion and maintenance of a high standard of professional ethics, transparency and accountability and the mandatory requirement that –

“Appointments to offices in all tiers of government, including government institutions and government-controlled entities and other public enterprises, must be made primarily on the basis of merit.”

It cannot be doubted that the process of public nomination of candidates and public interviews conducted by the JSC were designed to ensure the appointment of judges on merit. This will be lost, and it will be perceived as lost, if the appointment process does not subject the CJ, DCJ and JP to public scrutiny and interviews.

The Amendment Bill seeks to repeal s 180 and replace it with provisions that remove the CJ, DCJ and the JP from the process to which all the other judges are subjected<sup>50</sup> but this must be said with a small rider. If these high office bearers are appointed from the ranks of former judges

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<sup>49</sup> Section 194 (1) (a), (f) and s (2).

<sup>50</sup> The amendment reads-

“(2) The Chief Justice, the Deputy Chief Justice, and the Judge President of the High Court shall be appointed by the President after consultation with the Judicial Service Commission.

(3) If the appointment of a Chief Justice, Deputy Chief Justice, and the Judge President of the High Court is not consistent with any recommendation made by the Judicial Service Commission in terms of subsection (2) the Senate shall be informed as soon as possible:

Provided that, for the avoidance of doubt, it is declared that the decision of the President as to such appointment shall be final.”

and serving judges it can be said some of the dangers sought to be addressed by the process set out in the current provision are to some extent eliminated. To be a judge in the first place one would have gone through the rigours of public interviews and scrutiny by the JSC. If a judge who has risen to serve on the Supreme Court or Constitutional Court Bench is otherwise unsuitable for appointment to any of these three positions, then the JSC must partly share the blame, as it is it that first recommended the appointment. If the appointments under the proposed Bill were to be made only from those that are serving or have served on the bench, then the fears of those who are critical of the proposed appointment process may be soothed somewhat.

Subsection (2) of s 180 of the Amendment Bill provides that the president will make the appointment “after consultation with” the JSC. The framers of Constitution found it necessary to define the phrase “after consultation with” in view of past experience. Section 339 (2) provides that-

“Whenever this Constitution requires any person or authority to consult anyone else, or to act after consultation with anyone else, the person or authority must –

(a) inform the other person in writing, what he or she proposes to do and provide the other person with enough information to enable the other person to understand the nature and effect of the proposed act;

(b) afford the other person a reasonable opportunity to make recommendations or representations about the proposal; and

(c) give careful consideration to the recommendations or representations that the other person may make about the proposal; but the person or authority is not obliged to follow any recommendations made by the other person.”

Section 339 (2) renders the proviso to ss (2) of s 180 of the Amendment Bill, superfluous and unnecessary. If we have strong, diligent, independent and fearless members of the JSC; if we have a JSC which is itself institutionally independent, and if our system of decision making at all levels is sufficiently transparent and the whole proposed appointment process is open to publicity on the recommendations of the JSC and the reasons for which the President departs from such recommendations, then the potential dangers posed by the proposed appointment procedures may be eliminated or at least minimized. The JSC needs not be reminded about one of its roles in terms of s 190 (2) of the Constitution: it “must promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice...”

It is necessary to take a comparative view of approaches to the appointment of the CJ, DCJ and JP before we adopt a negative view of the Amendment Bill. In Kenya, United States of America and India, the selection process of the CJ is different from that which currently obtains in

Zimbabwe. The American Constitution, Article 2, Section 2(2), for example, provides that the CJ is appointed by the President and confirmed by the Senate. It reads:

“He (the President) shall nominate and by and with the Advice and Consent of the Senate... and shall appoint Ambassadors, other public Ministers and Consuls Judges of the Supreme Court....”

India employs the most progressive, if not the most logical system of appointment of the Chief Justice. The Indian Constitution provides for the appointment of all judges and by convention “the most senior judge of the Supreme Court becomes the Chief Justice” on the recommendation of the outgoing Chief Justice. If there is doubt as to the suitability of the most senior judge for such appointment, the other judges are consulted.

The Botswana Constitution provides in s 96 that “the Chief Justice shall be appointed by the President” and that other judges of the High shall be appointed by the President acting in accordance with the advice of the JSC. It is clear that, in Botswana, the President appoints the Chief Justice.

The function of the CJ and the JP is to guide or lead the other judges, but the judges who are to be led have no say in their appointment. The JSC will now have minimal influence on who occupies these high offices. The Kenyan approach is instructive in this regard. Section 166(a) of the Kenyan Constitution provides that –

“The President shall appoint –  
the Chief Justice and Deputy Chief Justice, in accordance with the recommendation of the Judicial Service Commission, and subject to the approval of the National Assembly; and  
all other judges, in accordance with the recommendation of the Judicial Service Commission.”

The Kenyan President has the appointing powers but those powers are exercised subject to approval by the National Assembly. In terms of s 164(2) the judges of the Court of Appeal elect the President of that Court from among themselves. Similarly by s 165(2) the Principal Judge of the High Court is elected by the judges of that Court from among themselves.

The South African Constitution in s 174(3) provides that –

“The President as head of National Executive, after consulting the Judicial Service Commission and the leaders of parties represented in the National Assembly, appoints the Chief Justice and the Deputy Chief Justice, and after consulting the Judicial Service Commission, appoints the President and Deputy President of the Supreme Court of Appeal ...”.

This provision is similar to what is proposed in the Amendment Bill.

Before I come to what I think should be this workshop's recommendation or in-put into the law making process currently underway, I should make some remarks on the constitution amendment process itself.

Section 328 of the Constitution provides for the amendment of the Constitution and the methods of doing so and does not entrench the provisions relating to the judiciary in the same way as does Chapter VI, s 89(3)(b) and (4) of the Botswana Constitution, which requires that any amendment to that chapter should be submitted to a referendum. Thus our Constitution can be amended but the procedures for doing so must be strictly adhered to. The provisions relating to the judiciary are not as severely entrenched as those relating to the Bill of Rights (Chapter 4) and Land (Chapter 16) and Term limits (Section 328 (7) and (8)).

As long as the Executive is following the laid down procedure for amending the Constitution, no legally sound criticism of its action would be justified. As we have seen the proposed amendment will not be too dissimilar from the position in South Africa and other democracies where the Chief Justice is virtually appointed by the head of State. That, however, is not what I would prefer myself.

My preference is that the most senior judge of the Constitutional Court should become the Chief Justice as is the case in India. This system of appointment depends very much on the integrity of the whole appointment system for Judges. If we chose the right people to compose our Supreme Court and Constitutional Court benches we would not entertain any reasonable fear that any of them cannot become Chief Justice. The Indians do it, so we too can do it. I appreciate that this may not be a feasible approach in Zimbabwe because some of our appointments to the highest courts are not entirely beyond reproach.

The practicable approach in our circumstances, which I put forward as a necessary improvement to the draft Amendment Bill is to provide that the CJ and the DCJ be appointed by the President with the approval of the National Assembly. The people choose the President. The people choose members of the National Assembly. The President and the National Assembly must therefore be required by the Constitution to agree on who the head of the third arm of the State, the Judiciary, and his deputy should be. As for the JP I would recommend the Kenyan approach whereby his or her colleagues on the bench choose him or her. This will enhance the separation of power of which as we know Montesquieu, the French philosopher, had this to say:

“Political liberty is to be found only where there is no abuse of power. But constant experience shows that every man invested with power is liable to abuse it and to carry his authority as far as it would go... To prevent this abuse, it is necessary from the nature of things that one power should be a check on another... When the legislative and executive powers are united in the same person or body, there can be no liberty...Again there is no liberty if the judicial power is not separated from the legislative and executive... There would be an end of everything if the same person or body whether of the nobles or of the people, were to exercise all three powers.”

I thank you.

Justice M H Chinhengo (former Judge)

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**Foreign Investor Protection in Zimbabwe**  
**The "Principle of Non-Discrimination" and Foreign Investor Protection:**  
**A Zimbabwean Perspective**

**By**  
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**and**  
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The World Trade Organisation (WTO) is the body that regulates international rules of trade. Its role is to:

“Facilitate international trade in goods by progressively reducing and, in many cases, eliminating national governmental measures that are restrictive of trade, which traditionally almost always meant import-restrictive measures.”<sup>3</sup>

Zimbabwe has been a member of WTO since 5 March 1995 and a member of GATT since 11 July 1948. Zimbabwe forms part of the 162 member nations to the WTO.<sup>4</sup> The WTO consists of a number of agreements that have been recognized and signed by the bulk of trading countries across the world. The purpose of the WTO is to provide the legal ground rules for international commerce that will facilitate the smooth operation of international trade.

The agreement that established the WTO<sup>5</sup> (Marrakech Agreement) succinctly states in its preamble that one of the main objectives of the WTO is the “substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations.”<sup>6</sup>

The agreements established by the WTO are designed to achieve the objectives outlined in the WTO agreement. In line with this, the WTO has developed standards or principles that are deeply rooted in the desire to meet trade goals. The binding nature of WTO agreements on its member States is expounded in Article II of the Marrakesh Agreement. It states,

“The WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement.<sup>7</sup> The agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as “Multilateral Trade Agreements”) are integral parts of this Agreement, binding on all Members.<sup>8</sup> The agreements and associated legal instruments included in Annex 4 (hereinafter referred to as “Plurilateral Trade Agreements”) are also part of this Agreement for those Members that have accepted them, and are binding on those

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<sup>1</sup> LLB (Hons), LLM, LLD

<sup>2</sup> LLB (Hons), LLM (Imp & Exp)

<sup>3</sup> Desta "GATT/WTO law" 148-191.

<sup>4</sup> WTO *date unknown* [https://www.wto.org/.../the\\_wto.../org6\\_e](https://www.wto.org/.../the_wto.../org6_e).

<sup>5</sup> WTO Agreement: Marrakesh Agreement Establishing the World Trade Organisation (1994) hereinafter called the WTO Agreement.

<sup>6</sup> The WTO Agreement.

<sup>7</sup> A II (1) of the WTO Agreement.

<sup>8</sup> A II (2) of the WTO Agreement.

Members. The Plurilateral Trade Agreements do not create either obligations or rights for Members that have not accepted them.”<sup>9</sup>

The scope of the WTO as stated above is that, by virtue of being a member state to the WTO, the principles and agreements that are comprised therein are legally binding on such member states. As aforementioned, exclusions will in certain instances be made to member states who have not signed particular agreements. These agreements and principles are what comprise the WTO law. This law is taken to be binding on WTO member states.

With this in mind, central to the WTO law has been the principle of "non-discrimination". The non-discrimination principle is captured in the General Agreement on Tariffs and Trade (GATT),<sup>10</sup> the Agreement on Trade-Related Aspects of Intellectual Property Rights<sup>11</sup> (TRIPS) and the General Agreement on Trade and Services<sup>12</sup> (GATS). This principle is designed to ensure that investments shall not be impaired by arbitrary or discriminatory measures adopted by a State, such that they hinder or prohibit the flow of trade.<sup>13</sup> This concept is the crux of the principle of non-discrimination.

The WTO explicitly qualifies the principle of non-discrimination as comprising of the most favoured nation (MFN) treatment obligation<sup>14</sup> and the national treatment (NT) obligation.<sup>15</sup> However, as a closer examination will show, the principle of non-discrimination has developed such that it is broader in its application and is not necessarily limited to these two factors.

The most favoured nation principle can be explained as follows:

The most favoured nation treatment, [enables] the nationals of the [contracting] parties to profit from favourable treatment that may be given to nationals of third states by either contracting state.<sup>16</sup>

In essence, where favourable treatment is extended to one state by way of its citizens who engage in the trade of goods, citizens of a third state engaging in trade of goods are entitled to claim the same treatment. The most favoured nation treatment obligation under the non-

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<sup>9</sup> A II (3) of the WTO Agreement.

<sup>10</sup> A 1 and 3 of the GATT, A 1 makes provisions for the MFN treatment obligation and A 3 makes provision for the NT obligation

<sup>11</sup> A 3 and 4 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (1994) hereinafter called TRIPS, A 3 provides for the NT obligation in intellectual property and A 4 provides for the MFN treatment obligation in intellectual property.

<sup>12</sup> A 2 and 17 of the General Agreement on Trade in Services (1994) hereinafter called GATS. A 2 provides for the MFN treatment obligation in trade of services and A 17 provides for the NT obligation in the trade of services.

<sup>13</sup> Dolzer and Schreuer *Principles of International Investment Law*

<sup>14</sup> A 1 of the GATT states "any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties." The provision is specific to products in the context of international trade which is not necessarily the same as investment.

<sup>15</sup> A 3 of the GATT states "the products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use." The GATT states the NT obligation in the context of products.

<sup>16</sup> Sonorajah *The International Law on Foreign Investment* 236.

discrimination principle simply put, is "how a state deals with foreign goods and persons when they enter its territory and thereafter."<sup>17</sup>

The national treatment obligation also "entitles the foreign investor to be treated equally with national entrepreneurs."<sup>18</sup> At its heart and over the course of time, the national treatment obligation has been seen as providing "a level playing field between the foreign investor and the local competitor."<sup>19</sup> In general terms, the national treatment principle encourages that a foreign investor and his investments are "accorded treatment no less favourable than that which the host state accords to its own investors."<sup>20</sup> It is evident that the alternate treatment obligations work in complementing each other in preventing discrimination in the field of international trade.

As this discussion will revolve around concepts of trade in goods and services and investment, there is a need to define these terms. The concept of trade in goods and services can be defined as,

"The supply of [goods and services] from one Member country to another, within one Member country to service consumers of any other, that is, to foreigners, and in another Member country through either 'commercial presence,' that is legal presence in the form of subsidiaries, branches, or agencies, or through the 'presence of natural persons.'"<sup>21</sup>

On the other hand, investment may be defined as,

"The transfer of tangible or intangible assets from one country to another for the purpose of their use in that country to generate wealth under the total or partial control of the owner of the assets."<sup>22</sup>

The concept of trade in goods and services is as specific as its name sounds. It deals with the trade or exchange of various goods and services for profit between States. Investment, on the other hand involves concepts of the transfer of tangible and intangible assets for profit which is broad in its scope. Essentially,

"International trade and investment are bound at the hip. When businesses trade internationally, goods or services cross borders; when they invest, it is capital and other factors of production that do so."<sup>23</sup>

As stated under Article II of the WTO agreement, Zimbabwe, by virtue of being a member state to the WTO has agreed to be bound by the law and principles of the WTO. This means that Zimbabwe is obliged to observe the non-discrimination principle in its entirety.<sup>24</sup>

Whilst the WTO is predominantly focused on trade in goods, it has taken seriously the need to eliminate discrimination in both international trade and investment. This is due to the fact that "investment is generally supportive or complementary to trade."<sup>25</sup> It is true to say that,

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<sup>17</sup> Acconci "Most-Favoured-Nation Treatment" 363-406.

<sup>18</sup> Sornarajah *The International Law on Foreign Investment* 336.

<sup>19</sup> Dolzer and Schreuer *Principles of International Investment Law* 198.

<sup>20</sup> Dolzer and Schreuer *Ibid* at 198.

<sup>21</sup> Muchlinski, Ortino and Schreuer *International Investment Law* 192.

<sup>22</sup> Sornarajah *The International Law on Foreign Investments* 8.

<sup>23</sup> DiMascio and Pauwelyn 2008 *AJIL* 48.

<sup>24</sup> A II of the WTO Agreement states "The agreements and associated legal instruments (Multilateral Trade agreements) are integral parts of this agreement, binding on all members." As a member of the WTO, South Africa is bound by WTO law.

“Investment needs a predictable, transparent, and non-discriminatory business climate. A balanced framework of rules on FDI would be in the interests of all countries. This is especially true of the developing countries, for which a rules-based system would increase the opportunities to attract investment and make domestic reforms more credible.”<sup>26</sup>

Essentially, "eliminating barriers to foreign direct investment (FDI) is a means of achieving global market integration [and ultimately] increased trade in goods."<sup>27</sup> More simply put, trade barriers erected through discriminatory practices or legislation "may affect FDI growth, or FDI measures may restrict or distort trade."<sup>28</sup> Furthermore, the legal and regulatory framework applicable to investments is essential to trade as it ought to foster "equal competitive opportunities between nations."<sup>29</sup> A thriving investment regime leads to a healthy trade system, which is encouraged and facilitated by Foreign Direct Investment (FDI). "The WTO is aware of the link between trade and FDI and the dynamic effects of FDI on trade,"<sup>30</sup> and it is within this sphere that the principle of non-discrimination is most relevant and operational.

“To ignore the need to remove barriers to trade in the form of discriminatory practices would ultimately lead to the standstill of international trade and the WTO has made clear that such practices are intolerable within the framework of its member states.”<sup>31</sup>

In order for Zimbabwe to attract foreign direct investment, it is essential to assess whether or not adequate regulatory protection is afforded foreign investors. To invest, foreign investors need reassurance that there will be a fair and non-discriminatory framework in terms of their investments within Zimbabwe.

The WTO is an international organization that has "successfully encouraged multilateral trade liberalization,"<sup>32</sup> between its member states. This is largely due to its dedicated effort to remove international barriers to trade which may take on various forms. Barriers to trade have always posed the greatest threat to international trade. Realising this risk, the WTO, from its inception as the GATT to its transition to the WTO, took and has continued to take various measures that serve to facilitate trade. Among the greatest barriers to trade have been discriminatory practices between states in conducting trade. The WTO being aware of this has established the non-discrimination principle as a fundamental principle to the facilitation of trade.

The WTO operates through various agreements formulated between itself and member states.<sup>33</sup> These agreements make up the WTO law. These agreements are formulated to facilitate trade and are constructed so as to remain within the ambit of the fundamental principles upon which the agreement establishing the WTO is built. The Marrakesh Agreement which established the

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<sup>25</sup> WTO Report (1998) of the Working Group on the Relationship between Trade and Investment to the General Council.

<sup>26</sup> OECD date unknown <https://www.oecd-library.org/foreign-direct->

<sup>27</sup> Gordon 2001 <https://www.unctad.org/en/docs/pogdsmdpbpg24d9.en.pdf>.

<sup>28</sup> Hai-Qing The Relationship between Trade and FDI and the Implications for the WTO 11.

<sup>29</sup> OECD 2004 <https://dx.doi.org/10.1787/518757021651>.

<sup>30</sup> Hai-Qing The Relationship between Trade and FDI and the Implications for the WTO 11.

<sup>31</sup> The preamble to the WTO agreement states that the WTO is desirous of reduction of tariffs and other barriers to trade and the elimination of discriminatory treatment in international trade relations.

<sup>32</sup> Bagwell and Staiger 2004 *JIE* 1.

<sup>33</sup> In terms of the WTO agreements relating to the principle of non-discrimination in trade and investment the main agreements to focus on are the GATT (Article 1 and 3), the GATS (Article 2 and 17) and TRIPS (Article 3 and 4).

WTO entrenches the fundamental principle of non-discrimination in its preamble. It aptly states that the WTO and its member states are:

“...desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations, practices essential between trading states.”

All measures, strategies and policies concerning trade are cognisant of the founding principle of non-discrimination." Non-discrimination is a fundamental principle [to] the world trading system."<sup>34</sup> It has been acknowledged by WTO Ministers as being an "important element in securing" transparent, stable and predictable conditions for long-term investment...and will contribute to the expansion of trade.<sup>35</sup>

The principle of non-discrimination as encapsulated within the WTO law is wide and varying. The WTO singles out two treatment obligations in relation to it, namely, the Most-Favoured Nation obligation (MFN) and the National Treatment (NT) obligation which are found in various sources within the WTO law.<sup>36</sup> The MFN and NT obligations are applied in various forms, dependant on the context in which they are used. Regard is also had to the particular agreement or clause to which each or both obligations are considered necessary or relevant. However, the principle of non-discrimination has developed over the years to become much broader than the MFN and NT obligations and this development will be further discussed so as to attain a holistic understanding of the principle of non-discrimination.

This discussion will begin with a consideration of the MFN treatment obligation and NT obligation respectively. Thereafter, there will be a discussion concerning the development of the non-discrimination principle as it pertains to trade and investment. Ultimately, this approach will allow for an informed conclusion.

Based on the definition of the Most Favoured Nation treatment obligation found in the GATT,<sup>37</sup> the MFN treatment obligation is accorded by the:

Granting state to the beneficiary state, or to persons or things in a determined relationship with that State, not less favourable than treatment extended by the granting State to a third state or to persons or things in the same relationship with that third State.<sup>38</sup>

The MFN treatment obligation creates rights and obligations not only on the host country, but also on the States contracting with the host country. Consequently all WTO members have the right to expect equal advantage, favour, privilege and immunity of their products as is accorded

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<sup>34</sup> Qin 2005 *BUILJ* 216.

<sup>35</sup> WTO Report (1998) of the Working Group on the Relationship between Trade and Investment to the General Council.

<sup>36</sup> MFN provisions are found in A 1 of the GATT, A 2 of the GATS (General Agreement on Trade in Services) and A 4 of the TRIPS (Agreement on Trade-Related Aspects of Intellectual Property Rights). NT provisions are found in three main WTO agreements, being, A 3 of the GATT, A 17 of the GATS and A 3 of TRIPS.

<sup>37</sup> A 1 of the GATT states that "Any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

<sup>38</sup> International Law Commission 2015

[https://untreaty.un.org/ilc/texts/instruments/English/draft%20articles/1\\_3\\_1978.pdf](https://untreaty.un.org/ilc/texts/instruments/English/draft%20articles/1_3_1978.pdf).

to the most favourable or “strongest” of contracting states within the State that they are trading in.

All WTO members have the right to demand immediate and unconditional equal advantage, favour, privilege and immunity where they become aware of such treatment being extended to a contracting state with a WTO member state.

Flowing from the aforementioned rights are similar obligations that attach to WTO member states.

Member states to the WTO are under a binding obligation to observe the MFN principle as established in Article 1 of the GATT. Therefore where a member state is extending favourable treatment in any way, shape or form to the like product of a contracting state it is under a duty to extend that favourable treatment to all other member states contracting with it. To fail to do so would be to breach an undertaking by that state in terms of the WTO/GATT.

The “simple goal of [the] MFN is to ensure that the relevant parties treat each other in a manner at least as favourable as they treat third parties.”<sup>39</sup> When a country becomes a member of the WTO by process of accession,<sup>40</sup> the country is bound by the rules and obligations as set out under the WTO law. This obligates it to observe the MFN treatment obligation.<sup>41</sup>

It is important to note that the MFN treatment obligation as embodied under the WTO generally refers to the treatment of “goods” in trade.<sup>42</sup> It is trite that states are free to enter into trade agreements or treaties with other states.<sup>43</sup> Within these treaties or agreements the incorporation of treatment standards, particularly the MFN treatment obligation is generally seen as “promoting the flow of foreign investment.”<sup>44</sup> Therefore, it is correct to say, the intended effect of the MFN obligation, clearly, is to create equal and uniform treatment in the trade of goods as well as within the investment arena, particularly to all investors operating in a host country.<sup>45</sup> As this discussion evolves around the WTO law, it is necessary to state the definitions accorded the MFN treatment obligation by the key agreements and provisions within the WTO law.

Under the GATT as incorporated and annexed into WTO law, the MFN obligation is provided for in three important articles. Article 1:1 of the GATT provides for the instances in which the MFN obligation ought to be extended. Article 1:1 highlights that the MFN treatment ought to be extended to all WTO members. The MFN treatment, in terms of trade of goods, is to be extended to all ‘like’ products of members. Furthermore, the MFN treatment is taken to incorporate all regulations on imports and exports, tariffs, internal charges and taxes as well as internal regulations.

Any violation of this treatment obligation by an importing country that is a member of the WTO is an infringement of its duty under the WTO law. The concept of equal treatment of ‘like’ products

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<sup>39</sup> Dolzer and Schreuer *Principles of International Investment Law* 206.

<sup>40</sup> Article XII of the WTO Agreement states that accession to the WTO will be “on terms to be agreed” between the acceding government and the WTO. Accession to the WTO is essentially a process of negotiation (2016) [https://www.wto.org/acc\\_e/acces\\_e](https://www.wto.org/acc_e/acces_e).

<sup>41</sup> According to A 2 (2) of the Marrakesh agreement, members to the WTO agree to be bound by the Multilateral Trade Agreements of the WTO which include the GATT. Provisions on the MFN treatment obligation are found in A 1 of the GATT, A 2 of the GATS and A 4 of the TRIPS.

<sup>42</sup> A 1:1 of the GATT.

<sup>43</sup> Sornorajah *The International Law on Foreign Investment* 172.

<sup>44</sup> Sornorajah *Ibid* at 172.

<sup>45</sup> Muchlinski, Ortino and Schreuer *International Investment Law* 381.

has always been prone to much debate. However in the *BISD (Basic Instruments and Selected Documents)* 28S/102 Spain case, the facts and findings of the WTO tribunal were as follows:

“Departing from the practice of most countries, Spain had introduced different tariff rates on different kinds of unroasted, non-decaffeinated coffee beans. The panel's first conclusion in assessing most-favoured nation treatment was that the various types should be regarded as "like products". The panel then noted that Brazil mainly exported to Spain the types falling within the higher duty category and concluded that the new Spanish tariff scheme discriminated against unroasted coffee originating in Brazil.”<sup>46</sup>

It was established that *de facto* discrimination existed where products that ordinarily were considered as "like" were classified under different tariff headings and ultimately had a discriminatory effect on the investing states in terms of the duty applied. This case serves as an example of the different forms in which discriminatory practices may be perpetrated. It has been said that this case is noteworthy because,

“The panel did not merely conclude that Spain failed to extend the more advantageous treatment to the more highly burdened sub-categories within the like products. Instead, the panel established a link between the disfavoured types and their predominant presence among goods originating in Brazil. On that basis the panel labelled the treatment of the entire group of unroasted coffee beans as discriminatory.”<sup>47</sup>

The point to draw from this case is that the considerations placed upon the MFN treatment obligation extend to "discriminatory impact" or effect on member states.

Another commonality established by the aforementioned case is that the MFN treatment obligation is applicable to investment in much the same way that it is applicable to trade. This can be inferred from the fact that export of coffee beans for profit can be considered a form of investment.<sup>48</sup> It is clear and has been stated that the concept of non-discrimination has "emerged as a specific trait of international trade regulation and the protection of foreign direct investment.”<sup>49</sup>

In the matter of *Canada-Certain Measures Affecting the Automotive Industry*,<sup>50</sup> a dispute arose as to Canada's import duty exemption for imports by certain manufacturers. The panel found that,

“The duty exemption was inconsistent with the most-favoured-nation treatment obligation under Art. I:1 on the ground that Art. I:1 covers not only *de jure* but also *de facto* discrimination and that the duty exemption at issue in reality was given only to the imports from a small number of countries in which an exporter was affiliated with eligible Canadian manufacturers/importers.”<sup>51</sup>

The findings by the panel confirm and support that *de facto* discrimination is recognised in terms of the GATT and falls under the MFN treatment obligation

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<sup>46</sup> Panel Report, *Spain-Tariff treatment of unroasted coffee* (11 June 1981) BISD28S/102 paras 4.5, 4.9 and 4.10.

<sup>47</sup> Author unknown 1996 <https://jeanmonnetprogram.org/archive/papers>.

<sup>48</sup> Watson and Achinelli 2008 *GJ 1-Brazil* has established itself as a coffee exporting country whose coffee producers invest in the export and marketing of their coffee for profit.

<sup>49</sup> Cottier and Oesch 2011 *NCCR 2*.

<sup>50</sup> *Canada-Certain Measures Affecting the Automotive Industry* 2013 WT/DS412/AB/R.

<sup>51</sup> *Canada-Certain Measures Affecting the Automotive Industry* 2013 WT/DS412/AB/R.

The application and management of *de facto* discrimination is essential to the operation of the MFN treatment obligation in that it directly attributes to the prohibition of "protectionism and ensures equal treatment" of all stakeholders. By observing this, there is an assurance of continued stability and confidence in the trade and process.

Article XIII of the GATT makes provision for Non-Discriminatory Administration of Quantitative Restrictions. In essence, this article provides for instances in which quantitative restrictions or tariff quotas are applied to like products. The provision states that these measures may be instituted but only in as far as they are non-discriminatory. No particular definition or scope is set out however as to what non-discriminatory in this context entails. This article may be read as complementary to the MFN treatment as set out in Article 1 of the GATT. It provides specific instances in which the MFN treatment ought to be applied.

Article XVII of the GATT provides for "States Trading Enterprises." State trading enterprises are "defined as governmental and non-governmental enterprises, including marketing boards, which deal with goods for export and/or import."<sup>52</sup> The working definition of State Trading Enterprises as established by the WTO comes in three parts. State enterprises (owned by the state), enterprises granted special privileges by the State (e.g. a subsidy or its equivalent) and enterprises granted exclusive privileges (monopolies in production, consumption or trade of particular goods). The definition extended by Article XVII of the GATT appears monopolistic in its nature as the operation of state trading enterprises seemingly hinges on the sole discretion of the State. However, the concern that arises, is whether discriminatory practices can be justified in instances where the trading or investing party does not fall under the definition of a state trading enterprise. Essentially, provisions such as these may undermine both trade and investment. By so doing, it can directly impact economic intergration as between foreign and domestic players. Article XVII takes cognisance of this however and makes it obligatory for such enterprises to operate within the ambit of the non-discrimination principle which comprises of the MFN treatment obligation so as to prevent the abuse of this provision.

The most detailed provisions on the MFN treatment obligation are found in the GATT as it primarily deals with trade. It must however be mentioned that the MFN treatment obligation has been extended into other areas through other agreements in the WTO. Trade related aspects under the WTO are also found in the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). In both the GATS and the TRIPS there has been the inclusion of MFN treatment obligation. The MFN treatment obligation has been extended to services and service providers as stated in Article II of the GATS,

Each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than it accords to like services and service suppliers of any other country.

Likewise, the MFN treatment obligation has also been extended to intellectual property rights as enshrined in Article 4 of the TRIPS. It states:

With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members.

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<sup>52</sup> WTO date unknown [https://www.wto.org/english/.../statra\\_e.htm](https://www.wto.org/english/.../statra_e.htm).

While both these agreements make provisions for the MFN treatment obligation they are no different from the GATT as they also make provisions for specific exceptions to the MFN rule. These will however not be discussed here.

The MFN treatment obligation as discussed is clearly intended to ensure a uniform standard of treatment of parties engaged in trade (treaty States) by a host or contracting state. The MFN treatment obligation under the GATT relies heavily on the MFN treatment only being applicable to "like" products. It is suggested that this critical aspect to the MFN treatment obligation creates a possible loophole which begs the question "Is discrimination acceptable in cases where products are deemed to be unlike?"<sup>53</sup> If the MFN treatment obligation is designed to ensure progressive liberalization and promotion of trade and investment there is need to seriously consider the implications of what the term "like" entails as it is at best vague.<sup>54</sup>

Having said that, the MFN principle is useful in that it is applicable to matters such as market access, performance requirements and the right of establishment.<sup>55</sup> It also works hand in hand with the National Treatment obligation which further elaborates on the operation of the non-discrimination principle as well as the MFN treatment obligation and how all three components work together in the pursuit of foreign trade protection.

National treatment works hand in hand with the MFN treatment obligation in order to fulfil and make effective the principle of non-discrimination. Like the MFN treatment obligation, provisions for the national treatment obligation are found in all three of the WTO main agreements, these being the GATT, GATS and TRIPS.

National treatment under the GATT can be looked at in two sections, firstly, that:

"Internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production..."<sup>56</sup>

Furthermore:

"The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use."<sup>57</sup>

The national treatment obligation in essence is not much unlike the MFN obligation. It contains the "like" requirement which is designed to prevent discrimination between imported products and those produced locally. However it is important to state that the operation of the NT obligation does not preclude taxes or levies at the border. The NT obligation "only applies once a product, service or item of intellectual property has entered the market."<sup>58</sup>

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<sup>53</sup> Herrmann and Terhechte 2011 *EYIEL* 181.

<sup>54</sup> Muchlinski, Ortino and Schreuer *International Investment Law* 368.

<sup>55</sup> UNCTAD 2010 [https:// unctad.org/.../diae](https://unctad.org/.../diae).

<sup>56</sup> A III: 1 of the GATT.

<sup>57</sup> A III: 4 of the GATT.

<sup>58</sup> WTO date unknown [https://www.wto.org>tif\\_e>fact2\\_e](https://www.wto.org>tif_e>fact2_e).

Article XVII of the GATS, as with the MFN treatment obligation, extends the National Treatment obligation to services and service providers. Article 3 of the TRIPS agreement also extends the National treatment obligation to the protection of intellectual property rights. Essentially all foreign services and service providers in a host State are to be treated equally with those of nationals of that State. The same applies to intellectual property rights.

The NT obligation effectively addresses possible "hidden" barriers to trade that may be erected through measures such as inflated domestic consumption tax. The treatment obligation compels members to treat "like" imported products no less favourably than those which are of national origin. It places national and imported products on a level playing field. By so doing, a stable environment is created for trade which positively impacts investment as a stable trade regime to encourage investment. This principle is extremely important as several rights and obligations can be taken to flow from it which directly impact trade and investment.

This treatment obligation has been framed as follows under the GATT:

"The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product."<sup>59</sup>

The rights that flow from the NT obligation are predominantly vested in the state contracting with the host nation. The contracting state has a right to equal treatment in terms of the laws, regulations and requirements that pertain to the sale of products within the host nation, presuming that such products have originated from within the host nation.

A contracting state has the right to demand equal treatment between itself and the nationals of a host state with regards the laws, regulations and requirements of trade goods originating from within the host state where the host state is failing to extend such treatment to the foreign trading state or person.

The obligations that arise from the NT obligation predominantly falls on the host state. A WTO member state has the obligation to ensure that the like products between foreign trading entities and local traders are treated equally in terms of regulations, laws and requirements that relate to the sale of such products in the host state. In this manner there is a lessening of the risk of discriminatory practices in trade that may lead to the decrease of international trade and investments.

The national treatment obligation may be viewed as a minimum standard of treatment that must be accorded to all foreign traders and their products.<sup>60</sup> The obligation essentially stipulates that treatment which is accorded to nationals of a State must be equally accorded to foreign traders and their products. It has been said that the advantages of national treatment in modern times are invaluable as "states reserve many of their economic sectors and privileges to their nationals." The national treatment obligation encourages foreign investment as it assures the

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<sup>59</sup> A 3 (4) of the GATT.

<sup>60</sup> *Pope and Talbot v Canada* (2001) Awarded on the Merits 9.

foreign trader or foreign trading state of uniform and equal application of the law and regulations as they pertain to the treatment that will be extended to them as well as their products.

An important consideration to be made as mentioned earlier is the rights and obligations that stem and flow from the national treatment obligation. First, it places the products of foreign traders and local products on a par, but what is probably most important is that:

“National Treatment at the stage of entry is regarded as an important right, as it entitles the foreign investor to a right of entry and establishment. The granting of national treatment after entry may confer advantages on aliens, as it will grant them the same privileges enjoyed by nationals.”<sup>61</sup>

This will however be discussed at a later stage.

Essentially, the NT obligation is an important tool in promoting trade and investment within and between states.

The NT obligation when applied correctly is designed to ensure that a foreign entity engaging in the trade of goods and products and a domestic entity engaged in the same activity are treated in the same manner, in terms of the laws and regulations applicable to them. Where this balance is disturbed a situation is created whereby a country may find itself suffering from a lack of foreign direct investment as there is a correlation between the observance of treatment standards and foreign direct investment.<sup>62</sup> This correlation is founded on the notion that foreign investors require a guarantee of uniform and fair treatment in order to invest outside of their borders.<sup>63</sup>

Having considered the principle of non-discrimination under the provisions of the WTO, it becomes necessary to consider the non-discrimination principle outside the limitations of the MFN and NT obligation as encapsulated in the GATT.

The WTO is not mandated as the regulatory body of investment law, however, that is not to say the operation of the principle of non-discrimination is limited to trade of goods. It has been rightly observed that,

“Trade in goods, trade in services, and foreign direct investment are distinct forms of economic activity. All are liable to benefit from creating an environment that is “non-discriminatory.”<sup>64</sup>

The observance and development of the principle of non-discrimination in trade can be tracked in terms of WTO law. In terms of investment, the “definition and application of the concept of non-discrimination involves a range of policy considerations.”<sup>65</sup> Amongst the most important policy considerations to creating an attractive investment environment is the creation of a system of “transparency and protection.”<sup>66</sup> This entails observing the non-discrimination principle in investment.<sup>67</sup>

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<sup>61</sup> Sornorajah *The International Law on Foreign Investment* 335.

<sup>62</sup> Cottier and Oesch 2011 *NCCR*.

<sup>63</sup> Cottier and Oesch *Ibid*.

<sup>64</sup> OECD 2002 <https://www.oecd>.

<sup>65</sup> OECD 2002 <https://www.oecd>.

<sup>66</sup> OECD 2006 <https://www.oecd>.

<sup>67</sup> UNCTAD 1992 <https://www.unctad.org>>PublicationChapters.

The definition of non-discrimination in investment is similar to that used in the WTO. It "provides that all investors, both foreign and domestic, are [to be] treated equally."<sup>68</sup> Furthermore, the MFN treatment obligation and NT obligation are not isolated to trade of goods but are applied similarly in investment.

The MFN treatment obligation is a useful tool in the protection of foreign investors against non-commercial risks that could deter foreign investors from investing in host states.<sup>69</sup> This is because the MFN treatment obligation under investment law operates in much the same way as it does under trade law. In investment, an investor from a party to an agreement, or its investment, would be treated by the other party "no less favourably" with respect to a given subject-matter, than an investor from any third country, or its investments.<sup>70</sup> The NT obligation with regards to investment, stipulates that a foreign investor must be accorded treatment "no less favourable than that which the host state accords to its own investors."<sup>71</sup> The wording and operation of the NT obligation in both trade and investment are similar and may be seen as complimentary to each other in terms of their operation.

Therefore, it is reasonable to consider aspects of non-discrimination in trade as being relevant to cases of investment and *vice versa*.

The WTO states that the MFN treatment obligation and NT obligation form the non-discrimination principle. However,

"It is well established that non-discrimination not only prohibits measures which differentiate directly – or *de jure*, but also indirectly – or *de facto* – discriminatory measures."<sup>72</sup>

*De jure* discrimination and *de facto* discrimination can be distinguished on the following grounds. *De jure* discrimination can be defined as "*discrimination in law*" or "*explicit*" "*overt*" or "*formal*" discrimination<sup>73</sup> and *de facto* discrimination has been described in the following manner:

"The meaning of *de facto* discrimination appears to be close to that of implicit discrimination in that it is based on practice rather than a legislative requirement. The term of *de facto* discrimination was firstly used in the report by the WTO Appellate Body in the 1996 banana panel decision.<sup>74</sup> The Appellate Body contrasted *de facto* discrimination with *de-jure*, or formal, discrimination."<sup>75</sup>

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<sup>68</sup> OECD 2006 <https://www.oecd>.

<sup>69</sup> OECD 2006 <https://www.oecd>.

<sup>70</sup> OECD 2004 <https://www.oecd.org>investmentpolicy>.

<sup>71</sup> OECD 2005 <https://www.oecd.org/.../>.

<sup>72</sup> Diebold 2010 *ILLJ* 2.

<sup>73</sup> Ortino "WTO Jurisprudence on De Jure and De Facto Discrimination" 217 – 262.

<sup>74</sup> *EU Communities-Regime for the Importation, Sale and Distribution of Bananas* 1996 WT/ds 27/ab/r - The complainants (Ecuador, Guatemala, Honduras, Mexico and the United States of America) alleged that the EU communities' regime for importation, sale and distribution of bananas was inconsistent with Article I on non-discrimination and MFN and Article III.4 on national treatment in the GATT (1994). The Panel found that the EU's regime for the importation, sale and distribution of bananas was indeed inconsistent with the GATT on the grounds that it was discriminatory in its effect. In its *obiter dictum*, the panel stated "Articles I and II of the GATT have been applied, in past practices to measures involving *de facto* discrimination.

<sup>75</sup> Goode *Dictionary of Trade Policy Terms* 119.

In light of this, the non-discrimination principle may be confined to a narrow legal definitive interpretation (*de jure*) or it may be subject to a wider and more sweeping definition (*de facto*) that includes the practical application and implication of certain trade and investment measures that override or undermine the spirit behind the non-discrimination principle.<sup>76</sup>

As a starting point, there is a need to state and acknowledge that international law is "based on the principle of sovereign equality of states."<sup>77</sup> Sovereign equality may be construed to mean,

"All states [are] equal Members of the international community, notwithstanding differences of economic, social or political characteristics, or of any other kind."<sup>78</sup>

Essentially such equality extends to the legal status of every state at an international level. However,

"It does not entail equal treatment in terms of treaty relations and policies. Indeed, sovereignty entitles states to discriminate among their peers and to prefer some over others in unilateral policies and bilateral relations. Equally, it has been the *raison d'être* of nation states to protect and thus to privilege their own citizens and domestic products within their jurisdiction."<sup>79</sup>

The significance of the principle of non-discrimination as encapsulated under WTO law is clear when contrasted against the nature of state sovereignty under international law and the way in which it may be exploited with regards to international trade. It essentially provides an equal standard of protection and uniformity to aspects of trade that may otherwise be abused to create technical barriers to trade which ultimately the WTO is seeking to disperse with altogether.<sup>80</sup>

The advent of the formation of the WTO has been significant in that:

"... Governments [have] agreed to contractually limit their sovereign rights to discriminate and to meet the obligations of equal treatment, thus implementing the principles of substantive equality in international relations."<sup>81</sup>

The principle of non-discrimination has been said to have been created specifically to inhibit protectionism and ensure equal treatment in international investment law.<sup>82</sup>

Non-discrimination and its limitation of sovereign powers to engage in policies privileging one state over another, emanates from the principle of equality.<sup>83</sup> The notion of equality being, "equals must be treated on equal terms." In relation to the WTO, this concept of equality is reflected within the non-discrimination principle as the prohibition of distinction based on nationality or the origin of trade goods. The non-discrimination principle essentially creates and

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<sup>76</sup> Rihova *The Evolution of the Non-Discrimination Principle in International Trade* 28.

<sup>77</sup> Brownlie *Principles of Public International Law* 289.

<sup>78</sup> See, e.g., Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United States, G.A. Resolution 2625 (XXV), 24 United Nations Year Book (1970), 788.

<sup>79</sup> Schwarzenberger 'Equality and Discrimination' 163.

<sup>80</sup> The preamble to the *Agreement Establishing the World Trade Organization* (Marrakesh Agreement) explicitly states that it is *desirous* of contributing to these objectives by entering into reciprocal and *mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations* (italics my own).

<sup>81</sup> Cottier and Oesch 2011 *NCCR*.

<sup>82</sup> Cottier and Oesch 2011 *NCCR*.

<sup>83</sup> Cottier and Oesch 2011 *NCCR*.

establishes an environment of equal competition in trade. The operation of the WTOs non-discrimination principle and its effect has been neatly summed up in the following statement:

“Non-discrimination does not guarantee results and outcomes, but rather the potential to operate successfully on markets on equal terms and unimpaired by unfair restrictions imposed either by governments or private actors. Equality of opportunity looks at real conditions of competition and does not stop at legal discrimination. It entails direct/legal as well as indirect/*de facto* discrimination.”<sup>84</sup>

A *de jure* interpretation of the principle of non-discrimination may lead to the very thing which the principle seeks to avoid, namely it may create an environment that stifles equal opportunity and competition. This may happen due to the fact that in practice, states may employ a variety of exceptions and mechanisms that effectively undermine the operation of the non-discrimination principle.<sup>85</sup> This point has been acknowledged in a number of instances. For example, the MFN treatment obligation as well as the NT obligation operates from a basis of non-discrimination between 'like products.'<sup>86</sup> This "comparative system" may easily be used in order to propagate discriminatory practices. However as acknowledged and acted upon in *Occidental v Ecuador*,<sup>87</sup> the tribunal opted to disregard a construction that would have limited the matter to a comparison of the same (like) economic sector or activity and ultimately would have had a discriminatory effect on the matter. Instead, the tribunal opted to interpret and decide the matter based on the effect of a *de jure* application of the law. It has been said that,

“Tribunals generally favour an objective approach that looks at the consequences of a particular measure and not at discriminatory intent.”<sup>88</sup>

This statement can be seen as the basis upon which the broader principle of non-discrimination is based. It embraces the notion of *de facto* discrimination as a part of the non-discrimination principle.

In the case of *Japan-Alcohol*,<sup>89</sup> the Panel had to decide whether discrimination existed under the GATT Article III (2). In its consideration of the question, the panel acknowledged that a claim of *de facto* discrimination would require an examination of the "the design, the architecture and the revealing structure" of a measure. Furthermore, the Panel in the *Bananas*<sup>90</sup> case had to decide whether Article II (1) of the GATS applied only to *de jure* (formal) discrimination or whether it also applied to *de facto* (material) discrimination. The panel confirmed and stated that the provision would be applicable to both *de jure* and *de facto* discrimination. The purpose of the aforementioned cases is to establish that the non-discrimination principle has developed over the years to include *de facto* discrimination. Furthermore, that *de jure* and *de facto* discrimination are distinguishable from each other is evident from the discussed cases.

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<sup>84</sup> Cambridge 2013 <https://www.cambridge.org/...trade.../liberalising>.

<sup>85</sup> Rihova *The Evolution of the Non-Discrimination Principle in International Trade* 8.

<sup>86</sup> See A1(1) and A3 (40 of the GATT (1986).

<sup>87</sup> *Occidental v Ecuador* (Award) 2004, the tribunal found the practice of "like products" within the GATT/WTO as not pertinent.

<sup>88</sup> *Myers v Canada* 2000 Award on Liability paras 252-4.

<sup>89</sup> *Japan – Taxes on Alcohol Beverages*, WT/DS28, DS10, DS11, adopted 1 November 1996.

<sup>90</sup> *European Communities – Regime for the Importation, Sale and Distribution of Bananas III*, WT/DS27, adopted 25 September 1997.

With this in mind, it is only appropriate that the approach adopted in this discussion will not be limited in scope to non-discrimination as it applies to the MFN and NT obligation but rather to trade and consequently investment as a whole. This is in recognition of the fact that the non-discrimination principle is not limited to the legal definition accorded it in the relevant provisions of WTO law but also encompasses *de facto* discrimination that goes against the inherent nature of the non-discrimination principle which is to protect foreign persons and their merchandise from disadvantages in foreign markets.<sup>91</sup>

As previously stated, the non-discrimination principle aims to level the playing field between foreign and domestic investors in the field of trade. This has been pursued by member states through a variety of regulatory approaches (which shall be considered here) aimed at balancing sovereign regulatory powers with the inherent goals of non-discrimination. "Discrimination is essentially addressed and removed by employing positive integration."<sup>92</sup> Examples of such intergration can be drawn from member states to the WTO. The approaches to be considered (that have been taken by member states to the WTO) will be limited to those that directly reflect or have bearing on the current provisions of the Protection of Investment Act.

According to Cottier and Oesch,<sup>93</sup> the principle of non-discrimination is best secured by a transference of regulatory powers to the international law-maker (being the WTO). This would result in "common and uniform rules administrated by the same authority for stakeholders and members alike."<sup>94</sup> The WTO has an adjudicatory body in the form of panels and an Appellate body which only have powers to adjudicate matters as chosen by a member state. This is premised on the fact that such adjudicatory bodies are not supranational in nature and ultimately have no inherent rule-making powers in implementing the law.

Secondly, non-discrimination is secured through the harmonisation of law.<sup>95</sup> Common rules may be established by the WTO, but the member states must ensure compliance with such rules as reflected in their domestic legislation.<sup>96</sup> One may say harmonisation is achieved by virtue of the autonomous application and interpretation of WTO law but that is not always the case.

Lastly, non-discrimination can only be secured where the core rules or regulatory system (domestic law) of a member state is in compliance with the WTO law.<sup>97</sup> Where nations insist on the application of their domestic law, which they are free to create as best suits their needs, there is a danger of creating a governing body of rules that may constitute barriers to trade and ultimately be non-conforming with the spirit of the non-discrimination as provided for under WTO law.

Giving due regard to the various forms in which discrimination may be perpetrated in a *de facto* manner, and acknowledging that discrimination as it pertains to trade and investment law as a whole need not be limited in scope and application to the MFN and NT obligation.<sup>98</sup> This discussion will proceed to consider the regulatory framework applicable investment in Zimbabwe.

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<sup>91</sup> Cottier and Oesch 2011 *NCCR*.

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*

<sup>95</sup> Cottier and Oesch 2011 *NCCR*.

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*

<sup>98</sup> Cambridge 2013 <https://www.cambridge.org/...trade.../liberalising>.

Zimbabwe has several pieces of legislation that are applicable to investment. Namely;

- Constitution of Zimbabwe (No 20) 2013
- Securities Act [*Chapter 24:25*]
- Collective Investment Schemes Act [*Chapter 24:19*]
- Zimbabwe Investment Authority Act [*Chapter 14:30*]

In terms of the Constitution of Zimbabwe<sup>99</sup> which is the supreme source of law in the country, the rights of all people in Zimbabwe is confirmed and founded in the Declaration of Rights.<sup>100</sup> As a starting point, the Constitution establishes equality before the law and confirms equal protection and benefit of the law "to the extent that it is applicable"<sup>101</sup> or "can be appropriately extended." The Constitution further states:

"Every person has the right not to be treated in an unfairly discriminatory manner on such grounds as their nationality, race, and colour."<sup>102</sup>

Whilst the Constitution prevents unfair discrimination on the grounds of nationality, no specific reference is made to the concept of non-discrimination as encapsulated in the MFN or NT obligation. This can be said to create a gap in the law with regards the scope of the principle of non-discrimination.

It goes without saying, that fair administrative treatment is vital to ensuring non-discriminatory application of the law. The principle of non-discrimination as discussed earlier is designed to ensure "a general standard of fair and equitable treatment."<sup>103</sup> To this end, the Constitution provides:

"Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair."<sup>104</sup>

This provision is important in that it guarantees administrative justice in any dispute or issue that may arise with regards investments that fall within the Zimbabwean jurisdiction.

It is interesting to note however, that in each respective legislative instrument aforementioned, there is no express mention of non-discriminatory treatment of foreign investors. This raises a number of concerns which will be discussed below.

An examination of the relevant legislation reveals a number of limitations applicable to the field of investment law that deserve consideration.

In terms of the Constitution,<sup>105</sup>

"Subject to section 72, every person has the right, in any part of Zimbabwe, to acquire, hold, occupy, use, transfer, hypothecate, lease or dispose of all forms of property, either individually or in association with others."

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<sup>99</sup> Constitution of Zimbabwe, 2013.

<sup>100</sup> Chapter 4 of the Constitution.

<sup>101</sup> Section 45 of the Constitution.

<sup>102</sup> Section 56

<sup>103</sup> Muchlinski, Ortino and Schreuer *International Investment Law* 23.

<sup>104</sup> Section 68 (1) of the Constitution.

<sup>105</sup> Section 71 (2) of the Constitution.

Security in terms of property rights is essential to all foreign investors as it ensures that they will not face arbitrary disposition of any property they may invest in and suffer loss. However, the Constitution places limitations upon said property rights. Section 72 (3) of the Constitution states:

- “No person may be compulsorily deprived of their property except where the following conditions are satisfied
- (a) the deprivation is in terms of a law of general application
  - (b) the deprivation is necessary for any of the following reasons-
    - (i) in the interests of defence, public safety, public order, public morality, public health or town and country planning; or
    - (ii) in order to develop or use that or any other property for a purpose beneficial to the community.”

In essence, the limitation of a right, whilst not taken lightly, may for all intents and purposes be exercised. The concern that arises in view of this is, it cannot be guaranteed that a claim of public interest consideration will not be used to create a discriminatory environment that may negatively impact foreign investment.

Furthermore, all the legislation stated earlier that has direct bearing on the field of investment law creates similar limitations that may have adverse inferences for foreign investors in Zimbabwe.

The Securities Act governs a number of aspects amongst which is the control and regulation of investment in securities.

In terms of the objectives set out in section 4 (1) (a) of the Act, the Securities Commission aims to maintain high levels of investor protection. However, the Act does not make any further specific provisions as to how the Commission shall protect and promote principles of non-discrimination to protect investors.

Essentially the Act provides no guidance or reflection of the principle of non-discrimination.

The Zimbabwe Investment Authority Act is:

AN ACT to provide for the establishment of the Zimbabwe Investment Authority and its functions; to provide for the promotion and co-ordination of investment<sup>106</sup>

The operations of the Zimbabwe Investment Authority are vested in its Investment Committee<sup>107</sup> which has the power to regulate investment as set out in terms of the Act;

“The Board shall establish an Investment Committee which shall be responsible for making recommendations to the Board to approve or refuse to approve any investment applications submitted to the Authority by any prospective domestic or foreign investors.”<sup>108</sup>

Furthermore, the Investment Committee is vested with the following powers:<sup>109</sup>

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<sup>106</sup> Preamble to the Zimbabwe Investment Authority Act [*Chapter 14:30*].

<sup>107</sup> Section 6 (2) of the Zimbabwe Investment Authority Act [*Chapter 14:30*].

<sup>108</sup> Section 6 (1) of the Zimbabwe Investment Authority Act [*Chapter 14:30*].

<sup>109</sup> Section 7 of the Zimbabwe Investment Authority Act [*Chapter 14:30*].

“(a) to deal with applications for investment licences;(b) to plan and implement investment promotion strategies for the purpose of encouraging investment by domestic and foreign investors;

(c) to identify sectors of the economy with potential for investment for the purpose of attracting domestic and foreign investors;

(d) to respond to proposals from any domestic or foreign investor for joint ventures with the State or otherwise;

(e) to promote the decentralisation of investment activities in accordance with the development policy of the Government;

(f) to supervise, monitor and evaluate the implementation of approved investment projects and to submit reports to the Minister concerning such projects;

(g) to promote and co-ordinate investment activities in enterprises or sectors of the economy which—

(i) are of strategic importance to national development; or

(ii) require additional investment for the purpose of any sectoral objectives;

(h) to recommend to the Minister, the granting of additional incentives, where necessary, outside of existing policy investment procedures;

(i) to advise the Minister on investment policy so as to enhance the development of the economy; and

(j) to advise the Minister on all matters relating to investment in Zimbabwe.”

Whilst the Act makes no express mention of the principle of non-discrimination, the MFN obligation or the NT obligation, it is clear that the terms contained in the Act are applicable to both foreign and domestic investors which implies an equal standard of treatment. It bears mentioning that the regulatory powers vested in the committee are extensive. The concern that rises in this particular instance is that the centralisation of such powers may easily result in abuse of said powers.

The Act does however state that the Minister of Industry and International Trade or any other Minister to whom the President may from time to time assign the administration of this Act, may;<sup>110</sup>

“(1) The Minister may give to the Authority such directions in writing of a general character relating to the exercise by it of its functions as appear to the Minister to be requisite in the national interest.

(2) The Authority shall, with all due expedition, comply with any direction given to it in terms of subsection (1).”

No further exposition is made as to the criteria to be used when determining the scope of "national interest." It may be inferred from a literal translation of the provision that the qualifications placed on the considerations to be made when assessing the context of "national interest" will lean heavily on considerations of national, economic and social implications. This approach may potentially undermine the principle of non-discrimination in its failure to balance the interests of foreign investment protection with that of nationalistic considerations.

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<sup>110</sup> Section 7 of the Zimbabwe Investment Authority Act [*Chapter 14:30*]

Essentially investment security as between local and foreign investors in terms of the Act can be seen as not being provided for on a strict basis, but rather on a “general” sphere of application due to nationalistic considerations. Protectionist policies may be promoted at the expense of equitable and fair investment protection.

The notion of national or public interest is wide and varied and, because of this, is susceptible to abuse. It may certainly provide a gateway to which nationalistic goals are achieved at the expense of protection that ought to be extended to foreign investors. The lack of precise parameters in which considerations of public policy will operate makes this a threat to the exercise and observance of the principle to the non-discrimination. Furthermore, it may limit the security that may be seen as existing under the provision of fair administrative treatment as encapsulated in the Constitution.

The Collective Investment Schemes Act regulates and controls the promotion and operation of collective investment schemes in Zimbabwe and provides for matters connected with or incidental to the foregoing.

A relatively small Act, there are no provisions that are identifiable that are reflective of or have a direct correlation with the principle of non-discrimination. It is therefore impractical and beyond the scope of this discussion to engage in further analysis of the Act.

Ultimately the principle of non-discrimination is meant to foster goodwill between States and ensure that benefits are had by all parties involved in the field of trade or investment. It is to this end, that the non-discrimination principle has been developed over the years to be much broader in its scope and application than the MFN and NT obligations.

In light of the discussion afore, the preservation of the principle of non-discrimination is essential to all domestic legislation that is enacted by any WTO member. It has been proven over time that trade and investment flourish where there is equal and fair treatment between States.

In light of the discussed issues, it is recommended that the regulatory framework extending protection to foreign investors be revisited.

The qualifications established in relation to the protections offered to foreign investors must be more concisely defined so as to prevent possible future interpretational difficulties. It is essential for the qualifications to investor protection to be worded precisely and as extensively as possible as the qualifications in question (as discussed earlier) are potential weapons in the circumvention of the non-discrimination principle as set out by WTO law.

It is also recommended that checks and balances be established with regards to considerations of national interest so as to minimise its potential for abuse. A system of checks and balances is essential to any provision that has the potential to be used to negate obligations placed on the state.

By adopting these measures, it is submitted that any concerns of foreign investors may be quelled regarding their protection as well as that of their investments in Zimbabwe. Whilst small, an adoption of such recommendations has the potential for far reaching effects in assuring investors that the country is committed to its obligations in terms of the non-discrimination principle to ensure that they as investors and their investments will be treated in the most non-discriminatory way possible.

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# **A Critical Analysis The World Trade Organization's dispute settlement system is equally available to all member states and creates a fair and level playing field**

**By Zvichanzii V. Mugota<sup>1</sup>**

## **Introduction: Structure of the dispute settlement mechanism**

The dispute settlement mechanisms of the World Trade Organisation (WTO) are set up in terms of Understanding of the Rules and Procedures Governing the Settlement of Disputes (the dispute settlement system hereinafter referred to as DSB).<sup>2</sup> The DSB is not an entirely new creation, it is an organisation that evolved from the GATT diplomacy-conciliatory base system to a more judicially focused organisation.<sup>3</sup> Before the dawn of the DSB, disputes were negotiated through diplomatic channels which could be easily frustrated by one of the parties in view of the absence of legal frameworks to deal this. Each one of the GATT Agreements had its own dispute settlement mechanisms<sup>4</sup> which made dispute resolution complex.

Under the DSB, the respondent state no longer has the right to veto the setting up of a panel to adjudicate over an alleged dispute.<sup>5</sup> It also sets a time frame in which a dispute can be settled<sup>6</sup> and the findings implemented,<sup>7</sup> which is a vast improvement over the time inefficiencies that characterised the GATT era.

The DSB of the WTO has introduced improvements to the nature of dispute resolution and disputes are resolved in three stages, namely:

- i) Consultation stage: a 60 day negotiation period where the parties try to resolve the dispute through diplomatic means. Nearly half the disputes brought before the WTO end at this stage with the defendant yielding a concession or two.<sup>8</sup> Disputes that are not resolved through consultations move to second stage;
- ii) The Panel stage has a panel of three to five members appointed to adjudicate the dispute.<sup>9</sup> The panel is empowered to consider submissions from the main parties to the dispute as well as to admit *amicus curia* from other interested parties and it produces an interim report which the parties consider for adoption. About 13 per cent of the disputes are resolved at this stage.<sup>10</sup> The panel issues a final report which is adopted by the WTO for implementation although, if one of the parties opposes the report, the process will move on to the last stage;

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<sup>2</sup> Annex 2 of the WTO Agreement

<sup>3</sup> Simon Lester & Bryan Mercurio, *World Trade Law Text, Materials and Commentary* (2008) Hart Publishing 155

<sup>4</sup> Amin Alavi, 'African Countries and the WTO's Dispute Settlement Mechanism' *Development Policy Review*, (2007), 25 (1): 25-42

<sup>5</sup> DSB Art 6.1

<sup>6</sup> *Ibid* Art. 20

<sup>7</sup> *Ibid* Art. 22

<sup>8</sup> Marc L. Busch, 'The WTO Dispute Settlement Mechanism and Developing Countries' (2004) SIDA Trade Brief available at [www.sida.se/publications](http://www.sida.se/publications) date accessed 13 May 2013 2

<sup>9</sup> DSB Art. 8

<sup>10</sup> Busch (note 8) 3

- iii) The Appellate Body consists of a permanent body of jurists who review the findings of the panel. It is competent to decide issues on treaty interpretation,<sup>11</sup> practice and procedures, and to give *amicus curiae* briefs standards of review among other functions.<sup>12</sup> About 73 per cent of all panel rulings are referred to the Appellate Body<sup>13</sup> whose decisions are then implemented by the parties. The Appellate body is empowered to direct compensation, compliance and retaliation.<sup>14</sup>

The composition of the Appellate Body provides a broad based representation of leading legal and trade experts from all the members of the WTO.<sup>15</sup> The DSB is designed to enable the prompt settlement of disputes and mitigation of expenses and to prevent case backlogs through procedural efficiencies.<sup>16</sup> It has embedded principles to advance the interests of developing countries and can, if requested by the developing country, offer a time extension<sup>17</sup> to enable the developing country to adequately prepare its case.

The rules of the WTO dispute settlement *prima facie* give an enabling platform for any member, regardless of its economic status, to take on other members on trade violations.<sup>18</sup> The dispute settlement mechanisms were expected to favour the developing nations as they contained an 'an important guarantee of fair trade for less powerful countries'.<sup>19</sup> This is due to the fact that the dispute settlement mechanism is a judicial system which is based on the rights of members as opposed to the political or economic clout that members might wield,<sup>20</sup> and this rights-based approach has been hailed by critics as seeking to engender 'transparency and predictability'.<sup>21</sup> The majority of WTO members are developing countries and their effective participation is vital for the credible functioning of the WTO as an organisation that champions the trade interests of all members.<sup>22</sup>

However, in practice, the process has been attacked for not offering a level playing field for the effective participation of developing countries. Several factors have been put forward as creating imbalances in the ability of member states to utilize the DSB. This essay will analyse the following factors:

- 1) the role of political and economic power wielded by countries involved in disputes;
- 2) lack of technical and financial capacity to participate effectively in the proceedings at the WTO DSB and;

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<sup>11</sup> Turkey – Restrictions on Imports of Textile and Clothing Products (*Turkey – Textiles*) WT/DS34/AB/R the Appellate Body had to decide on the interpretation of the GATT Agreement

<sup>12</sup> Julio Lacarte-Muro and Petina Gappah, 'Developing Countries and the WTO Legal and Dispute Settlement System: A View from the Bench' (2000) *Jn Int Economic Law* 395 398

<sup>13</sup> *Ibid* at note 12.

<sup>14</sup> *Ibid* at note 12.

<sup>15</sup> DSB Art 17.3

<sup>16</sup> Lacarte-Muro & Gappah *Ibid* at note 12, 396

<sup>17</sup> Art. 12.10

<sup>18</sup> Lacarte-Muro & Gappah *Ibid* at note 12, 401

<sup>19</sup> WTO former Director-General, Renato Ruggiero

<sup>20</sup> Lacarte-Muro & Gappah *Ibid* at note 12, 400

<sup>21</sup> *Ibid* at note 12

<sup>22</sup> *Ibid* (note 12) 401

3) the lack of effective enforcement clout.<sup>23</sup>

It is the writer's view that the WTO dispute settlement mechanism is not freely accessible to all members and that it does not ensure an equal and level playing field across the board. This discussion will show the political factors that influence the conduct of members at the WTO and how these factors invariably affect the dispute settlement process. The focus will shift to the technical and financial barriers faced by developing countries in trying to access the DSB. Attention will also be paid to the enforcement mechanisms available to implement the rulings of the process. The discussion will conclude by analysing the proposed reforms to the dispute resolution system.

## **BARRIERS TO FAIR AND EQUITABLE ACCESS TO WTO DISPUTE SETTLEMENT MECHANISMS**

### **Behind the consensus veil: the real forces that determine the fairness and equality of the WTO dispute settlement procedures**

The WTO is guided by the principle of sovereign equality; all members have the same rights and duties and can effectively participate in the deliberations of the organisations.<sup>24</sup> All members are free to attend meetings, oppose or propose recommendations and have the right to approve or disapprove a consensus.<sup>25</sup> Supporters of the process have hailed the DSB as offering developing countries practical experience in dispute settlement through participating in the process. They state that is through participation that developing states learn to distinguish between 'what can be won' and what cannot.<sup>26</sup>

Decisions are made through a consensus process;<sup>27</sup> which allows developing countries to veto agreements that are not favourable to them. In the past, developing countries have employed this tradition of consensus to veto proposals such as the EU's proposal on permanent panellists and USA's proposal on transparency,<sup>28</sup> which they did not regard as being in their interests. However, this system is not guaranteed to ensure that the developing countries will always be able to control the direction of the WTO.

The establishment of a third party quasi-judicial procedure (the Appellate Body) to resolve disputes has the potential to make decisions that may alter the direction of the WTO to the possible detriment of developing countries through a negation of their veto powers.<sup>29</sup> This is because the Appellate Body does not have a developmental focus; it is concerned with a positivist approach to the rules of the WTO.<sup>30</sup> Though the concessionary method of decision making in the WTO is commendable, sceptics are concerned with the nature of the consensus.

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<sup>23</sup> Douglas S. Ierley, 'Defining the Factors that Influence Developing Country Compliance with and Participation in the WTO Dispute Settlement System: Another Look at the Dispute over Bananas' (2001-2002) 33 *Law & Pol'y Int'l Bus.* 615 616

<sup>24</sup> Ilan Kapoor, 'Deliberative democracy and the WTO' (2004) 11:3 *Review of International Political Economy* 522 528

<sup>25</sup> *Ibid* (note 24)

<sup>26</sup> Ierley *Ibid* (note 23) 622

<sup>27</sup> Marrakesh Agreement Establishing the WTO Article IX

<sup>28</sup> James Smith, 'Inequality in international trade? Developing countries and institutional change in WTO dispute settlement' (2004) 11:3 *Review of International Political Economy* 542

<sup>29</sup> *Ibid* (note 28) 543

<sup>30</sup> James Smith *Ibid* (note 28)

They argue that it is necessary to have 'quality of consensus-making' to enable the making of just and fair outcomes.<sup>31</sup>

The WTO dispute settlement mechanism is a result of negotiations in the international trade arena which is influenced by both political and economic forces that dictate the tone of international relations.<sup>32</sup> Powerful trading nations have used the forum presented by GATT to champion their own interests.

Towards the conclusion of the Uruguay Round, the USA coerced weaker nations into agreeing to all the intellectual property clauses, investment and services in the TRIPS Agreement by threatening to withdraw from the Round and to impose trade restrictions on all the countries that did not agree to its proposal.<sup>33</sup> The US further teamed up with the European Union to secure its demands by successfully pushing for a 'single undertaking' of the whole GATT/WTO system.<sup>34</sup>

In order for developing countries to comply with the requirements of the TRIPS and TRIMS Agreements, they had to amend and realign their laws with the foreign western laws.<sup>35</sup> This automatically put the developing countries on the back foot as they had to learn the intricate details of these laws so as to effectively implement them. When it comes to TRIPs related dispute, the developing and developed countries do not have the same knowledge or relevant expertise to equally resolve such disputes.<sup>36</sup> This illustrates that there is no real consensus as some of the developing countries are coerced into accepting the positions of other countries.<sup>37</sup>

The coercion translates into the subterranean field of dispute settlement procedures, making it difficult for developing countries to institute proceedings against stronger nations.<sup>38</sup> It also makes it difficult for weaker countries to vote against a position taken by a stronger nation concerning the adoption of panel reports during the dispute settlement stages. The political power that influences the working of the WTO also helps to tilt the dispute resolution field in favour of the developed countries.

In addition, many developed countries are able to offer concessions in the consultation phases of the process which is a bargaining tool that developing countries do not have at their disposal. Some of the outcomes of the dispute may not be based on fairness but on the promises made in the consultations. Though the consultations are on a 'without prejudice basis', political arm twisting cannot be ruled out.<sup>39</sup> This further illustrates how the system of dispute settlement in the WTO is not immune to political and economic manipulation which can distort the notions of equality and fairness that are embodied in the DSB legal framework.

### **Lack of financial and technical capacity**

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<sup>31</sup> Kapoor (note 24) 528

<sup>32</sup> Lerley (note 23) 616

<sup>33</sup> Richard Steinberg, 'In the Shadow of Law or Power? Consensus-based bargaining in the GATT/WTO' [2002] 56 (2) *International Organisation* 339

<sup>34</sup> Kapoor (note 24) 530

<sup>35</sup> *Ibid* at 535

<sup>36</sup> *Ibid*

<sup>37</sup> *Ibid*

<sup>38</sup> *Ibid*

<sup>39</sup> Kapoor (note 24) 537

The dispute settlement process is open to all members but members are required to meet their own legal costs<sup>40</sup> that are a huge challenge for developing countries.<sup>41</sup> Bringing a case before the WTO is very expensive. According to Bown and Hoekman, top lawyers who offer specialist legal counsel in trade litigation can charge from USD 89,950 for a relatively simple case to USD 247,100 for a more complex case.<sup>42</sup> These legal fees do not include the costs of data collection, or the hire of other experts which usually cost anything between USD 100 000-200 000.<sup>43</sup> When the logistical overheads, such as accommodation, are factored in, the 'litigation only' bill can be about \$500,000.<sup>44</sup> When the costs of lobbying and public engagement are added on, the amount needed to sustain just one leg of litigation is very substantial.

Based on past disputes, WTO disputes are seldom settled in one round<sup>45</sup> and cases usually go to the Appellate Body for a final ruling.<sup>46</sup> The developed countries have the financial wherewithal to absorb these costs which constitute an obstacle for poorer countries. In this way, using the WTO procedures for dispute settlement is not equally accessible to all parties.

Another challenge for developing countries to effectively participate in the dispute making proceedings of the WTO is due to their limited legal capacity to participate or keep abreast with the process.<sup>47</sup> Trade disputes are highly technical and complex and require legal and technical expertise to proceed with a case.<sup>48</sup> Parties have to act as both players and referees to spot violations of trade agreements and bring them for resolution. Some developing countries are unable to adequately identify the issues so as to effectively address them. In contrast, the developed countries have armies of professional trade experts, from both the public and private sectors who work together to ensure effective investigation of the cases. They also work hard to drum up political interest which is very handy in eventual compliance or non-compliance with the case outcomes.<sup>49</sup>

The subsidised legal assistance offered by the WTO Advisory Services in Geneva is not fully adequate for a state to effectively lodge a complaint against a more powerful member state.<sup>50</sup> This is because the assistance offered by the Advisory Services and other NGOs can be biased to favour the special interests of the NGOs. The work produced by NGOs has been criticised for being of a lower standard as it is usually produced by interns working in these organisations. This is in stark contrast to the work that forms the basis of the arguments of the developed countries which is produced by high-level legal experts hired by the governments with the support of the large corporations.<sup>51</sup>

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<sup>40</sup> Chad P. Bown & Bernard M. Hoekman, 'WTO Dispute Settlement And The Missing Developing Country Cases: Engaging The Private Sector' (2005) 8(4) *J Intl Econ L* 8(4) 861 870

<sup>41</sup> Chad P. Bown 'Participation in WTO Dispute Settlement: Complaints, Interested Parties and Free Riders' (2005) Vol 19 No 2 *Wld.Bank Econ.Rev.* 294

<sup>42</sup> Bown & Hoekman (note 40) 870

<sup>43</sup> *Ibid*

<sup>44</sup> *Ibid*

<sup>45</sup> Robert E. Hudec, 'The Adequacy of WTO Dispute Settlement Remedies: A Developing Country Perspective' (2002) *World Bank Report* 81 88

<sup>46</sup> The EC- Bananas and Dolphin-Tuna cases

<sup>47</sup> Smith (note 28) 547

<sup>48</sup> Amin Alavi (note 4) 32

<sup>49</sup> Bown & Hoekman (note 40)

<sup>50</sup> Bown (note 41) 246

<sup>51</sup> Bown & Hoekman (note 40)

In addition, assisting services are only provided once a dispute has been formally lodged,<sup>52</sup> which means that there is a capacity gap in the proper preparation of the case.<sup>53</sup> The Appellate Body is also cognisant of the fact that the governments of developing countries may not have similar trade expertise within their rank and file to effectively represent their interests, which is why the Appellate Body in the *European Commission-Bananas* case made a decisive ruling to allow private legal counsel to represent a state party.<sup>54</sup>

However, the decision to allow private legal counsel to represent member states highlights the fact that the procedure of the DSB is 'so complicated that one needs training to use it.'<sup>55</sup> The prohibitive costs of litigation disputes coupled with the lack of technical expertise make it difficult for poorer countries to access the DSB on the same terms as richer, more industrialised countries.

### **The most favoured nation principle as a disincentive for the participation in dispute settlement**

The operation of the most favoured nation (MFN)<sup>56</sup> under the general rules of the WTO can act as a disincentive for the participation of all interested parties to a dispute. In the *United States - Safe guard on Circular Welded Pipes case*, Korea litigated but other parties did not join the proceedings as interested parties. Instead, they waited to have the issue determined so that they could enjoy the benefit without having to meet any litigation costs. When a member is complying with the ruling of the dispute settlement body and grants extra concessions to the complainant in the dispute, it has to offer the same treatment to the other members of the WTO due to the operation of the MFN principle.<sup>57</sup> This means that the party that has met all the costs of litigation would have done so in vain as all the other members will benefit as free riders.<sup>58</sup>

The inherent unfairness of this is illustrated by the granting of compensation. If a ruling orders the granting of compensation, the MFN principle will apply and all interested parties will reap the benefits of the ruling. However, if trade concessions are to be suspended, the suspension is only applicable to the actual parties to the dispute.<sup>59</sup> This makes the system unfair against complainants as they have no tangible benefits that accrue to them as a result of instituting the dispute.

### **Participation as interested third parties**

The WTO Mechanisms allow parties to participate in the DSB either as complainants or as interested third parties.<sup>60</sup> It is difficult for a developing country to institute proceedings as it is expensive in monetary terms and demanding with regard to legal and technical requirements. However, if developing countries participate as interested third parties this lowers the cost of dispute resolution and they also obtain vital first-hand experience in the settlement of disputes

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<sup>52</sup> Amin Alavi (note 4) 33

<sup>53</sup> *Ibid*

<sup>54</sup> European Communities- Regime for the Importation Sale and Distribution of Bananas WT/DS27/AB/R

<sup>55</sup> Lerley (note 23) 624

<sup>56</sup> WTO Agreement Art.1

<sup>57</sup> Lester & Mercurio (note 3) 165

<sup>58</sup> *Ibid* at note 3.

<sup>59</sup> Arwel Davies, 'Reviewing Dispute Settlement at the World Trade Organisation: a Time to Reconsider the Role/s of Compensation?' (2006) 5 (1) *World Trade Review* 31

<sup>60</sup> Bown (note 40)

by the WTO.<sup>61</sup> The interested party route is available but has seldom been utilised by the developing countries. If this route is used more often, the dispute mechanisms of the WTO will be reasonably equally accessible to members.

### **How effective are the DSB enforcement mechanisms?**

Countries that have had disputes previously, such as Mexico and Ecuador, complain about the lack of enforcement remedies against violators of WTO commitments.<sup>62</sup> The greatest weakness of the dispute settlement mechanism of WTO is that it fails to have an enforcing system; instead it leaves the enforcement of the agreement to the complainant.

This renders dispute resolution out of the reach of the weaker developing nations as they often lack the 'retaliatory might to threaten' sanctions on the party violating the agreement. The lack of economic backlash on the part of the offending nation removes the impetus for fulfilment of WTO Agreements.<sup>63</sup> Also, due to the relatively small size of the overall size of the domestic market, the developing countries cannot control international prices of most commodities<sup>64</sup> and therefore have no clout to ensure compliance with recommendations in their favour. Further, countries are hesitant to drag major trading partners to the DSB due to special political or economic relationships. These special relationships can include receiving development assistance from a major donor country or being members of the same free trade agreements.<sup>65</sup> If a country relies on aid from another country, it is less likely to institute proceedings against its donor country or, if the countries belong to a free trade agreement, the agreement might have its own dispute settling mechanisms outside the scope of the DSB.<sup>66</sup>

The lack of effective mechanisms due to differences in economic resources can be best illustrated by the *EC-Bananas* case. In this case, Ecuador was empowered to enforce retaliatory measures to force compliance with a ruling in its favour. Ecuador sought cross retaliation<sup>67</sup> under different agreements as it did not have sufficient economic might to force compliance against the EU powerhouse.<sup>68</sup> It considered the grounds for the use of cross retaliation in other areas such as TRIPS.

It was held that for a member to use these provisions, it must prove that the measures available under the same agreement are not practical or effective. This is a factual requirement and not just speculative.<sup>69</sup> Cross retaliation had been advocated by the developing countries as a way of enforcing the findings of the WTO. The Appellate body did not effectively discuss the long held view of developing countries that some retaliation measures would harm the countries more than affect the developing countries. In the case of Ecuador, if it put higher tariffs on consumer goods, it would lead to more harm being done to its economy. The Appellate Body's insistence

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<sup>61</sup> Lacarte-Muro & Gappah (note 12) 397

<sup>62</sup> Bown (note 41)

<sup>63</sup> Bown (note 41) 301

<sup>64</sup> *Ibid* 293

<sup>65</sup> *Ibid*

<sup>66</sup> *Ibid* 302

<sup>67</sup> Article 22.3 of the WTO

<sup>68</sup> Hudec (note 45) 88

<sup>69</sup> Arbitration Decision European Communities-Regime for the Importation and Distribution of Bananas, Recourse to Arbitration by the European Communities WT/DS37/ARB/ECU para 70-72

that the government of Ecuador apply restrictions first in trade in goods (similar agreement issues) proved that some of the GATT enforcement remedies are impractical.<sup>70</sup>

The carousel approach to retaliation was first employed in this case. The USA imposed retaliation tariffs on new products from the European Union every six months and the tariffs were as high 100%.<sup>71</sup> It must be noted that the carousel approach is only practical for larger industrialised countries which have a vast array of goods on which to apply the different tariffs. Developing countries have no effective methods of enforcing the awards if they should win a dispute against a more industrialised country.<sup>72</sup> A developing country does not have sufficient economic might to compel the offending industrialised country to abide by the ruling.<sup>73</sup> However the same remedy of retaliation in the hands of a more developed country can inflict serious damage on a developing country.<sup>74</sup> This simply shows that the WTO dispute resolution mechanism is heavily skewed in favour of the developed countries<sup>75</sup>

*The Tuna-Dolphin* case illustrates that the interpretation of the rules of the GATT can be used to protect the interests of developing countries ahead of the concerns of the more developed countries. In this case, the Panel had to adjudicate on the permissibility of trade restrictions based on Article XX of GATT. First, the USA was caught out as it discriminated against Mexican tuna; this was a violation of the national treatment.<sup>76</sup> The Panel further ruled that the ban was not justifiable under Article XX (b)<sup>77</sup> as the ban on Mexican tuna was not deemed necessary for the protection of animal life. It further ruled that Article XX (g)<sup>78</sup> was only applicable as a measure to protect domestic resources and could not have extra territorial application.<sup>79</sup> This case was a leading case in setting the hurdles for the proper adjudication of disputes of an environmental nature<sup>80</sup> and also shows that the operation of the WTO DSB seeks to promote equality among states.

## PROPOSED REFORMS

In order to make the DSB a more level playing field, proposals have been made which range from seeking to improve the workings of the DSB at panel stages to assessing the costs of participation for developing countries.<sup>81</sup>

### The reforms to the operations of the DSB

There is need for the panel to provide a range of measures that can be used by the winning party to enforce the recommendations of the panel report.<sup>82</sup> This will provide leeway to the party

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<sup>70</sup> Hudec (note 45) 89

<sup>71</sup> EU Bananas case

<sup>72</sup> Hudec (note 45) 89

<sup>73</sup> *Ibid*

<sup>74</sup> *Ibid* 81

<sup>75</sup> *Ibid*

<sup>76</sup> GATT Art II

<sup>77</sup> *Ibid* Art. XX (b) necessary to protect human, animal or plant life or health;

<sup>78</sup> *Ibid* Art. XX (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption

<sup>79</sup> United States-Restrictions on Imports of Tuna GAIT B.I.S.D

<sup>80</sup> Bruce Neuling, 'The Shrimp-Turtle Case: Implications for Article XX of GATT and the Trade and Environment Debate' (1999-2000) 22 Loy. L.A. *Int'l & Comp. L. Rev.* 1

<sup>81</sup> Marc L. Busch and Eric Reinhardt, 'The Evolution of GATT/WTO Dispute Settlement' (2003) available at [http://www9.georgetown.edu/faculty/mlb66/tpr2003\\_busch\\_reinhardt.pdf](http://www9.georgetown.edu/faculty/mlb66/tpr2003_busch_reinhardt.pdf) last accessed 13 May 2013

to enforce these recommendations without necessarily having to change their domestic legislation.<sup>83</sup> Another way to ensure a much fairer dispute settlement is through the utilisation of the arbitration provided for in terms of Article 25 of the DSB.<sup>84</sup> Arbitration is cheaper and much faster than the DSB dispute resolution mechanism<sup>85</sup>. The negative impact of using international arbitration is that arbitral awards might be inconsistent with the WTO jurisprudence which has been developed through the DSB rulings.<sup>86</sup>

Compensation is currently used as a response to non-compliance; and it has been proposed that compensation should be employed both as a recommendation and as a noncompliance remedy.<sup>87</sup> The party that would be permitted to seek compensation should also be empowered to choose which concessions and under what are agreements it wishes to have implemented in its favour. This will effectively address the concerns raised by Ecuador in the EC-Bananas case on the feasibility of substitution of concessions.<sup>88</sup>

Other reforms that have been proposed concern the application of retrospective damages. However, the granting of retrospective damages would undermine the protectionist measures that a country can adopt prior to a WTO ruling.<sup>89</sup> The retrospective damages will be assessed at three stages; "(a) the date of imposition of the measure; (b) the date of the request for consultations; or (c) the date of establishment of the Panel."<sup>90</sup>

### **Reforms to improve the participation of developing countries**

Proposals have been put forward to allow for collective retaliation as a method available to developing countries to enable the remedy to be more effective<sup>91</sup> and mandatory conciliation and mediation<sup>92</sup> have been proposed to make access to the DSB less costly.<sup>93</sup> However, mandatory conciliation and mediation will be a step back as it is a way of reviving the dispute resolution mechanisms of GATT.

In order to ensure greater compliance with the WTO rules, it has been proposed that only countries that have fully implemented previous rulings against them should be allowed to institute proceedings at the WTO. Whilst this is a noble idea, it will not level the playing field in dispute resolution; instead it will make it much harder for weaker parties to resist decisions against them with which they do not agree.<sup>94</sup> This forced compliance will be done to ensure that they are not excluded from enjoying the benefits associated with the rest of the WTO.

From the analysis of the litigation process, the inhibitive costs associated with the process have been identified as usurious on developing countries. Trebilcock and Howse have recommended

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<sup>82</sup> *Ibid*

<sup>83</sup> *Ibid*

<sup>84</sup> Article 25.1 states that "[e]xpeditious arbitration within the WTO as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties."

<sup>85</sup> Ierley (note 23)

<sup>86</sup> *Ibid*

<sup>87</sup> *Ibid*

<sup>88</sup> *Ibid*

<sup>89</sup> Busch & Reinhardt (note 81)

<sup>90</sup> Busch & Reinhardt (note 81)

<sup>91</sup> Busch & Reinhardt (note 81)

<sup>92</sup> DSU Art. 5

<sup>93</sup> Busch & Reinhardt (note 81) 3

<sup>94</sup> Ierley (note 23) 627-628

that if a developed country loses a dispute instituted by a developing country, the developed country should be ordered to pay the costs of the other party.<sup>95</sup>

## **CONCLUSION**

It can be concluded that on paper the dispute resolution mechanisms of the WTO are fair and equally accessible to all. However, in practice, the situation is restricted by lack of expertise to conduct effective trade litigation; prohibitive costs; and the lack of effective enforcement procedures. However, the DSB must be commended for being a platform that seeks to engender principles of fairness and equality of nations regardless of their political and economic status.

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<sup>95</sup> Michael J. Trebilcock & Robert Howse, *The Regulation of International Trade* 3 Edition, (2005) Routledge Taylor & Francis Group 145

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# **Limitation of human rights in international law and the Zimbabwean Constitution**

**By Innocent Maja<sup>1</sup>**

## **Introduction**

Human rights contained in international treaties, regional treaties and national constitutions are generally not absolute but are often qualified and subject to reasonable restrictions.<sup>2</sup> Currie and de Waal argues that '[c]onstitutional rights and freedoms are not absolute. They have boundaries set by the rights of others and by important social concerns such as public order, safety, health and democratic values.<sup>3</sup> This essentially means that not all infringement of rights is unconstitutional. Rights can be limited or justifiably infringed if the reason for infringement is justifiable 'in an open and democratic society based on human dignity, equality and freedom.<sup>4</sup>

A discussion of the limitation of rights is crucial because the extent to which limitations to rights are considered legitimate determines the actual application and effectiveness of these rights. It is even more crucial in Zimbabwe where there is currently limited national jurisprudence on the extent to which rights can be limited in terms of section 86 of the Zimbabwean Constitution.

This article is divided into two parts. The first part explores the limitation of rights in international law in a bid to establish best practices. Part two analyses the limitation of rights in section 86 of the Zimbabwean Constitution in a bid to provide some best practices that the Zimbabwe can use to interpret section 86 of the Constitution.

## **1. Limitation of rights in International law**

This section analyses the limitation of rights in international law. The focus will be on the United Nations (UN), European and African human rights systems. The aim is to establish best practices that could be used to interpret section 86 of the Zimbabwean Constitution.

### **1.1 Limitation of rights in the UN human rights system**

The key provisions regarding the limitation of rights under the UN human rights system are article 29(2) of the Universal Declaration of Human Rights,<sup>5</sup> articles 19(3) and 25 of the

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<sup>2</sup> There have been convincing arguments that some rights have become absolute and cannot be derogated from. These include the right not to be tortured or subjected to cruel, inhuman and degrading treatment or punishment; the right not to be placed in slavery; the right to human dignity, etc. This aspect is not the focus of this article.

<sup>3</sup> Iain Currie and Johan de Waal, *The Bill of Rights Handbook*, 6 Edition, 150 Juta & Co. Ltd, Cape Town, (2014).

<sup>4</sup> Currie and de Waal op cit note 3 above 151.

<sup>5</sup> Article 29(2) of the Universal Declaration provides that 'In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.'

International Covenant on Civil and Political Rights<sup>6</sup> (ICCPR) and article 4 and 5 of the International Covenant on economic, Social and Cultural Rights (ICESCR).<sup>7</sup>

There are, generally speaking, three conditions for legitimate limitation of rights provided for by the UN treaties namely:

*a. The limitation must be provided by the law*

This condition requires that the limitation must have a clear legal basis. The law authorising the limit of the right must be a) publicly accessible; b) sufficiently precise to enable people to regulate behaviour and c) it must not confer unfettered discretion on the state to prevent risk of abuse and arbitrary exercise of discretion.<sup>8</sup>

*b. The limitation must serve a legitimate aim*

The question that is normally asked is '*[w]hat is the problem that is being addressed by the limitation?*' The legitimate aims refer to the interests of the state and the rights of others. Some of the enumerated aims include:

- i. respect for the rights and reputations of others;
- ii. respect for public morals;
- iii. protection of public order;
- iv. promoting the general welfare in a democratic society..

*c. Proportionality between end and means*

The proportionality principle demands that the means used by a state to limit a right must be proportional to the aim sought. Note 4, paragraph 35 of the UNHRC General Comment No. 34 states that '*[w]hen a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the*

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<sup>6</sup> Article 19(3) of the CCPR states that 'The exercise of the rights to [freedom of expression], carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary, (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order or of public health or morals.' Article 25 of the CCPR insinuates that the limitation of a right should be a reasonable restriction.

<sup>7</sup> Article 4 of the CESCRC states that 'The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.'

<sup>8</sup> Note 4 paragraph 25 of the UNHRC General Comment No. 34 says 'For the purposes of paragraph 3, a norm, to be characterized as a "law", must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution. Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not.'

*threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.'*

There are a number of considerations that need to be taken into account to justify that the means used by a state<sup>9</sup> to limit a right is proportional to the aim sought. In a nutshell, proportionality includes aspects of suitability, subsidiarity and proportionality in the narrow sense.<sup>10</sup> Suitability requires that the limitation should in principle lead to the legitimate aim which is sought after. Proportionality in the narrow sense requires a reasonable relationship between the infringement and the legitimate aim. It essentially follows that a greater infringement should further a heavier legitimate aim. The subsidiary test reviews whether there are other alternative less restrictive means to reach the legitimate aim.<sup>11</sup>

## **1.2 Limitation of rights in the European human rights system**

It has been established above that human rights do not apply absolutely but may be restricted through legitimate limitations. This section analyses how the European Convention on Human Rights (ECHR) limits human rights. There are, generally speaking, three<sup>12</sup> conditions for legitimate limitation of rights provided for by the ECHR.

### *a. Law of general application*

The limitation of rights provided for in the ECHR should have a basis in national law to avoid arbitrary limitations to rights.<sup>13</sup>

### *b. Legitimate aim*

The limitation's object should belong to one of the explicitly enumerated legitimate aims. Even though the enumerated goals are broadly formulated, they all refer to the interests of the state and the rights of others.<sup>14</sup>

### *c. Proportionality between end and means*

The limitation should be necessary in a democratic society to meet the legitimate goal. The European Court interpreted the characteristics of a democratic society to include pluralism,

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<sup>9</sup> States are afforded some margin of discretion in this regard. The concept of margin of appreciation is discussed in section 1.2 below because its origins are traced in the European system and it is predominantly applied in that system.

<sup>10</sup> Henrard, The right to equality and non-discrimination and the protection of minorities in Africa in S Dersso (ed) *Perspectives on the rights of minorities and indigenous peoples in Africa* (2010) 220.

<sup>11</sup> JH Gerards Judicial review in equal treatment cases (2004) 49-55 52.

<sup>12</sup> The fourth instance where rights may be temporarily limited is found in article 15 of the ECHR which allows temporary limitation of rights when there is a state of emergency.

<sup>13</sup> See *Kopp v Switzerland Eur. Ct. H. R.*, 25 March 1998 55-75 where the European Court stated that the regulation should be sufficiently precise in its formulation and accessible for the subjects.

<sup>14</sup> K Henrard Devising an adequate system of minority protection: Individual human rights, minority rights and the right to self-determination (2000) 133.

tolerance, broadmindedness and respect for human rights.<sup>15</sup> An example includes article 10(2) of the ECHR that permits limitation of the right to freedom of expression if it is limited by 'law' that is 'necessary in a democratic society' to serve certain circumscribed interests such as 'the protection of health or morals' and 'the reputation or rights of others.'

The jurisprudence of the European Court introduced two key principles to regulate the justification of state interference with human rights namely the proportionality principle and the deference or margin of appreciation principle. This section analyses these two principles to evaluate how they impact the limitation of human rights provided for in the ECHR.

### *ci. Proportionality principle*

It has already been established above that a state can limit a right if there is an objective and reasonable justification and the justification has to be evaluated taking into account its goal, as well as its effect, assessed against the background of the principles inherent in democratic societies. The limitation has to have a legitimate aim and there must be a reasonable and proportional relationship between this aim and the means used to limit the right. The required proportionality is evaluated using the basic values of a democratic society such as tolerance, diversity and broadmindedness.<sup>16</sup>

The proportionality principle was introduced in the Belgian Linguistic Case<sup>17</sup> where it was established that the means used by a state to limit a right must be proportional to the aim sought. Ever since then, the proportionality principle has been developed by the European Court to police the justification of state interference with human rights, ensuring that the state places no greater limitation on rights than necessary.<sup>18</sup> Examples include *Olsson v Sweden*<sup>19</sup> and *Glaser v Germany*<sup>20</sup> where the European Court reiterated that the means used by a state to limit a right must be proportional to the aim sought.

The proportionality test is used to assess the means and side effects of state action. For instance, in *Dudgeon v UK*,<sup>21</sup> the European Court assessed the proportionality of the means used by the state to 'preserve public order and decency' in regulating homosexual conduct in criminal law. It is minimally used to assess the legitimacy of the state's aims.<sup>22</sup>

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<sup>15</sup> *Dudgeon v UK* ECHR (22 October 1981) Ser A 45.

<sup>16</sup> See the recent cases of *Tanase v Moldova* ECHR (27 April 2010) 41-44 and *Animal Defenders International v United Kingdom* ECHR (22 April 2013) 39-43.

<sup>17</sup> *Belgian Linguistic case* (1968) 1 EHRR 252 specifically states that 'Article 14 is violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.' See also the 2002 Inter-American Court decision of *Cantos v Argentina* Series C No. 97 (2002) IACtHR [54].

<sup>18</sup> A Legg, *The margin of appreciation in international human rights law: Deference and proportionality*, (2012), Oxford University Press, 178.

<sup>19</sup> *Olsson v Sweden*, ECHR (24 March 1988) Ser A 130 67.

<sup>20</sup> *Glaser v Germany*, ECHR (28 August 1986) Ser A 104 90.

<sup>21</sup> *Dudgeon v UK* ECHR (22 October 1981) Ser A 45. See also *Christine Godwin v UK* No. (2002) EHRR.

<sup>22</sup> *Thlimmenos v Greece* No. 34369/97 (2000) EHRR where the European Court found that, as a result of disproportionality, the state's conduct lacked a legitimate aim.

Because human rights are based on interests, the assessment employed by the proportionality principle involves a flexible balancing of the competing interests of an individual and the state as a whole.<sup>23</sup> In *Hatton v UK*, the European Court explained that in assessing whether the means used by the state to limit rights is justifiable, '*regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole.*'<sup>24</sup> According to *Young, James & Webster v UK*, '*democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.*'<sup>25</sup>

### *cii. The margin of appreciation or deference principle*

Related to the principle of proportionality is the concept of margin of appreciation or deference.<sup>26</sup> The margin of appreciation refers to the discretion given State Parties to the ECHR to strike a balance between the common good of society (national interests) and the interests of the individual (individual rights) when they restrict human rights.<sup>27</sup> It allows states a 'margin' or latitude to determine issues that sovereign national institutions are better placed to 'appreciate' such as the exact content of rights and the necessity of a restriction.<sup>28</sup>

It is important to note that the discretion given to states is limited in that the European Court supervises it. In *Handyside v UK*, the European Court made it clear that the state does not have unlimited power of appreciation and the margin of appreciation has to be supervised.<sup>29</sup> *Sunday*

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<sup>23</sup> S Tsakyrakis, 'Proportionality: An assault on human right?' (2009) 7 (3) *International Journal on Constitutional Law* 468 expresses concern that is rights can be overridden by other interests when placed in the balance, then human rights are themselves at risk.

<sup>24</sup> *Hatton v UK* No. 36022/97 (2003) (ECtHR) (GC) [98]. See also *Cossey v UK* No. 10843/84 (1990) (ECtHR) [41] that highlights that '... the notion of proportionality between a measure or a restriction and the aim which it seeks to achieve. Yet that notion is already encompassed within that of the fair balance that has to be struck between the general interest of the community and the interests of the individual.'

<sup>25</sup> *Young, James & Webster v UK*, ECHR (13 August 1981) Ser A 44 63.

<sup>26</sup> The precise definition of the margin of appreciation is illusive. A number of authors have attempted to describe it. For example, P Mahoney, 'Universality versus subsidiarity in the Strasbourg case law of free speech: Explaining some recent judgments' (1997) EHRLR 364, 370 describes it as an interpretational tool that determines which human rights matters require a uniform international human rights standard and which one require variation from state to state. JG Merrills, *The development of international law by the European Court of Human rights*, (1993) 2 ed, Manchester UP, 74-5 describes it as a doctrine that establishes whether it is a matter of national sovereignty or for Tribunals to demarcate the contours of a particular human rights standard.

<sup>27</sup> M Tümay, 'The "margin of appreciation doctrine" developed by case law of the European Court of Human Rights' (2008) 5(2) *Ankara Law Journal* 202.

<sup>28</sup> *Handyside v UK*, ECHR (7 December 1976) Ser A 24 48-49 argues that 'It is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals... By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them.

<sup>29</sup> *Handyside v UK*, ECHR (7 December 1976) Ser A 24 49 states that 'Article 10(2) does not give the Contracting States an unlimited power of appreciation. The Court... is responsible for ensuring the observance of those States' engagements, [and] is empowered to give the final ruling on whether a 'restriction' or 'penalty' is reconcilable with freedom of expression... The domestic margin of appreciation

*Times v UK* makes it clear that in supervising the state's margin of appreciation, the European Court applies the proportionality principle<sup>30</sup> to ascertain whether the means used by a state to limit a right is proportionate to the legitimate aim pursued. *Chassagnou v France*<sup>31</sup> establishes that in a democratic society marked with pluralism, tolerance and broadmindedness, the state's margin of appreciation should be exercised in a way that ensures the protection of minorities.

However, the European Commission and European Court jurisprudence reveals that state interests often prevail in the balancing process.<sup>32</sup> Although the state's margin of appreciation varies depending on the legitimate goal relied upon, the (non) existence of a European standard<sup>33</sup> and the nature of the right infringed,<sup>34</sup> states have generally been given a wide margin of appreciation regarding the actual implementation of rights enshrined in the ECHR.<sup>35</sup> In *Ireland v UK*, the European Court established that in article 15(1) of the ECHR gives the state a wide margin of appreciation when limiting rights during a state of emergency. Such a broad margin of appreciation has the effect of limiting the enjoyment of the rights concerned.

In *Sidiropoulos and five others v Greece*,<sup>36</sup> the European Commission accepted that the state's margin of appreciation concerning the assessment of the need in a democratic society for a limitation is wide where matters of national security are concerned.

Henrard<sup>37</sup> observes that the state's wide margin of appreciation is strongly influenced by textual constraints and the way state interests and existent state structures often prevail in the balancing process inherent in the assessment of a possible violation of a provision of the ECHR. This has led to the supervision by the European Court and European Commission to be criticised as too subsidiary and deferent to the Contracting state.<sup>38</sup> Such deference reduces the level of protection of vulnerable groups in a state.

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thus goes hand in hand with a European supervision. Such supervision concerns both the aim of the measures challenged and its 'necessity'...

<sup>30</sup> *Sunday Times v UK* (1991) EHRR 242 242 holds that '[t]he Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient.'

<sup>31</sup> *Chassagnou v France* (1999) EHRR 112.

<sup>32</sup> See *Handyside v UK*, ECHR (7 December 1976) Ser A 24 and *Silver and others v UK* ECHR (25 March 1983) Ser A 61.

<sup>33</sup> See *Marckx v Belgium*, ECHR (13 June 1979) Ser A 31 41.

<sup>34</sup> Like in *Campbell v UK*, ECHR (25 March 1992), Series A 233 46-47 and *Lingens v Australia*, ECHR (8 July 1986) Ser A 10342.

<sup>35</sup> *United Communist Party of Turkey & Ors v Turkey*, (1988) EHRR 57.

<sup>36</sup> *Sidiropoulos v Greece* [1997] ECHR 49.

<sup>37</sup> K Henrard *Devising an adequate system of minority protection: Individual human rights, minority rights and the right to self-determination* (2000) 75.

<sup>38</sup> K Henrard *supra*.

The preceding discussion of the ECHR highlights that the jurisprudence from the European Court and European Commission shows that human rights can be limited by a law of general application serving a legitimate aim taking into account the proportionality principle and the margin of appreciation given to states.

### 1.3 Limitation of minority language rights under the African human rights system

Under the African human rights system, human rights may be legitimately limited by states in three ways in terms of the African Charter on Human and Peoples' Rights (ACHPR).<sup>39</sup>

First, rights can be limited by 'claw back' clauses such as 'for reasons... previously laid down by law,'<sup>40</sup> 'within the law,'<sup>41</sup> 'subject to law and order'<sup>42</sup> and 'provided he abides by the law.'<sup>43</sup> The obvious concerns are that state parties could use 'claw back' clauses to unduly restrict the rights provided for in the ACHPR.<sup>44</sup> However, the African Commission has interpreted the term 'law' as international law or international human rights standards,<sup>45</sup> thus minimising the negative effects of these clauses.

Second, human rights in the ACHPR can be limited using right-specific-norm-based limitations<sup>46</sup> that requires the limiting law to serve some stipulated objective like national security, law and order, public health or morality,<sup>47</sup> health, ethics and rights and freedoms of others.<sup>48</sup> Interestingly, in *Amnesty International v Zambia*, the African Commission treated right-specific-norm-based limitations as 'claw back' clauses that can only be limited by international law or international human rights standards.<sup>49</sup>

Third, minority language rights in the ACHPR can be limited using the general limitation clause in article 27(2) of the ACHPR which says '*[t]he rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common*

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<sup>39</sup> This section has heavily relied on F Viljoen *International Human Rights Law in Africa* (2012) 329-333.

<sup>40</sup> Art 6 of the ACHPR.

<sup>41</sup> Art 9 of the ACHPR.

<sup>42</sup> Art 8 of the ACHPR.

<sup>43</sup> Art 10(1) and 12(1) of the ACHPR.

<sup>44</sup> See E Bondzie-Simpson, 'A critique of the African Charter on Human and Peoples' Rights' (1988) 31 *Howard Law Journal* 643, 661.

<sup>45</sup> See Communications 105/93, 128/94, 152/96 (joined), *Media Rights Agenda and others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) (12<sup>th</sup> Annual Activity Report); Communication 101/93, *Civil Liberties Organisation (in respect of Bar Association) v Nigeria* (2000) AHRLR 186 (ACHPR 1995) (8<sup>th</sup> Annual Activity Report) para 15 and Communications 27/89, 46/90, 49/90, 99/93 (joined), *Organisation Mondiale Contre la Torture and others v Rwanda* (2000) AHRLR 282 (ACHPR 1996) (10<sup>th</sup> Annual Activity Report).

<sup>46</sup> F Viljoen *International Human Rights Law in Africa* (2012) 329.

<sup>47</sup> Art 12(2) of the ACHPR.

<sup>48</sup> Arts 8 and 11 of the ACHPR.

<sup>49</sup> Communication 212/98, *Amnesty International v Zambia* (2000) AHRLR 325 (ACHPR 1999) (12<sup>th</sup> Annual Activity Report) para 50.

*interest.*'<sup>50</sup> In practice, the African Commission applies the proportionality test to establish whether a limitation is legitimate and justifiable.<sup>51</sup>

The limitation should be by law of general application. The impact, nature and extent of the limitation is weighed against the legitimate state interest serving a particular goal. The limitation should not have the effect of obliterating and rendering the right concerned illusory.<sup>52</sup> Whenever there is more than one way of achieving an objective, the less invasive route should be followed.<sup>53</sup>

It is interesting to note that in *Legal Resources Foundation v Zambia*,<sup>54</sup> the African Commission established that the limitation of rights cannot be solely based on popular will but the proportionality principle in article 27(2) of the ACHPR. This is crucial for the protection of vulnerable and non-dominant groups within a state.

One question that has arisen is whether and to what extent the European principle of margin of appreciation discussed above applies in the African human rights system. In *Prince v South Africa*, the African Commission acknowledged that the principle of subsidiarity and the doctrine of margin of appreciation apply to the ACHPR since states are primarily responsible for protecting rights in the ACHPR.<sup>55</sup> However, the African Commission did not allow a restrictive reading of the doctrines of deference and margin of appreciation which advocates for the hands-off approach by the African Commission on the mere assertion that its domestic procedures meet more than the minimum requirements of the African Charter. This would oust the African Commission's mandate to monitor and oversee the implementation of the African Charter. Put differently, the doctrine of margin of appreciation does not preclude an assessment by the African Commission of the reasonableness of the limitation of rights in terms of section 27(2) of the ACHPR.<sup>56</sup> This approach is similar to the European Court's approach that also indicates that the margin of appreciation goes hand in hand with European supervision (though the latter is inversely related to the width of the margin).

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<sup>50</sup> Communications 105/93, 128/94, 152/96 (joined), *Media Rights Agenda and others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) (12<sup>th</sup> Annual Activity Report) paras 68 and 77 established that the only legitimate limitation to rights in the ACHPR is article 27(2) of the ACHPR.

<sup>51</sup> See F Viljoen *International Human Rights Law in Africa* (2012) 331.

<sup>52</sup> Communications 105/93, 128/94, 152/96 (joined), *Media Rights Agenda and others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) (12<sup>th</sup> Annual Activity Report) para 65.

<sup>53</sup> Communication 242/2001, *Interights and Ors v Mauritania* (2004) AHRLR 87 (ACHPR 2004) (17<sup>th</sup> Annual Activity Report) para 82.

<sup>54</sup> Communication 211/98, *Legal Resources v Zambia* (2001) AHRLR 84 (ACHPR 2001) (14<sup>th</sup> Annual Activity Report) para 69.

<sup>55</sup> Communication 255/02, *Prince v South Africa* (2004) AHRLR 105 (ACHPR 2004) para 51 establishes that 'Similarly, the margin of appreciation doctrine informs the African Charter in that it recognises the respondent state in being better disposed in adopting national rules, policies and guidelines in promoting and protecting human and peoples' rights as it indeed has direct and continuous knowledge of its society, its needs, resources, economic and political situation, legal practices, and the fine balance that needs to be struck between the competing and sometimes confliction forces that shape its society.'

<sup>56</sup> F Viljoen *International Human Rights Law in Africa* (2012) 333.

It is clear from the discussion in section 1 that human rights are not absolute but can be limited by claw-back clauses, norm-based limitations, the proportionality principle and the margin of appreciation given to states. However, the limitation should not have the effect of obliterating and rendering the right concerned illusory.

## 2. Limitation of rights in the Zimbabwean Constitution

Section 86 of the Zimbabwean Constitution is considered as the limitation clause. It has two interesting aspects. First, section 86(3) highlights rights that may be potentially absolute in the Zimbabwean Constitution namely the right to human dignity; the right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment; the right not to be placed in slavery or servitude; the right to fair trial; the right to obtain an order of habeas corpus and the right to life except to the extent specified in section 48 of the Constitution. Section 86(3) says 'No law may limit the following rights in this Chapter, and no person may violate them...' The use of may is not peremptory but discretionary in section 86(3). This potentially gives the Court the discretion to determine whether the mentioned rights are absolute or discretionary.

The second fundamental aspect of section 86 is that it provides the circumstances under which the rights enshrined in the Bill of rights may be limited. Currie and de Waal convincingly argue that the existence of a limitation clause does not mean that the rights in the Bill of rights can be limited for any reason but can only be limited for a justifiable reason.

Woolman *et al*<sup>57</sup> argue that the limitation clause has a four-fold purpose. First, it functions as a reminder that the rights enshrined in the Bill of Rights are not absolute. Second, the limitation clause reveals that rights may only be limited where and when the stated objective behind the restriction is designed to reinforce the constitutional values. Third, the test set out in the limitation clause enjoins courts to engage in a balancing exercise in order to arrive at a global judgment on proportionality. Finally, the limitation clause serves as a reminder that the counter-majoritarian dilemma is neither a paradox nor a problem, but an ineluctable consequence of a country's commitment to living in a constitutional democracy.<sup>58</sup>

The Zimbabwean Constitutional Court is yet to come up with the approach that a court should take when interpreting section 86 of the Constitution. In South Africa where section 36 of the Constitution has provisions almost similar to section 86 of the Zimbabwean Constitution, the courts usually ask two fundamental questions. First, whether a right in the Bill of Rights has been violated, impaired, limited or infringed by law or conduct?<sup>59</sup> Second, if the answer to the

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<sup>57</sup> S Woolman, T Roux & M Bishop *Constitutional law of South Africa: Student edition* (2007) 34-1 to 34-2.

<sup>58</sup> Put differently, powers of judicial review are best understood not as part of a battle for ascendancy between courts and legislatures or as a means of frustrating the will of the political majority, but rather as a commitment of South Africa's basic law to shared constitutional competence.

<sup>59</sup> In some cases, the Constitutional Court has dispensed with this first question and has proceeded on the basis of the second inquiry alone. Such cases include *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) and *S v Jordan* 2002 6 SA 642 (CC) [28] – [29]. A further analysis of this aspect is not useful to the subject under discussion in this thesis.

first question is in the affirmative, whether the infringement can be justified as a permissible limitation of the right?<sup>60</sup>

A careful look at section 86 reveals that the limitation of rights is essentially two-fold. First, a right should be limited by a law of general application. It would be interesting for the Constitutional Court to define what a law of general application would entail. South African jurisprudence has defined the law of general application as the rule of law<sup>61</sup> that includes legislation,<sup>62</sup> common law<sup>63</sup> and customary law<sup>64</sup> that is impersonal,<sup>65</sup> applies equally to all and is not arbitrary in its application.

Second, the law of general application should be fair, reasonable, necessary and justifiable<sup>66</sup> in an open and democratic society that is based on openness, justice, human dignity,<sup>67</sup> equality and freedom. Currie and de Waal convincingly contend that<sup>68</sup> '[it] must be shown that the law in question serves as a constitutionally acceptable purpose and that there is sufficient proportionality between the harm done by the law (the infringement of fundamental rights) and the benefits it is designed to achieve (the purpose of the law).' In the same vein, *S v Makwanyane* established that '[t]he limitation of constitutional rights for a purpose that is reasonable in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality.'<sup>69</sup> The proportionality principle (discussed above) is considered as central to a constitutional democracy.<sup>70</sup>

Section 86(2) lists six factors that a court should take into account when it determines whether or not a limitation is reasonable and justifiable in a democratic society. Five of these factors are substantially similar to the factors that constituted proportionality in the *Makwanyane* case are used to determine proportionality. The following are the factors:

*a. The nature of the right or freedom*

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<sup>60</sup> Currie & de Waal op cit note 3 153. This approach is consistent with how Zimbabwean Court interpreted the Bill of rights before the new constitution came into effect. See *Bhatti & Anor v Chief Immigration Officer & Anor* 2001 (2) ZLR 114 (H)

<sup>61</sup> *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC).

<sup>62</sup> It includes Acts of Parliament and delegated legislation. See *Larbi-Odam v MEC for Education (North West Province)* 1998 1 SA 745 (CC) 27.

<sup>63</sup> 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.

<sup>64</sup> *Du Plessis v De Klerk* 1996 3 SA 850 (CC) 44 & 136.

<sup>65</sup> *Islamic Unity Convention v Independent Broadcasting Authority* 2002 4 SA 294 (CC).

<sup>66</sup> Devenish GE (2005) *The South African Constitution* (LexisNexis Butterworths: Durban) 181 says the limitation should be reasonable and proportional.

<sup>67</sup> Section 86(3)(b) of the Constitution makes it clear that human dignity is one of the rights that cannot be limited.

<sup>68</sup> Currie & de Waal op cit note 3 163.

<sup>69</sup> *S v Makwanyane* 1995 (3) SA 391 (CC) [102].

<sup>70</sup> 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.'

A court is usually enjoined to assess what the importance of a particular right is in the overall constitutional scheme vis a vis the justification of its infringement. It would therefore follow that a right that is important to the Constitutional ambition to create democratic society based on values embodied in section 3 of the Constitution will carry a lot of weight in the exercise of balancing the right against the justification for its infringement.

*b. The purpose of the limitation*

Reasonableness usually demands that the limitation of a right must serve some worthwhile and important purpose in a constitutional democracy. Unlike the SA Constitution that does not list acceptable purposes 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.’ It will be very interesting to see how the Zimbabwean Constitutional Court will interpret this provision.

*c. The nature and extent of the limitation*

This factor requires the court to assess the way in which the limitation of a right affects the right concerned. 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.<sup>71</sup> Essentially, the law that limits the right should not do more damage to the right than is reasonable for achieving its purpose.<sup>72</sup>

*d. The need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others*

This requirement awakens to the reality that rights are not exercised in isolation but should take into account the rights of others.

*e. The relationship between the limitation and its purpose.*

This factor requires that there be a good reason for the infringement of a right. The court should make a factual inquiry on whether or not there is proportionality between the harm done by a limitation of right and the benefits that the limiting law seeks to achieve. If the limiting law does not or barely contributes to achieving the purpose of limitation, such law will not be regarded as a reasonable and justifiable limitation of a right. Interestingly, section 86(2)(b) of the ZIM Constitution qualifies this factor by requiring the court to specifically assess whether the limitation ‘... imposes greater restrictions on the right or freedom concerned than are necessary to achieve its purpose.’

*f. Whether there are less restrictive means of achieving the purpose of the limitation*

This requires courts to assess whether the means used to restrict a right is the best possible means to achieve the purpose of a limitation or there are other means that can be used to achieve the purpose that a limitation of rights seeks to achieve without restricting the limited right at all or restricting the limited right to a smaller extent. Currie and de Waal<sup>73</sup> argue that to be legitimate, a limitation of a fundamental right must achieve benefits that are in proportion to

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<sup>71</sup> *S v Meaker* 1998 8 BCLR 1038 (W).

<sup>72</sup> *S v Manamela* 2000 3 SA 1 (CC) 34.

<sup>73</sup> Currie and de Waal op cit note 3 170.

the costs of limitation. It follows therefore that a limitation of a right can be deemed not proportionate if the state could employ other means to achieve the same ends that will not restrict the limited right at all or will restrict the limited right to a small extent. 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.<sup>74</sup>

It is therefore clear from the above discourse that constitutional rights are not absolute but qualified. Constitutional rights can be legitimately limited by a law of general application that is fair, reasonable, necessary and justifiable in an open and democratic society that is based on openness, justice, human dignity, equality and freedom

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<sup>74</sup> *S v Makwanyane* 1995 3 SA 391 [123] and [128].

# **A Critical Legal Analysis of the Supreme Court Decision Delivered on 13 February 2017 in the Case Concerning the Interviews for the Position of Chief Justice of Zimbabwe**

**By Caleb Mucheche<sup>1</sup>**

## **Introduction**

On 13 February 2017, a three member bench of the Supreme Court of Zimbabwe<sup>2</sup> delivered an unanimous instant decision allowing the appeal by the Judicial Service Commission and setting aside a previous High Court judgment in the case of *Romeo Zibani v Judicial Service Commission & Ors*<sup>3</sup> that had granted an interdict against the holding of public interviews for the position of Chief Justice of Zimbabwe. The purpose of this paper is to critically analyse the legal basis, import and impact of the aforesaid Supreme Court decision.

## **Brief background to the case**

A fourth year University of Zimbabwe law student, Romeo Taomberwa Zibani, filed an urgent chamber application at the High Court of Zimbabwe citing the Judicial Service Commission (JSC) and other respondents. In that urgent chamber application, the applicant sought an interdict to stop the respondents from proceeding with interviews for the appointment of the successor<sup>4</sup> Chief Justice in terms of section 180 of the Constitution of Zimbabwe on the basis of an allegation of impropriety in the interview process. This impropriety was occasioned by the fact that the candidates for the position of Chief Justice were being interviewed by some of their subordinates who constituted the interviewing panel thereby compromising the credibility of the interview process itself. Thus the applicant sought an order for the suspension of the interview process to allow an amendment to the Constitution giving the President the discretion to appoint the Chief Justice on his own volition and, alternatively, for the composition of the interview panel to be changed and be constituted by retired judges.

On 11 December 2016, the High Court<sup>5</sup> heard the application and granted an order temporarily suspending the interviews for Chief Justice pending an amendment to the Constitution to give the President the unfettered discretion to appoint the Chief Justice. The Court availed the full reasons for the judgment on 12 December 2016. Aggrieved by the High Court judgment, the JSC, as one of the respondents in the High Court matter, filed a notice of appeal against the High Court judgment at the Supreme Court on 12 December 2016. Relying on the common law principle that the noting of any appeal against a judgment of a superior court automatically suspends the operation of that judgment, the JSC proceeded to conduct public interviews for the position of Chief Justice in sync with section 180(2)(c) of the Constitution on 12 December 2016. The Supreme Court appeal was heard on 13 February 2017 and the decision of the court was delivered orally on the same date.

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<sup>2</sup> Comprising Hlatshwayo JA, Patel JA & Ziyambi AJA

<sup>3</sup> HH-796-16

<sup>4</sup> To replace the outgoing Chief Justice Honourable G Chidyausiku retiring at the end of February 2017 after reaching his mandatory retirement age of 70 years as provided for in terms of section 186(1)(a) of the Constitution of Zimbabwe.

<sup>5</sup> Per Hungwe J

## **Legal basis of the Supreme Court decision**

In the absence of full reasons for the decision but based on the verbatim decision by the Supreme Court, the basis of the appeal court's decision is that the interviews for the position of Chief Justice were lawfully held in terms of legally valid provisions of the Constitution of Zimbabwe. The High Court had made an order stopping the interviews on the basis that the executive had initiated a process for the amendment of the Constitution to change the procedure for the appointment of Chief Justice among others. The High Court merely wanted a suspension of the process of the appointment of Chief Justice and not the law relating to the appointment of the same. By so doing, the High Court judgment deferred to the wisdom of the executive mindful of the fact that, ultimately, the executive has the final say in the appointment of the Chief Justice no matter what process is followed.

However, the Supreme Court differed with the High Court and premised its decision on law as it is and not law as it ought to be, a jurisprudential principle that finds its manifestation in legal positivism<sup>6</sup>. It is a trite legal principle that the role of a court of law is to interpret and apply the law as it stands. The decision of the court seems to have a firm legal foundation in the supremacy of the constitution which is deeply embedded in terms of section 2(1) of the Constitution of Zimbabwe in the following salutary terms, "... 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." The meaning of the supremacy of the Constitution of Zimbabwe over any law, custom or conduct inconsistent with it means that the provisions of the Constitution are sacrosanct and constitute a barometer for measuring compliance with the letter and spirit of the Constitution.

The question that needs to be asked is: Was the *conduct* of holding interviews for the position of Chief Justice consistent with the Constitution of Zimbabwe? If the answer is yes, then that conduct meets the constitutionality test entrenched in terms of section 2(1) of the Constitution of Zimbabwe. Conversely, the other question to be asked is: Was the conduct of not holding interviews for the position of Chief Justice consistent with the subsisting provisions of the Constitution of Zimbabwe? If the answer is in the negative, then such failure to hold interviews will run foul of section 2(1) of the Constitution of Zimbabwe which exalts the constitution over any law, practice, custom or conduct. Section 180 (1) of the prevailing Constitution of Zimbabwe provides for similar provision for the appointment of the Chief Justice, the Deputy Chief Justice, the Judge President of the High Court and all other judges by the President in accordance with section 180(2), (3) and (4) of the Constitution. It worth noting that section 180(2) (c) of the Constitution provides for public interviews of prospective candidates for the position of Chief Justice just like any other judge.

It is imperative to note that section 2(2) of the Constitution of Zimbabwe makes it abundantly clear that the legal fetters imposed by the constitution equally bind all the three arms of the State, namely executive, legislature and judiciary, in the following terms:

"... 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."

## **Legal import of the Supreme Court decision**

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<sup>6</sup> Some of the notable stalwarts and proponents for legal positivism are English jurist John Austin (1790-1859) and English philosopher Jeremy Bentham (1748-1832).

The legal import of the Supreme Court decision is that the interviews for the Chief Justice which were done by the JSC are valid at law but that does not mean that the President is legally bound to appoint any of the candidates that underwent an interview. In terms of section 180(3) of the Constitution, the President has the unfettered discretion to decline to appoint any of the persons from the list prepared in terms of section 180(2)(d) and submitted to him by the JSC in terms of section 180(2)(e) of the Constitution but, in the event that he declines to appoint the Chief Justice from the initial list of three names, section 180(3) of the Constitution imposes a mandatory obligation on him to appoint a nominee as Chief Justice from a further list of three qualified persons submitted to him, without having any further discretion to appoint or not to appoint.

Thus, in terms of section 180(3) of the Constitution of Zimbabwe, the President has the final say on the choice of candidate for appointment as Chief Justice by virtue of the following provisions:

If the President considers that none of the persons on the list submitted to him or her in terms of subsection (2)(e) are suitable for appointment to the office, he or she must require the Judicial Service Commission to submit a further list of three qualified persons, whereupon the President must appoint one of the nominees to the office concerned.

The wording of section 180(3) of the current Constitution may potentially create a constitutional crisis if the President declines to appoint the Chief Justice from the initial list submitted to him by the Judicial Service Commission and the JSC fails to submit a further list of three qualified persons. Although the Constitution is silent on whether the names of applicants in the initial rejected list must be included in the further list of qualified persons, a reasonable presumption is that the second list may exclude the three rejected candidates in the initial list.

The fact that the Supreme Court has set aside the High Court judgment and upheld the interviews for the Chief Justice does not mean that the President is legally bound to appoint any of the candidates who attended the interviews for the position of Chief Justice as he still retains the discretion reposed to him in terms of section 180(3) of the Constitution. However, if the President chooses to appoint the Chief Justice under the current Constitution, he is constitutionally obliged to appoint the office holder in terms of the entire legal procedure laid down under section 180 of the Constitution and, in particular, section 180(3) of the Constitution and not outside such legal confines.

### **Impact of the Supreme Court decision**

The court's decision simply means that the appointment of the next Chief Justice of Zimbabwe now rests with the President's prerogative. Both the Supreme Court and High Court decisions reached the same destination that the President has the final say in the appointment of the Chief Justice but using different routes. The President is *not* under any *legal deadline* to appoint the Chief Justice to replace the outgoing Chief Justice because section 181(1) of the Constitution closes any lacuna or gap in the event that the current Chief Justice leaves office by providing for the Deputy Chief Justice to assume the position of Acting Chief Justice as follows:

If the office of Chief Justice is vacant or if the office holder is unable to perform the functions of the office, the Deputy Chief Justice acts in his or her place, but if both offices are vacant or both office-holders are unable to perform their functions, the most senior judge of the Constitutional Court acts as Chief Justice.

The President is at liberty to appoint the Chief Justice in terms of the provisions of the current Constitution or await the legal enactment of the proposed amendments to the Constitution and appoint the office holder in terms of the provisions of the amended Constitution.

### **Conclusion**

It is not clear at this juncture as to which procedure will lead to the appointment of the Chief Justice between the current Constitution and the proposed amendments to the Constitution. Suffice to say that it is legally unnecessary and inconsequential to speculate on how the President will exercise his discretion in the appointment of the Chief Justice but it is preferable to await the outcome of that discretion which will find expression in the suitable candidate to be appointed as Chief Justice of the Republic of Zimbabwe.

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## Playing Politics with the Judiciary and the Constitution?

By David T Hofisi and Geoff Feltoe

### Introduction

This article provides an overview of the tangled political machinations that have taken place in relation to the appointment of a new Chief Justice of the Republic of Zimbabwe. It draws from comments made by various organizations and individuals and compares the mooted constitutional amendment bill with regional and international standards.

The most senior member of the judiciary, the Chief Justice, must be appointed purely on merit and this appointment must not be influenced by political considerations. It is therefore highly regrettable that there appear to have been political manipulation to try to influence this process. This could have extremely damaging consequences for the integrity and independence of the judiciary in Zimbabwe.

Chief Justice Godfrey Chidyausiku reached the compulsory retirement age of 70 at the end of February 2017.<sup>1</sup> Before he was due to retire, a process was initiated to appoint his replacement.<sup>2</sup>

### The Constitutional Provisions

Section 180 of the Constitution of Zimbabwe provides for the appointment of the Chief Justice.<sup>3</sup> The Judicial Service Commission is required to advertise the position, invite the President and the public to make nominations, and conduct public interviews of prospective candidates. It must then prepare a list of three qualified persons as nominees and submit this list to the President. The President must appoint one of these nominees as Chief Justice, but if the President considers that none of the nominees are suitable for appointment, he must require the Judicial Service Commission to submit a further list of three qualified persons, whereupon the President must appoint one of the nominees to the position.<sup>4</sup>

Relying on these provisions, the Judicial Service Commission called for the nomination of candidates in October 2016.<sup>5</sup> Four candidates were nominated and they were due to be interviewed on 12 December 2016.<sup>6</sup>

### Developments Prior to Interviews

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<sup>1</sup> This is in accordance with sections 186(1)(a) (b) and (2) of the Constitution of Zimbabwe (2013)

<sup>2</sup> See "Chief Justice Vacancy Interviews on Monday" 3/12/16 article available at <https://www.dailynews.co.zw/articles/2016/12/03/chief-justice-vacancy-interviews-on-monday>

<sup>3</sup> Section 180 provides for the appointment of: "The Chief Justice, the Deputy Chief Justice, the Judge President of the High Court and all other judges appointed by the President in accordance with this section."

<sup>4</sup> See section 180 of the Constitution of Zimbabwe

<sup>5</sup> See *Veritas* Zimbabwe's Court Watch 4/2016 available at <http://veritaszim.net/node/1873>

<sup>6</sup> See *Veritas* Zimbabwe's Court Watch 2016 available at <http://veritaszim.net/node/1900>

Prior to the interviews and cognizant that these new appointment procedures might cause some problems, Chief Justice Godfrey Chidyausiku alerted the Executive about his concerns. As he did not receive a response, he inferred that the Executive was comfortable with the new procedures.<sup>7</sup> The Judicial Service Commission then proceeded to call for nominations and, thereafter, set the date for the interviews.<sup>8</sup>

A few days before the interviews were due to commence, the Chief Justice says he was surprised to receive a communication informing him that an Executive order had been issued to stop the selection process. The Chief Justice says he responded by advising that the Executive's directive could not be complied with without violating the Constitution and, as such; the interviews would proceed in terms of the Constitution. The Chief Justice says that he later ascertained that the President had not issued the alleged Executive order to stop the interviews.<sup>9</sup> Regarding the media coverage of this matter, the Chief Justice had this to say:

“Ever since adopting our stance to abide by the Constitution, a segment of the media has sought to impugn the integrity of the Judicial Service Commission. This is most regrettable. This is all I wish to say on this unfortunate debate. In this regard, I am inspired by Michelle Obama's words of wisdom, ‘When your detractors go low, you go higher’. You do not follow them into the gutter.”<sup>10</sup>

Five days prior to the date scheduled for the interviews, a law student, Mr Romeo Taombera Zibani, launched an application before the High Court seeking an interdict to stop the interviews from being held.<sup>11</sup>

### **The Applicant's Arguments**

The applicant argued that the process for appointing the Chief Justice mandated by section 180 of the Constitution was itself unconstitutional and ought to be amended. He asserted that the selection process violated the founding values of transparency and accountability in the Constitution because it created the possibility of biased decisions and could be seen as being incestuous.<sup>12</sup> Justice Rita Makarau, one of the applicants for the post, was (and remains) the secretary to the Judicial Service Commission. The other applicants for the post, Deputy Chief Justice Luke Malaba, Justice Paddington Garwe and Justice President George Chiweshe all report to the Chief Justice who chairs the selection panel.

### **The Affidavit from the Ministry**

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<sup>7</sup> See the *Herald* Article “Chidyausiku Speaks on Chief Justice Saga” 17/1/17 Article available at <http://www.Herald.co.zw/chidyausiku-speaks-on-chief-justice-saga/> : “As a cautionary move, I alerted the Executive to this new procedure in the appointment of the Chief Justice as early as March 2016. I did not get a response. I did not get a response. I inferred from the conduct that the Executive was comfortable with the new procedure.”

<sup>8</sup> See the *Herald* Article “Chidyausiku Speaks on Chief Justice Saga” 17/1/17 *supra*

<sup>9</sup> See the *Herald* Article “Chidyausiku Speaks on Chief Justice Saga” 17/1/17 *supra*

<sup>10</sup> See the *Herald* Article “Chidyausiku Speaks on Chief Justice Saga” 17/1/17 *supra*

<sup>11</sup> See the *Newsday* Article “UZ student bids to stop Chief Justice interviews” 08/12/16 available at <https://www.newsday.co.zw/2016/12/08/mphoko-chombo-roasted-protecting-criminals/>

<sup>12</sup> See See the *Newsday* Article “UZ student bids to stop Chief Justice interviews” 08/12/16 *Ibid*

The Minister of Justice was one of the respondents in the case. An affidavit was placed before the court by the Ministry's permanent secretary on behalf of the Minister. The affidavit deposed to the fact that there was an intention to amend section 180 to allow the President to decide himself who should be appointed as Chief Justice without any process of public interviews. This proposed change was to be canvassed with the public. Annexed to the affidavit was a draft amendment to section 180 of the Constitution and a draft memorandum addressed to Cabinet highlighting the principles of the proposed amendment.<sup>13</sup> Conspicuously, the memorandum did not bear the Minister's signature.<sup>14</sup>

## The Judgment

Justice Charles Hungwe granted the interdict to stop the interviews for the Chief Justice from taking place. The judgment in this case is *Zibani v Judicial Service Commission & Others* High Court Harare Case Number 797 of 2017.<sup>15</sup> Whilst agreeing that the process in section 180 was lawful, the Judge decided it was contrary to the constitutional values of transparency and accountability and was therefore unconstitutional. Upholding the Constitution ahead of an expressed intention by the Executive to amend section 180 would, he said, constitute "slavish adherence" to the Constitution. He held that the Judicial Service Commission is also accountable to politicians in the Executive and their expressed intention to amend the law had to be respected. Following the process presently mandated by the Constitution would thus, according to his judgment, amount to a threat to the independence of the judiciary. He said:

"It occurs to me that where a lawful process leads to an absurd result, in that sense that colleagues select each other for entitlement to public office, as argued by the applicant, it cannot be sanctioned on the ground that it is provided for in the law. Such an approach is irrational."<sup>16</sup>

This judgment is palpably wrong and has some very dangerous implications. It is completely at variance with the basic principles of independence of the judiciary, the separation of powers and the supremacy of the Constitution. It not only offends against the rule of law, but also threatens the proper administration of justice.

Section 180 of the Constitution sets out the process to be followed in the appointment of judges. This procedure was introduced by the Constitution of Zimbabwe (2013) to enhance transparency and accountability in appointing judges, including the Chief Justice.<sup>17</sup> The Judicial

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<sup>13</sup> See the *Sunday Mail* Article "Justice Ministry Won't Oppose Zibani" 5/3/17 available at <http://www.sundaymail.co.zw/justice-ministry-wont-oppose-zibani/>

<sup>14</sup> See page 15 of the *Zibani* judgment available at: [http://www.veritaszim.net/sites/veritas\\_d/files/Zibani%20v%20JSC%20%26%20Others%20-%20Hungwe%20J.pdf](http://www.veritaszim.net/sites/veritas_d/files/Zibani%20v%20JSC%20%26%20Others%20-%20Hungwe%20J.pdf)

<sup>15</sup> See <http://www.pindula.co.zw/news/wp-content/uploads/2016/12/Justice-Hungwe-Judgement-on-Romeo-Taombera-Zibani-Case-Interdicting-JSC-Interviews-.pdf>

<sup>16</sup> See Pages 6-7 of the Judgment in the *Zibani* judgment *Ibid*

<sup>17</sup> This point is dealt with more fully below in the paragraph titled: "Judicial Appointment in the Constitution of Zimbabwe"

Service Commission has a duty in terms of section 191 of the Constitution to conduct its business in a fair, just and transparent manner.<sup>18</sup> Further, in terms of Section 324 of the Constitution, all constitutional obligations must be performed diligently and *without delay*.<sup>19</sup> Thus, there was a clear and incontrovertible duty on the Judicial Service Commission to conduct the interview process and to do so without delay. These constitutional provisions notwithstanding, Justice Hungwe found that the process which the Commission intended to follow was unconstitutional.

The finding by the judge that the selection process is unconstitutional is legally untenable. The Constitution is supreme law of the country and any law, practice, custom or policy which is inconsistent to the Constitution is, to the extent of the inconsistency, invalid.<sup>20</sup> Judges are the guardians of the Constitution and are sworn to uphold it.<sup>21</sup> The Judicial Service Commission is thus obliged to follow the process provided for in section 180. It was entirely wrong for Justice Hungwe to interdict and stop a lawful constitutional process on the basis of concerns of a private individual about the nature of the process or indeed on the basis of an unsigned communication of the intention to amend section 180 of the Constitution. Stated intentions to amend laws cannot be the basis for not obeying them – this is an abrogation of the rule of law.<sup>22</sup>

There is no provision in the Constitution which would allow a court to declare as unconstitutional a provision in the Constitution. It is a trite rule of statutory interpretation that a statute is interpreted in favour of internal consistency, more so when that law is a constitution whose provisions are presumed to be mutually consistent.<sup>23</sup> If a constitutional provision turns out to be ill-considered or to have unacceptable consequences, the only recourse is for the Executive to propose that the provision be amended and to go through the required Parliamentary process of amendment.

Renowned academic Alex Magaisa has this to say about Judge Hungwe's ruling;

“The implication of Justice Hungwe's reasoning is that if any citizen does not like a constitutional clause which requires a constitutional body to do something, they can go to court to stop the constitutional body from carrying out its mandate and the court can order the Executive or Parliament to amend the Constitution. Meanwhile, the Constitution is put in abeyance, pending the fulfilment of the litigant's desires. It negates the basic principle that the Constitution, however objectionable it might be, is supreme. It also breeds uncertainty and confusion.

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<sup>18</sup> See Section 191 of the Constitution of Zimbabwe: “The Judicial Service Commission must conduct its business in a just, fair and transparent manner.”

<sup>19</sup> See Section 324 of the Constitution of Zimbabwe: “All constitutional obligations must be performed diligently and without delay.”

<sup>20</sup> See Section 2(1) of the Constitution of Zimbabwe

<sup>21</sup> See the Judicial Oath or Affirmation in the Third Schedule of the Constitution of Zimbabwe

<sup>22</sup> The rule of law is mentioned seven times in the Constitution of Zimbabwe

<sup>23</sup> See Principles of Constitutional Interpretation: <http://thefederalistpapers.org/principles-of-constitutional-interpretation>

If Justice Hungwe's reasoning were to be followed, it would allow constitutional bodies to disobey the Constitution arguing that they are lobbying government to pass a law to change it. For example, ZEC might refuse to register voters, arguing that they are waiting for government to process an amendment to the Constitution. Such reasoning, which Justice Hungwe's judgment encourages, would be a recipe for disaster. You could have citizens suing to interdict constitutional bodies for all manner of reasons, the ultimate end of which is to stop them from carrying out their constitutional mandate. A constitutional democracy does not work like that. It prioritises the constitution above all else."<sup>24</sup>

*Veritas* provided the following trenchant comment on the Hungwe judgment:

"The Constitution is the supreme law and the Judicial Service Commission must obey it. The argument that section 180 is unconstitutional verges on nonsense. The Constitution is an integral whole, and no part of it can be regarded as invalid or unconstitutional. The fact that the government or a faction within government would like to amend section 180 cannot justify the Judicial Service Commission disregarding it."<sup>25</sup>

### **The Holding of Interviews**

Immediately after this judgment, the Judicial Service Commission lodged an appeal which had the effect of suspending the ruling.<sup>26</sup> The Commission then decided to go ahead with the interviews and they interviewed three judges, Justices Luke Malaba, Rita Makarau and Paddington Garwe.<sup>27</sup> Justice George Chiweshe was not interviewed because, although he was invited to the interview, he did not attend.<sup>28</sup>

### **The Supreme Court Appeal Decision**

In a unanimous verdict, the Supreme Court allowed the appeal filed by the Judicial Service Commission on 13 February 2017 and set aside the interdict imposed by Justice Hungwe.<sup>29</sup> The Supreme Court ruled that the Judicial Service Commission had acted lawfully by following the process currently provided for in the Constitution.<sup>30</sup> The executive's plans to amend the present constitutional provisions did not in any way affect the finding of the Supreme Court as the

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<sup>24</sup> See Alex Magaisa, "Comment on Justice Hungwe's Judgment in the Zibani matter" 15/12/16 Article available at <https://www.bigsr.co.uk/single-post/2016/12/15/Comment-on-Justice-Hungwe%E2%80%99s-Judgment-in-the-Zibani-matter>

<sup>25</sup> *Veritas* Court Watch 2 March 2017 "Chief Justice Succession: The Continuing Saga."

<sup>26</sup> See "Chidyausiku hits back; Chief Justice interviews still on as JSC appeal to Supreme Court" 11/12/16 available at <http://www.pindula.co.zw/news/2016/12/11/chidyausiku-hits-back-chief-justice-interviews-still-jsc-appeal-supreme-court/#.WMEI9W997IU>

<sup>27</sup> See *Herald* Article "Chief Justice interviews go head (sic)" 13/12/16 Article available at <http://www.Herald.co.zw/chief-justice-interviews-go-head/>

<sup>28</sup> See *Herald* Article "Chief Justice interviews go head (sic)" 13/12/16 *supra*

<sup>29</sup> See *Herald* Article "Supreme Court Upholds" 14/02/17 available at <http://www.Herald.co.zw/supreme-court-upholds/>

<sup>30</sup> See *Herald* Article "Supreme Court Upholds" 14/02/17 *supra*

proposed constitutional amendment might not even be passed.<sup>31</sup> Thus, the entirely flawed basis for the decision by Justice Hungwe was emphatically rejected.

Alex Magaisa alleges that there was more political gamesmanship at the Supreme Court hearing. According to him, the failure by Mr Zibani's lawyers to follow the elementary requirement to submit heads of argument and the subsequent request for postponement at the hearing is evidence of attempts to delay the hearing so the constitutional amendment is enacted ahead of further judicial scrutiny.<sup>32</sup>

### **Application to the Constitutional Court**

Following the decision by the Supreme Court, Mr Romeo Taombera Zibani applied to the Constitutional Court for an order setting aside the Supreme Court's judgment on the ground that the appointment of retired Judge, Vernanda Ziyambi, to preside in the appeal was unconstitutional.<sup>33</sup> The second respondent, the Minister of Justice, raised the additional issue of the possible failure by Justice Ziyambi to take the oath of office.

"I do not take issue with the averments made by the applicant in paragraphs 1 to 8 of his founding affidavit. However, I believe third respondent did not comply with the peremptory provisions of Section 185 (2) of the Constitution. The peremptory provisions of Section 185 (2) of the Constitution require that a judge takes the oath of office upon appointment. My belief is premised on the fact that the letter of appointment of the fourth respondent, which I also received, makes no mention of that issue."<sup>34</sup>

*Veritas* have pointed to Section 186(3) of the Constitution which precludes compulsory retirement at the age of 70 for judges appointed in an acting capacity.<sup>35</sup>

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<sup>31</sup> See *Herald* Article "Supreme Court Upholds" 14/02/17 *supra*

<sup>32</sup> "... Zibani's lawyers deliberately failed to file heads of argument. It is an elementary rule of the court that a litigant must submit heads of arguments. In lay terms, heads of arguments constitute a summary of the main arguments that a party will make at the hearing. They allow judges and counter-parties to get a preview of the main arguments before the actual hearing. However, Zibani and his lawyers did not submit these heads. Their argument, apparently, was that the appeal had been improperly set down ahead of other matters. They forgot that they had submitted their High Court application on an urgent basis. If the application was urgent, why shouldn't the appeal be treated as urgent too? Instead, when they appeared at the Supreme Court, they sought to have the matter postponed, exposing the move as a no more than a delaying tactic. The object seems to have been to delay the matter as long as possible until the constitutional amendment, which is not yet before Parliament, is done. However, the Supreme Court made these machinations redundant by dismissing the application for a postponement and ruling in favour of the appeal. The ball is now firmly in President Mugabe's court. It is up to him to uphold the Constitution by proceeding with the current process or to defy the Constitution by waiting for the amendment." Available at <https://www.bigsr.co.uk/single-post/2017/02/13/Comment-on-the-Supreme-Court-decision-on-judicial-appointments>

<sup>33</sup> See "Chidyausiku dragged to court over successor" 24/02/17 available at <https://www.newsday.co.zw/2017/02/24/chidyausiku-dragged-court-successor/>

<sup>34</sup> See "Retired Chief Justice Chidyausiku could have violated constitution in Ziyambi appointment" 08/03/17 available at <http://www.chronicle.co.zw/retired-chief-justice-chidyausiku-could-have-violated-constitution-in-ziyambi-appointment/>

<sup>35</sup> See 'Court Watch 2017' available at <http://www.veritaszim.net/node/1991>

“It was always accepted that under the equivalent provisions of the former constitution, retired judges could be called on to serve on the Bench when necessary. Indeed the conditions of service of judges require them to undertake such service when asked to do so, failing which they will not be paid their pensions.”<sup>36</sup>

This matter remains pending before the Constitutional Court.

## The Political Context

There is speculation that the factional fighting within ZANU PF underlies the development (and possible denouement) of this matter.<sup>37</sup> According to this notion, the Vice President in charge of the Justice Ministry prefers the appointment of Justice Chiweshe as Chief Justice because he is sympathetic to the Vice President’s faction.<sup>38</sup> Thus, in any litigation involving a challenge to the presidency after the current president ceases to be the incumbent, Justice Chiweshe would lean in favour of the current Vice President. On the other hand, at least some of the other three nominees are allegedly sympathetic to the other ZANU PF faction.<sup>39</sup> According to this theory, the proposed change to section 180 to give the President the sole discretion in appointing the Chief Justice is to enable the President to appoint Justice Chiweshe who has a liberation war background and strong ties with the military.<sup>40</sup> It is further speculated that Justice Chiweshe did not attend the public interviews because he might not be recommended for appointment by the panel. Some reports suggest he might have been aware that the amendment of section 180 was imminent and he would stand a better chance of appointment if the decision rested solely with the President; whilst the other reason proffered for his absence was the ruling by Justice Hungwe halting the interview process.<sup>41</sup>

All of this is pure speculation. However, any veracity in relation to these claims would bode ill for the integrity and independence of the judiciary as it would be symptomatic of an attempt to politically influence the judicial appointment process. Alex Magaisa maintains:

“What is clear from this case is that the process of appointing the Chief Justice has been the subject of political gamesmanship within the context of ZANU PF’s succession politics. While Zibani, the litigant who tried to stop the interviews is a private citizen, there is much to suggest that he was not a lone ranger, but that he was, in fact, a proxy of a political faction

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<sup>36</sup> See ‘Court Watch 2017’ *supra*

<sup>37</sup> See *The Zimbabwe Independent* “Race to succeed Chidyausiku takes a factional dimension,” 25/11/16 Article available at: <https://www.theindependent.co.zw/2016/11/25/race-succeed-chidyausiku-takes-factional-dimension/>

<sup>38</sup> See *The Zimbabwe Independent* “Race to succeed Chidyausiku takes a factional dimension,” 25/11/16 *supra*

<sup>39</sup> See *The Zimbabwe Independent* “Race to succeed Chidyausiku takes a factional dimension,” 25/11/16 *supra*

<sup>40</sup> See *The Zimbabwe Independent* “Race to succeed Chidyausiku takes a factional dimension,” 25/11/16 *supra*

<sup>41</sup> See “Ministers in fierce row over chief justice,” 23/12/16 Article available at: <https://www.theindependent.co.zw/2016/12/23/ministers-fierce-row-chief-justice/>

which is pushing for a particular candidate to take over as Chief Justice. It is hardly a coincidence that Romeo Zibani submitted his application at the same time that the Ministry of Justice was also crafting an amendment to the process of appointing a Chief Justice and that the Ministry had no interest in opposing Zibani's application. On the contrary, the Ministry of Justice seemed to be quite happy with Zibani's application, instead of defending the existing provisions of the Constitution, as it is legally obliged to do. It curiously gave precedence to a proposed constitutional amendment, ahead of an existing and valid provision of the Constitution."<sup>42</sup>

*Veritas* had this to say:

"It is most unfortunate that the appointment of the new Chief Justice seems to have fallen prey to political factionalism. Even the appearance of political involvement in the appointment process diminishes the authority and prestige that should attach to the office. It is to be hoped that whoever finally becomes Chief Justice will be able to reassert the independence of his or her office and the judiciary as a whole."<sup>43</sup>

### **Independence of the Judiciary**

Judicial independence is vitally important for the fair administration of justice and for the upholding of the rule of law.<sup>44</sup> Three reasons were advanced by former U.S. Solicitor General, Archibald Cox, for judicial independence:

1. To guard against abuse of executive power;
2. To halt legislative erosion of fundamental human rights, and
3. To provide assurances to the public that judges are impartial and fair in their decision-making processes.<sup>45</sup>

The scholars James Melton and Tom Ginsburg note that two thirds of all constitutions written since 1985 include at least two of the six constitutional features identified as enhancing judicial independence.<sup>46</sup> This is a marked progression from the pre-1985 period in which 60% of constitutions either contained only one of these features or none at all.<sup>47</sup> As of 2017, 77% of all constitutions contained a statement requiring judicial independence.<sup>48</sup> This normative consensus is reflected in Zimbabwe's Constitution which states that judicial independence is

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<sup>42</sup> See Alex Magaisa: "Comment on the Supreme Court decision on judicial appointments" 13/02/17 available at <https://www.bigsr.co.uk/single-post/2017/02/13/Comment-on-the-Supreme-Court-decision-on-judicial-appointments>

<sup>43</sup> *Veritas* Court Watch 2 March 2017 "Chief Justice Succession: The Continuing Saga."

<sup>44</sup> See also Lord Bingham '(i)t is a truth universally acknowledged that the constitution of a modern democracy governed by the rule of law must effectively guarantee judicial independence.' *The Business of Judging: Selected Essays and Speeches* (2000) OUP at 55.

<sup>45</sup> Archibald Cox 'The Independence of the Judiciary: History and Purposes' (2006) 21 *University of Dayton Law Review* 565 at 567-74

<sup>46</sup> See James Melton & Tom Ginsburg, "Does De Jure Judicial Independence Really Matter? A Re-evaluation of Explanations for Judicial Independence" (Coase-Sandor Institute for Law & Economics Working Paper No. 612, 2014).

<sup>47</sup> See James Melton & Tom Ginsburg *supra*

<sup>48</sup> See James Melton & Tom Ginsburg *supra* at page 192

central to the rule of law and good governance.<sup>49</sup> Further, the courts are subject only to the constitution and the law.<sup>50</sup>

Whilst necessary, statements of judicial independence are insufficient drivers for actual independence. Some scholars opine that the formal provision for judicial independence, *de jure* independence, is the most important determinant for actual, *de facto*, independence.<sup>51</sup> However, Melton and Ginsburg express skepticism regarding this claim since the marked increase in *de jure* independence has not had a concordant rise in *de facto* independence.<sup>52</sup> They make the seminal inquiry regarding textual drivers for and supporters of judicial independence.<sup>53</sup> It is their finding that, even though the popular zeitgeist is to have a constitutional statement of judicial independence, different countries will have different levels of demand for judicial independence ranging from the nominal to the radical.<sup>54</sup>

To illustrate, a country could require judicial independence in the constitution but give all powers of nomination and appointment to the executive, thereby undermining actual independence. This is important since the view has been expressed by the official in charge of the Ministry of Justice, Legal and Parliamentary Affairs claiming that the proposed amendment has no effect on judicial independence since the provisions relating to judicial independence remain unaltered: “So, the amendment is to deal with the issues of procedures. It does not derogate anything concerning independent of the judiciary. Independence of the judiciary is guaranteed in the Constitution. We are not tempering with that. I wanted that to be clear.”<sup>55</sup> This claim cannot be sustained since judicial independence is the result of a number of constitutional features. As noted above, Melton and Ginsburg draw on various studies to identify six central constitutional features which enhance judicial independence.<sup>56</sup> These are:

1. Statement of Judicial Independence;
2. Judicial Tenure;
3. Selection Procedure;
4. Removal Procedure;
5. Limited Removal Conditions;
6. Salary Insulation.<sup>57</sup>

## Judicial Appointment Procedures – Normative Claims

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<sup>49</sup> See Section 164 of the Constitution of Zimbabwe (2013) and also Section 79B of the Lancaster House Constitution (as amended)

<sup>50</sup> See Section 164 of the Constitution of Zimbabwe (2013) *Ibid*

<sup>51</sup> See Hayo, Bernd, and Stefan Voigt (2007) “Explaining De Facto Judicial Independence” *International Review of Law and Economics* 27:269-90.

<sup>52</sup> See James Melton & Tom Ginsburg *supra* at page 188

<sup>53</sup> See James Melton & Tom Ginsburg *supra* at page 191

<sup>54</sup> See James Melton & Tom Ginsburg *supra* at page 192

<sup>55</sup> See *Herald* Article “ED Speaks on Govt,JSC row” 21/3/17 available at <http://www.Herald.co.zw/ed-speaks-on-govt-jsc-row/>

<sup>56</sup> See James Melton & Tom Ginsburg *supra* at page 195-196

<sup>57</sup> See James Melton & Tom Ginsburg *supra* at pages 195-196

Thus, there are other constitutional and legal provisions which enhance judicial independence, key for this analysis being the selection procedure. Judicial appointment is a crucial mechanism to enhance judicial independence as “Judges who are dependent in some way on the person who appoints them may not be relied upon to deliver neutral, high-quality decisions, and so undermine the legitimacy of the legal system as a whole.”<sup>58</sup> Provisions on judicial independence which provide for multiple bodies to be involved in appointment, promotion or removal of judges enhance actual independence as other actors can retaliate and increase the political cost of ignoring the constitutional text.<sup>59</sup> As noted by Melton and Ginsburg:

“*Ceteris paribus*, textual promises will facilitate enforcement to the extent that they raise the visibility of judicial independence or designate multiple officials to be involved in the institutional processes related to the judiciary.”<sup>60</sup>

For this reason, they note that the use of judicial councils in judicial appointments enhances judicial independence.<sup>61</sup>

There are other reasons for supporting the use of judicial councils/commissions in judicial appointment processes.<sup>62</sup> Regional and international instruments implore the need to ensure transparency in appointment of judicial officers. The African Principles and Guidelines on the Right to a Fair Trial provide as follows:

“The process for appointments to judicial bodies shall be transparent and accountable and the establishment of an independent body for this purpose is encouraged. Any method of judicial selection shall safeguard the independence and impartiality of the judiciary.”<sup>63</sup>

Similarly, the Universal Declaration on the Independence of Justice (Montreal Declaration) provides that:

“Judges shall be nominated and appointed, or elected in accordance with governing constitutional and statutory provisions which shall, if possible, **not confine the power of nomination to governments** or make nomination dependent on nationality.”<sup>64</sup> (emphasis added.)

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<sup>58</sup> See United States Institute of the Peace, “Judicial Appointments and Judicial Independence.” January 2009, [www.usip.org](http://www.usip.org) at page 1

<sup>59</sup> See James Melton & Tom Ginsburg *supra*

<sup>60</sup> See James Melton & Tom Ginsburg *supra* at page 194

<sup>61</sup> See James Melton & Tom Ginsburg *supra* at page 196: “We consider appointment processes that involve a judicial council or two (or more) actors as enhancing judicial independence.”

<sup>62</sup> For a discussion on the need for judicial appointments to enhance judicial independence and ensure appointments are based on merit and promote equality, diversity and judicial accountability, see Ila Suame *The Constitutional Touchstones of Judicial Appointments*

<sup>63</sup> See Principle A, Paragraph 4(h) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa. See also the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, Principles 13-17 and the Latimer House Guidelines, Principle II.1

<sup>64</sup> See Paragraph 1.11 of the Universal Declaration on the Independence of Justice (Montreal Declaration)

The Universal Charter of the Judge also requires judicial appointments to be open and transparent and encourages that this is done by an independent body with “substantial judicial representation.”<sup>65</sup> The ineluctable conclusion is that there is regional and international impetus for the use of an independent judicial council/commission in the appointment of judicial officers.<sup>66</sup>

### **Judicial Appointment in the Constitution of Zimbabwe**

The appointment procedure provided in the Constitution of Zimbabwe (2013) is a reflection of the efficacies of multiple-actor driven appointment processes. It is an instance of constitutional convergence with the Constitution of South Africa which, by and large, provides for a similar procedure.<sup>67</sup> Some scholars have concluded that this is an international best practice.<sup>68</sup> This is because it allows for consultations with a broad range of professionals including accountants, lawyers, professors and human resource management personnel.<sup>69</sup> There is strong scrutiny of potential candidates and this ensures appointment of the best qualified candidates.<sup>70</sup> It is transparent, open and reduces executive control over the process.<sup>71</sup> It was a welcome departure from the secretive method of appointment under the former Constitution as noted by prominent lawyer and academic, Mr Derek Matyszak:

“The manner in which appointments are to be made under the (then) draft has also been improved and diminishes Presidential influence in this regard. Rather than the opaque manner in which the JSC comes to consider prospective candidates which exists under the (then) current constitution...”<sup>72</sup>

As shown above, this method of appointment is strongly recommended by regional and international instruments. For these reasons, the Comparative Constitutions Project (CCP) gives the Constitution of Zimbabwe a score of four (4) out of six (6) in respect of judicial independence.<sup>73</sup> This score is higher than that of *inter alia* Sweden, Switzerland, U.S.A., and the United Kingdom.<sup>74</sup> This does not necessarily support a claim that the judiciary in Zimbabwe is

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<sup>65</sup> See Article 9 of the Universal Charter of the Judge available at <http://www.iaj-uim.org/universal-charter-of-the-judges/>

<sup>66</sup> See also Paragraph 8 of the UN Basic Principles on the Independence of the Judiciary which state that methods of judicial appointment must safeguard against appointment for improper motives and discrimination.

<sup>67</sup> See Section 174(4) of the Constitution of South Africa

<sup>68</sup> See Sarkar Ali Akkas, “Appointment of Judges: A key issue of Judicial Independence: available at <http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1293&context=blr> : In this regard the composition and working system of the South African Judicial Services Commission may be an acceptable model. Such a mechanism may be very effective to ensure the appointment of the best-qualified people to judicial office.”

<sup>69</sup> See the composition of the Judicial Services Commission in Section 189 of the Constitution of Zimbabwe (2013)

<sup>70</sup> See Sarka Ali Akkas *supra* at page 208

<sup>71</sup> See Sarka Ali Akkas *supra* at page 208

<sup>72</sup> See Derek Matyszak “Presidential Power and the Draft Constitution,” RAU February 2013 available at <http://researchandadvocacyunit.org/system/files/PRESIDENTIAL%20POWER%20AND%20THE%20DRAFT%20CONSTITUTION.pdf>

<sup>73</sup> See Constitution Rankings available at: <http://comparativeconstitutionsproject.org/ccp-rankings/>

<sup>74</sup> See Constitution Rankings available at: <http://comparativeconstitutionsproject.org/ccp-rankings/>

more independent than that of the U.S.A. or the United Kingdom, but shows the progressive nature of the constitutional text compared to others.

### **Provenance of Section 180 of the Constitution of Zimbabwe (2013)**

In his blog post entitled “Five myths behind ZANU PF’s proposed constitutional amendment,” Alex Magaisa emphatically denies the claim that section 180 of the Constitution is a clause proposed by the Movement for Democratic Change (MDC) during the constitution making process.<sup>75</sup> Instead, he asserts that the MDC wanted a more rigorous process which required parliamentary approval of nominations and that all judges re-apply for their jobs as was done in the Kenyan Constitution Reform Process<sup>76</sup>. Section 180 of the Constitution therefore represents, according to Magaisa, the compromise reached by all parties to the constitution-making process in light of best practices in other jurisdictions, including South Africa.<sup>77</sup>

### **Judicial Appointment in Constitution of Zimbabwe Amendment (No.1) Bill**

The Government of Zimbabwe published the Constitution of Zimbabwe Amendment (No. 1) Bill, 2016 (HB 15, 2016) in December of 2016, beginning the formal process of shifting appointment powers back to being entirely within the whim of the Executive. It seeks to get rid of the public advertisements and interviews in respect of the three senior positions of Chief Justice, Deputy Chief Justice and Judge President of the High Court. These appointments are to be made by the President after consultation with the Judicial Service Commission. Section 339(2) of the Constitution defines the phrase “after consultation” as requiring the proffering of views which are not binding on the appointing authority.<sup>78</sup> Thus, appointment would be wholly in the hands of the Executive President. Any difference of opinion between the President and the Judicial Service Commission would require the Senate to be informed without any effect on his/her sole discretion to appoint these three judicial officers. This is because there is no provision allowing the Senate to override a decision by the President which is contrary to the recommendation of the Judicial Service Commission. The amendment proposes a return to the provisions of the Lancaster House Constitution (as amended), which scholars noted was “legally opaque” and only allowed for appointment of persons acceptable to the government.<sup>79</sup> The process of appointing the most senior judges would be neither open nor transparent and the amendment would give even more sweeping powers to an already powerful presidency.<sup>80</sup>

### **Presidential Power and Constitution of Zimbabwe Amendment (No.1) Bill**

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<sup>75</sup> See also “Five myths behind ZANU PF’s proposed constitutional amendment,” 24/12/16 by Alex Magaisa in dealing with Myth Number 3 available at <https://www.bigsr.co.uk/single-post/2016/12/14/Five-myths-behind-ZANU-PF%E2%80%99s-proposed-constitutional-amendment>

<sup>76</sup> See Alex Magaisa, “Five myths behind ZANU PF’s proposed constitutional amendment,” 24/12/16 *supra*

<sup>77</sup> See Alex Magaisa, “Five myths behind ZANU PF’s proposed constitutional amendment,” 24/12/16 *supra*

<sup>78</sup> See Section 339 (2) of the Constitution of Zimbabwe (2013)

<sup>79</sup> See Derek Matyszak *supra*

<sup>80</sup> This point is fully argued in the next paragraph

The scholar Nicolas van de Walle noted in 2001 that in all constitutional reform processes in Africa, “not a single democratizing state chose to move to a parliamentary form of government.”

<sup>81</sup> In the words of renowned constitutional scholar Kwasi Prempeh;

“The presidential form of government remains the unrivalled favorite of Africa’s constitutional designers....the contemporary Africa president generally retains within the constitutional and political orbit the essential attributes of imperium long associated with presidential power in postcolonial Africa.”<sup>82</sup>

Similarly, the Constitution of Zimbabwe (2013) retained an all-powerful presidency congruent with H. Kwasi Prempeh’s concept of the Imperial African Presidency.<sup>83</sup> The president remains the head of State and government with powers to appoint an unlimited number of Ministers and dissolve Parliament if it passes a vote of no confidence or refuses to pass the national budget.<sup>84</sup> A notable exception was the new section 180 which, as noted above, was largely welcomed since it espoused judicial independence and accountability.<sup>85</sup> In seeking to remove this provision, the executive intends to restore presidential monopoly over judicial appointments in respect of the three most senior members of the bench. The pitfalls of such an approach are self-evident:

“Persistent presidential monopoly of policy initiative continues to impoverish policymaking in Africa, because its practical import is to confine to a single perspective—the president’s—the range of possible solutions to any given societal problem.”<sup>86</sup>

The use of constitutional amendments to give more discretionary powers to the President is not without precedent. Then Minister of Justice, Legal and Parliamentary Affairs, Dr Eddison Zvobgo, famously articulated his pride and “privilege” in introducing the bill which abolished the positions of Prime Minister and ceremonial President in *lieu* of the all-powerful Executive Presidency.<sup>87</sup> It was widely believed that Dr Zvobgo crafted these provisions with the hope of

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<sup>81</sup> Nicolas van de Walle, *The Impact of Multi-Party Politics in Sub-Saharan Africa, 1-2001* *F. Dev. Stud.*,31 (2001) quoted in “Africa’s “constitutionalism revival”: False start or new dawn?” by H. Kwasi Prempeh 13/06/2007

<sup>82</sup> See H.Kwasi Prempeh *supra* at page 497

<sup>83</sup> For a full discussion of the powers retained by the President, see the Paragraph 8 of the National Constitutional Assembly (NCA)’s Vote No Campaign published on 5 February 2013 and available here: [http://archive.kubatana.net/html/archive/demgg/130205nca.asp?sector=POLPAR&year=2013&range\\_start=1111](http://archive.kubatana.net/html/archive/demgg/130205nca.asp?sector=POLPAR&year=2013&range_start=1111)

<sup>84</sup> See National Constitutional Assembly (NCA)’s Vote No Campaign published on 5 February 2013 *Ibid*, also see Derek Matyszak *supra*

<sup>85</sup> See Derek Matyszak, *supra*

<sup>86</sup> See H. Kwasi Prempeh *supra* at page 498

<sup>87</sup> See Hansard Vol.14, No.131 at 15554 quoted by L Madhuku in “A Survey of Constitutional Amendments in Post-independence Zimbabwe (1980-1999); Zimbabwe Law Review 1999 Volume 16: “Mr Speaker, Sir, this is a proud moment for me. Just over two months ago, I came before this house to present the bill which led to the removal of racial representation in Parliament and rid our constitution of the taint of racialism. Now I come before a House with the privilege of introducing another Bill, one which will fundamentally change, indeed revolutionise, the political structure of this country...This bill, Mr Speaker, will introduce what is generally known as an Executive Presidency into our political system.”

succeeding Mugabe as President.<sup>88</sup> He would later complain about President Mugabe's failure to step down and hand over power.<sup>89</sup> The current official in charge of the Ministry of Justice, Legal and Parliamentary Affairs has been similarly fervid in his views regarding Constitution of Zimbabwe Amendment (No.1) Bill; going as far as to claim that the Head of State is above all branches of government and in that lofty capacity, must not only choose the Chief Justice, but the Speaker of Parliament as well: "We have one person who is above the executive, the judiciary and the legislature – the Head of State. So when he exercises his powers to appoint the Speaker, Chief Justice – he does that as Head of State..."<sup>90</sup>

Needless to state that this view is not supported by law or common practice. The Speaker of Parliament is not appointed by the Head of State but is elected by the National Assembly at its first sitting.<sup>91</sup> Further, the proposed amendment has no backing or basis in regional and international instruments. It is a return to the direct appointment of judges by a single person (the advice of the Judicial Services Commission notwithstanding), a practice which, at least in Europe, is no longer extant.<sup>92</sup> It is another layer of imperium added to an already powerful presidency which betrays the separation of powers, judicial independence and rule of law clauses in the Constitution.

### **Local Critiques of Constitution of Zimbabwe Amendment (No.1) Bill**

Two reasons advanced in favour of amending the current constitution are to the effect that the current constitution allows junior judicial officers to assess and select their superiors<sup>93</sup> and that the country must revert to the scenario under the former constitution when the President was unhindered in his choice of Chief Justice.<sup>94</sup> The first argument is demonstrably fallacious since ordinary people frequently select their superiors, most markedly in the form of the person who

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<sup>88</sup> See The Guardian "Eddison Zvobgo (Obituary)" 24/08/04 available at <https://www.theguardian.com/news/2004/aug/24/guardianobituaries.zimbabwe> "Critics suggested he was creating powers that he hoped to enjoy himself once Mugabe retired."

<sup>89</sup> See Ibbo Mandaza "Will ZANU PF survive after Mugabe" in "The Day After Mugabe" Gugulethu Moyo and Mark Ashurst (ed) African Research Institute 2007 available at <http://africaresearchinstitute.org/newsite/wp-content/uploads/2007/11/TheDayafterMugabe-r.pdf> where Dr Zvobgo complained that President Mugabe had "...the mentality of a madman who, when given a baton in a race, flees with it into the mountains instead of passing it on."

<sup>90</sup> See *Herald* Article "ED Speaks on Govt,JSC row" 21/3/17 available at <http://www.Herald.co.zw/ed-speaks-on-govt-jsc-row/> : "We have three arms of State – the Executive, headed by the President, the judiciary by the Chief Justice and the legislature by the Speaker (of Parliament. We have one person who is above the executive, the judiciary and the legislature – the Head of State. So when he exercises his powers to appoint the Speaker, Chief Justice – he does that as Head of State...Ndiwomatongegwo enyika aya (This is how a country is ruled)."

<sup>91</sup> See Section 126(1) of the Constitution of Zimbabwe (2013)

<sup>92</sup> See Katalin Kelemen, "Appointment of Constitutional Judges in a Comparative Perspective – with a Proposal for a New Model For Hungary" available at <https://poseidon01.ssrn.com/delivery.php?ID=5400981041191230100008708807001707802008504108503906810108409908111702111106508311204512403803111001000309610712200911408906611901102806603209707301110608110800501500501807900908200308208301011120082080126116074125071071003007100069008070107072018072&EXT=pdf>

<sup>93</sup> See "VP Mnangagwa on JSC appointment: Arrangement where Chief Justice is appointed by juniors untenable" 03/02/17 available at <http://www.chronicle.co.zw/vp-mnangagwa-on-jsc-appointment-arrangement-where-chief-justice-is-appointed-by-juniors-untenable/>

<sup>94</sup> See Derek Matyszak *supra*

will be President and Commander-in-Chief of the Defence Forces.<sup>95</sup> *Veritas* have gone on to argue that not all members of the Judicial Service Commission are judges (and thus juniors of the Chief Justice) and listed other instances of similar selection processes including company shareholders electing or appointing directors and boards of directors appointing their chairpersons.<sup>96</sup> The argument for reverting to the former Constitution is counter intuitive given the extensive work that went into drafting a new Constitution which was resoundingly approved in a referendum.<sup>97</sup> *Veritas* have rightly argued that that amendments to the constitution must not be done lightly and indeed, "...not so as to compromise the independence of the Judiciary, one of the constitutional pillars on which the rule of law rests."<sup>98</sup>

The Law Society of Zimbabwe also severely criticized the proposed constitutional amendment and expressed dismay at the willingness to amend the constitution when so many provisions are yet to be implemented. They noted that the amendment bill "... negates the spirit of accountability and transparency...gives unfettered power to a single individual to appoint the most influential positions in the judiciary. This has dire consequences on judicial independence."<sup>99</sup>

### **Comparative Analysis: Judicial Appointment Procedures**

The African phenomenon of the '*imperial presidency*' is akin to the Latin American experience with the 'hyper-presidency'.<sup>100</sup> Chile, Mexico, Paraguay, Uruguay and Argentina have all had to deal with presidencies with sweeping powers.<sup>101</sup> One measure adopted to counter the growing power and influence of the executive branch has been the use of a judicial council in judicial appointments.<sup>102</sup> This was also the basis for their introduction in France and Italy.<sup>103</sup>

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<sup>95</sup> See the Election of the President and Vice President, Section 92 of the Constitution of Zimbabwe (2013)

<sup>96</sup> See Constitution of Zimbabwe Amendment (No. 1) Bill, 2016 (HB 15, 2016) - Analysis by *Veritas* Zimbabwe available at <http://www.zimlil.org/content/constitution-zimbabwe-amendment-no-1-bill-2016-hb-15-2016-analysis-veritas-zimbabwe>

<sup>97</sup> The Constitution was approved by 95% of voters, see: "Zimbabwe: Draft New Constitution Approved In Referendum," 26/03/2013 available at <http://www.loc.gov/law/foreign-news/article/zimbabwe-draft-new-constitution-approved-in-referendum/>

<sup>98</sup> *Veritas* Constitutional Amendment to Extend Presidential powers in Constitution Watch 2 of 2017 (25 January 2017); See also "Five myths behind ZANU PF's proposed constitutional amendment," by Alex Magaisa in dealing with Myth Number 3 available at <https://www.bigsr.co.uk/single-post/2016/12/14/Five-myths-behind-ZANU-PF%E2%80%99s-proposed-constitutional-amendment>

<sup>99</sup> See "Law Society of Zimbabwe statement on Constitutional Amendment Bill (No. 1) of 2016" 12/01/17 available at [http://www.pindula.co.zw/news/2017/01/12/law-society-zimbabwe-statement-constitutional-amendment-bill-no-1-2016-full/#.WMepH\\_I97IU](http://www.pindula.co.zw/news/2017/01/12/law-society-zimbabwe-statement-constitutional-amendment-bill-no-1-2016-full/#.WMepH_I97IU)

<sup>100</sup> See Iveth A. Plascencia; "*Judicial Appointments, A Comparative Study of Four Judicial Appointment Models Used by Sovereigns Around The World*" 12/2/2013 at page 5: "Hyper-Presidency is a term used to refer to a President or any head of the executive branch that has sweeping powers to rule at his or her discretion. This concentration of power in the President throws off the balance required in a democracy in that there is no separation of powers or a system of checks and balances."

<sup>101</sup> See Iveth A. Plascencia *supra*

<sup>102</sup> See Iveth A. Plascencia *supra* at page 5

<sup>103</sup> See USIP *supra* at page 5

The judicial council/commissions model, used by 60% of countries in the world, is by far the world's most popular method of judicial appointment.<sup>104</sup> The ubiquity of this model is because it is a 'happy medium' between "the polar extremes of letting judges manage their own affairs and the alternative of complete political control of appointments, promotion and discipline."<sup>105</sup> This model is used in Ireland, Israel, New Zealand and the Netherlands.<sup>106</sup> Most American States have also adopted this model, in the form of 'merit commissions', as a reaction to partisan judicial elections.<sup>107</sup> American merit commissions usually provide the short-list of three nominees to the Governor to appoint.<sup>108</sup>

Some jurisdictions go as far as to require legislative approval after appointment of a nominee from the judicial council/commission process. This ensures participation by all three branches of government.<sup>109</sup> This is not the case in Zimbabwe and indeed in Australia and Canada where appointment, further to the judicial council/commission process, is the sole responsibility of the executive.<sup>110</sup> Proponents of this model argue that reducing the number of branches of government involved would also reduce the number of actors the judiciary feels beholden to and thus, increase judicial independence.<sup>111</sup>

It goes without saying that concentrating powers of both nomination and appointment in a single branch is deleterious to judicial independence and democratic governance. Whilst defending the separate nomination and appointment process in respect of the President in the Constitution of the U.S.A., Alexander Hamilton stated that "...every advantage would in substance, be derived from the power of nomination, which is proposed to be conferred upon him; while several disadvantages which might attend the absolute power of appointment in the hands of that officer would be avoided."<sup>112</sup> Heavy reliance on one branch of government "...tarnishes the purity of the judiciary" and what is needed is an "...appointment process which is open and transparent..."<sup>113</sup> For these reasons, the American President requires the advice and consent of Senate to approve his or her judicial nominations.

This American model<sup>114</sup> is replicated in the Czech Republic and is also used in Slovenia with the distinction that it is the lower house (*Državni zbor*) which votes for or against the nominee.<sup>115</sup>

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<sup>104</sup> United States Institute of the Peace, "Judicial Appointments and Judicial Independence." January 2009, [www.usip.org](http://www.usip.org) at page 4

<sup>105</sup> See USIP *supra* at page 4

<sup>106</sup> See Sarka Ali Akkas *supra* at page 207

<sup>107</sup> See USIP *supra*

<sup>108</sup> See USIP *supra* at page 5

<sup>109</sup> See the *Constitution of Argentina* Chapter III, Powers of the Executive Branch

<sup>110</sup> See Mary L. Volcansek, Judicial Selection: Looking at How Other Nations Name Their Judges, 53 *The Advoc. (Texas)* 95 (2010) and F.L. Morton, Judicial Appointments in Post-Charter Canada: A System in Transition, in *Appointing Judges in an Age of Judicial Power* 56, 57 (Kate Malleson and Peter H. Russel, eds, (2006).

<sup>111</sup> See Iveth A. Plascencia *supra* at pages 22-25

<sup>112</sup> See Alexander Hamilton, The Federalist Papers Number 76 "The Appointing Power of the Executive" available at

<https://www.congress.gov/resources/display/content/The+Federalist+Papers#TheFederalistPapers-76>

<sup>113</sup> See Iveth A. Plascencia *supra* at pages 37-38

<sup>114</sup> In respect of the Presidential nominations as distinct from the widespread State practice of using Merit Commissions to short list candidates to the Governor

The Slovak Republic provides for the converse, with the unicameral parliament providing nominees for the head of state to confirm.<sup>116</sup> Further, and perhaps most importantly, the pioneer Constitutional Court conceived by Hans Kelsen, the Austrian Constitutional Court, also provides for appointment by the President following nomination by the federal government and two houses of the federal parliament.<sup>117</sup> Thus, appointment of judges is generally upon collaboration of at least two branches of government.

### **The Other Side: Institutional Variation in the Judicial Appointment Process**

It must be conceded that institutional variation in the judicial appointment process is not uncommon. Separate appointment procedures for the most senior members of the bench, or even for the highest court in the land, is not only common practice but has been identified as a key feature in jurisdictions in which constitutional adjudication is within the exclusive purview of one court/higher courts.<sup>118</sup> It has already been mentioned that in the U.S.A. merit commissions usually submit nominees to the Governor whereas Federal Judges are nominated by the President and approved by the Senate. Three African countries have similar variation in judicial appointment. In Ghana, the appointment the Chief Justice is done by the President in consultation with the Council of State and with the approval of parliament.<sup>119</sup> There is no role for the Judicial Council in respect of this key appointment, unlike the appointment of the other Supreme Court Justices where the President acts on the advice of the Judicial Council in consultation with the Council of State and with the approval of parliament.<sup>120</sup> In Kenya, The President appoints the Chief Justice and Deputy Chief Justice in accordance with the recommendations of the Judicial Service Commission, subject to the approval of the National Assembly.<sup>121</sup> All other judges are appointed in accordance with the recommendation of the Judicial Services Commission without need for parliamentary approval.<sup>122</sup> More poignantly, the Chief Justice and Deputy Chief Justice in South Africa are appointed by the President after consultation with the Judicial Service Commission and leaders of parties represented in the National Assembly.<sup>123</sup> The President and Deputy President of the Supreme Court of Appeal are appointed by the President after consulting the Judicial Service Commission.<sup>124</sup> In other words, the appointing authority (the President) is only required to consult but is not bound by the views of the other bodies in the choice of these top judicial officers.<sup>125</sup> Further, there is no requirement

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<sup>115</sup> See Katalin Kelemen *supra* at page 14

<sup>116</sup> See Katalin Kelemen *supra* at page 14

<sup>117</sup> See Katalin Kelemen *supra* at page 15

<sup>118</sup> See Ferreres, Victor, "The Consequences of Centralizing Constitutional Review in A Special Court." (2004). *SELA (Seminar en Latinoamérica de Teoría Constitucional y Política) Papers*. 39.

[http://digitalcommons.law.yale.edu/yls\\_sela/39](http://digitalcommons.law.yale.edu/yls_sela/39) at page 3

<sup>119</sup> See Section 144(1) of the Constitution of Ghana

<sup>120</sup> See Section 144(2) of the Constitution of Ghana. In respect of Justices of the Court of Appeal and of the High Court and Chairmen of Regional Tribunals, the President acts on the advice of the Judicial Council.

<sup>121</sup> See Section 166(1) (a) of the Constitution of Kenya

<sup>122</sup> See Section 166 (1)(b) of the Constitution of Kenya

<sup>123</sup> See Section 174(3) of the Constitution of South Africa

<sup>124</sup> See Section 174(3) of the Constitution of South Africa

<sup>125</sup> Whilst the Constitution of South Africa does not define the phrases "in consultation" and "after consultation," it uses them both and these were defined in the Interim Constitution of South Africa, suggesting that the drafters were guided by the same meaning. See "FUL Proposes Changes to

for the rigorous public interview process in respect of these top judges, even though other judges of the Constitutional Court are subjected to this process under Section 174(4) of the Constitution of South Africa.

The reference to this practice is not a commendation of the mooted amendment to the Constitution. To the contrary, it is vital to note that in Kenya, Ghana and the U.S.A. there is need for some form of parliamentary approval of the President's appointee – in other words the appointing power is not left entirely to the executive branch of government. The President needs to collaborate with the legislature. In South Africa, where no such legislative sanction is required, there are growing calls to amend Section 174(3), which provides for appointment of senior judicial officials, to move it towards Section 174(4), which provides for the appointment of all other Constitutional Court judges.<sup>126</sup> In fact, the South Africa organization *Freedom Under Law* offers four seminal reasons why the process under Section 174(3) should move towards Section 174(4). This is vitally important as these arguments are advocating for a provision of law which would be similar to the current section 180 of the Constitution of Zimbabwe and distinct from the situation as proposed by the mooted amendment of the Constitution of Zimbabwe. The reasons are as follows:

*“First:* it would prevent a situation where, if the Chief Justice was not appointed from the ranks of the Constitutional Court judges, his elevation to that court as Chief Justice could be seen as less rigorous than for other Constitutional Court judges.

*Second:* given the inherent equality in the position of such judges... there seems little reason why a similar process of appointment should not be adopted for the appointment of all Constitutional Court judges.

*Third:* to the extent that there is a distinction to be drawn, the unique position of the Chief Justice **requires greater, not fewer, safeguards**, to insure that his appointment is, and is seen to be, consistent with the highest standards of independence of the judiciary.

Recent depictions of Justice Mogoeng as the President's lapdog [42]<sup>127</sup> (whatever their origin or accuracy) are indicative of how quickly a system without vigorous institutional safeguards can lead to a perception, however unwarranted, that a judge is not independent. When that judge is thereafter appointed as Chief Justice, such perceptions may undermine the rule of law.”

Thus, where there is institutional variance in judicial appointments, there is still the requirement of consent of another branch of government as is the case in Kenya, Ghana and the U.S.A. A failure to provide such a safeguard is deleterious to judicial independence and accountability as

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Appointment of Chief Justice” by Jeremy Gauntlett S-20-08/11 available at <http://constitutionallyspeaking.co.za/ful-proposes-changes-to-appointment-of-chief-justice/>

<sup>126</sup> See Jeremy Gauntlett SC *Ibid*: “The one relatively simple option in order to better cater for the concerns of the independence of the judiciary and the rule of law, is for s 174(3) to be amended to follow more closely the scheme created in s 174(4), which deals with the appointment of Constitutional Court judges other than the Chief Justice and Deputy Chief Justice.”

<sup>127</sup> This is a reference to a cartoon by Jonathan Shapiro, popularly known as Zapiro, which appeared in the *Mail and Guardian* on 19 August 2011 which is available at <http://blackopinion.co.za/wp-content/uploads/2016/05/Zapiro.jpg>

has been noted in the case of South Africa. Any amendment of the Constitutional should enhance rather than reduce judicial independence and accountability and this is the hurdle where Constitution of Zimbabwe Amendment (No.1) Bill fails.

## **Conclusion**

The politicization of the judiciary to create a compliant judiciary is inimical to the rule of law and proper administration of justice. The intimidation of judges who hand down judgments at variance with the ruling party's interests is a matter of on-going concern.<sup>128</sup> The president has openly criticized judges who have acted in a manner which he perceives to be unfavourable to ruling party interests.<sup>129</sup> Further, the purging of the Gubbay led Supreme Court bench in 2001 orchestrated by the ruling party allowed for the appointment of new judges that were more acceptable to the ruling party.<sup>130</sup> The current Constitution departs from this paradigm by insulating judicial appointments from the whims of the executive. Any changes to the appointment process must, in the letter and spirit of the Constitution, facilitate greater independence and accountability. Unfortunately Constitution of Zimbabwe Amendment (No. 1) Bill, 2016 is the antithesis of independence, accountability and indeed good governance.

## **Postscript**

The attempted political manipulation surrounding the post of Chief Justice has come to nought. The Justice Malaba has now been appointed as Chief Justice as from 27 March 2017 and will soon be sworn in to this post. Justice Malaba was previously the Deputy Chief Justice and has been in that post since July 2008. He was interviewed for the post of Chief Justice by the Judicial Service Commission and scored the highest mark of all the applicants for this post. This appointment was made on merit after following the procedure set out in the Constitution.

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<sup>128</sup> See "Mugabe Warns Judges over current wave of protests" 3/9/19 available at <http://www.newzimbabwe.com/news-31051-Stop+allowing+protests;+Mugabe+warns+judges/news.aspx>

<sup>129</sup> See "Mugabe Warns Judges over current wave of protests" *supra*

<sup>130</sup> See Justice Anthony Gubbay, "THE PROGRESSIVE EROSION OF THE RULE OF LAW IN INDEPENDENT ZIMBABWE" THIRD INTERNATIONAL RULE OF LAW LECTURE: BAR OF ENGLAND AND WALES INNER TEMPLE HALL, LONDON WEDNESDAY 9 DECEMBER 2009 available at [http://www.barcouncil.org.uk/media/100365/rule\\_of\\_law\\_lecture\\_agubbay\\_091209.pdf](http://www.barcouncil.org.uk/media/100365/rule_of_law_lecture_agubbay_091209.pdf)



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## **Worlds Apart: Conflicting narratives on the right to protest**

**By G. Feltoe, G. Linington and F. Mahere**

### **Case Notes on**

**1. *Democratic Assembly for Restoration and Empowerment (DARE) & Ors v The Commissioner of Police & Ors* HH-554-2016**

**2. *Democratic Assembly for Restoration and Empowerment (DARE) & Ors v The Commissioner of Police & Ors; Zimbabwe Divine Destiny v Sauyama & Ors* HH-589-2016**

### **Introduction**

On 1 September 2016 the police officer commanding the Harare district issued a notice in terms of section 27(1) of the Public Order and Security Act [*Chapter 11:07*] (POSA) which prohibited for two weeks the holding of all public processions and demonstrations in the Central Business District of Harare. This notice was published in the Government Gazette as Statutory Instrument 101A of 2016.

This case note deals primarily with the issue of whether section 27 of the Public Order and Security Act [*Chapter 11.17*] curtails the constitutional right to protest peacefully provided for in section 59 of the Constitution to an extent that is not reasonably justifiable in a democratic society. It deals only briefly with other issues arising from the processes used by the police when issuing the order.

### **Differing perspectives in Zimbabwe on the right to engage in public demonstrations**

“Human Rights Commission statement torches storm” was the headline in the *Herald* newspaper on 20 August 2016. What had the Commission said that had allegedly torched this storm? All the Commission had done was to issue a temperate statement about the constitutional right to peaceful protest and the duty of the police force not to violate this right. The Commission’s statement highlighted the constitutional provision in section 219 of the Constitution which imposes on the police the duty to protect people and enforce the law without fear or favour. The police, it said, had a duty to facilitate the conduct of undisturbed peaceful demonstrations and petitions but instead had used the excuse of security concerns to harass demonstrators and non-demonstrators alike. The Commission went on to express great concern about the recent violent conduct on the part of the police. It pointed out that it had received complaints of alleged police brutality which had caused injuries to some innocent persons including minors. It called for the prosecution of such human rights violators and encouraged complainants to make reports to the Commission. It also exhorted demonstrators to exercise their rights in a peaceful manner. The statement ended by urging the police and the respective arms of the Executive to ensure that citizens are permitted to demonstrate peacefully and utilize constructive dialogue to address genuine concerns

This statement was roundly condemned by the *Herald* in an editorial on 29 August 2016. The editorial quoted unnamed “analysts” who said that the Commission was acting like an armchair critic by failing to appreciate the situation on the ground. It accused the Commission of being partisan and of pushing the interests of opposition political parties. It pointed to the injury to persons, including police officers, and destruction of property caused in previous demonstrations. The editorial said that police were simply doing their duty by responding to the situation and protecting people against such violence. It alleged that the Commission had not carried out a proper investigation into the situation before issuing its statement.

These diametrically opposed viewpoints illustrate the vastly different views about the nature and objectives of protest action in Zimbabwe. The version of the President and the ruling party is that the protests are aimed at illegal regime change and the demonstrations are being encouraged by hostile governments in the West that had imposed economic sanctions upon Zimbabwe to destabilize the country. They maintain that the demonstrators are engaging in violent protests and that the police and military forces are duty bound to suppress this illegal violence.

The protesters believe they are simply exercising their constitutional right to mount peaceful protests against the suffering emanating from the dire socio-economic situation within the country which they attribute to mismanagement of the economy and widespread corruption. They believe that the government has failed to redress the situation and that they have a right to publicly protest about this failure through public protests aimed at displaying public dissatisfaction with the situation. They consider that they are being prevented from exercising this constitutional right by a politically partisan police force and military which is using brutal force to break up these demonstrations, sometimes even after the courts have authorized the protests. They also believe that the Public Order and Security Act is being misused against the protestors.

The deteriorating economic situation has led to increased public protest action in the country and the response of the police has been to clamp down on protest action sometimes with brutal force which has led to protests against police behaviour.

A few days before the first case dealt with below was decided, President Mugabe had roundly condemned judges who had ruled that protests should be allowed to go ahead, saying that protests should not be permitted because they had turned violent. He accused these judges of being reckless. He said:

“Our courts, our justice system, our judges should be the ones who understand even better than ordinary citizens. They DARE not be negligent in their decisions when requests are made by people who want to demonstrate.”

The President told a conference of the ruling ZANU-PF’s youth wing that “enough is enough” and that he would not allow violent protests to continue.<sup>131</sup>

### **From the Law and Order (Maintenance) Act to the Public Order and Security Act**

After Independence in 1980 it was confidently expected that the new democratic government would move quickly to repeal the highly repressive Law and Order (Maintenance) Act of 1960.

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<sup>131</sup> *Zimbabwe Independent* 5 September, 2016

The white minority regime had used this legislation as one of its main weapons to try to suppress black nationalism, amending it frequently to make it even more repressive as the liberation struggle intensified. In addition to its many other draconian provisions, it had numerous provisions to prevent and criminalise protest action against the regime.

In the case of *In re Munhumeso & Ors* 1994 (1) ZLR 49 (S) the court had to adjudicate upon whether section 6 of the Law and Order (Maintenance) Act which was still in operation at the time violated the provisions on freedom of assembly and freedom of expression in the pre-2013 Constitution. It decided that the section excessively invaded the enjoyment of the rights and was not reasonably justifiable in a democratic society in the interests of public safety and public order. The basis of this decision is instructive, although the provisions of the current provisions of the Public Order and Security Act are significantly different. The court pointed to the following features of section 6 of the Law and Order (Maintenance) Act that cumulatively led the court to conclude that the fundamental rights in question had been excessively invaded:

1. The discretionary power of the regulating authority is uncontrolled.
2. Before imposing a ban on a public procession the regulating authority is not obliged to take into account whether the likelihood of a breach of peace or public order could be averted by attaching conditions upon the conduct of the procession.
3. The effect of the provision is to deny these primary rights unless it can be shown that the procession is likely to cause or lead to a breach of the public peace or public disorder.
4. The holding of a public procession with a permit is criminalized irrespective of the likelihood or occurrence of any threat to the public safety or public order, or inconvenience to persons not participating.

Surprisingly, however, it was only in 2002 that the notorious Law and Order (Maintenance) Act was repealed and replaced by the Public Order and Security Act [*Chapter 11.17*]. This new Act sought to replace the repressive provisions on assembly and protest in the Law and Order (Maintenance) Act with provisions that would supposedly allow peaceful assembly and protest subject to the police being notified of impending protests to allow the police to provide security during the protests to prevent outbreaks of violence. Section 26(3) provides that where the police receive credible information that a proposed public demonstration will result in public disorder or extensive property damage, the police may hold consultations with the organizers to arrive at an agreement on the taking of appropriate measures to avoid these consequences and thereafter to allow the demonstrations to go ahead.

However, the provisions of this Act have been frequently misinterpreted to mean that protests could only go ahead if prior permission has been granted by the police and whereas public demonstrations by supporters of the ruling party have been freely allowed, even without prior notification to the police, public demonstrations by persons protesting about government actions have been blocked or forcibly broken up.

Section 27(1) of this Act, goes much further and allows for the banning of public demonstrations. This provision reads:

“If a regulating authority for any area believes on reasonable grounds that the powers conferred by section 26 will not be sufficient to prevent public disorder being occasioned by the holding of processions or public demonstrations or any class thereof in the area or any part thereof, he may issue an order prohibiting, for a specified period not

exceeding one month, the holding of all public demonstrations or any class of public demonstrations in the area or part thereof concerned.”

It is a criminal offence for a person to organise or assist in organising or take part in or attend any procession or public demonstration where public demonstrations have been banned. The maximum sentence for this offence is imprisonment for one year.

The other provisions in this section deal with what the police must do before issuing a banning order.

Where it is practicable to do so, the regulating authority must

- cause a notice of the proposed banning order in the Gazette and in a newspaper circulating in the area concerned and to be given to any person whom the regulating authority believes is likely to organize a procession or public demonstration that will be prohibited by the proposed order; and
- afford all interested persons a reasonable opportunity to make representations in the matter.

The regulating authority must also ensure that the order is published in the Gazette, a newspaper circulating in the area and in such other manner as, in his opinion, will ensure that the order is brought to the attention of persons affected by it.

### **The constitutional right to demonstrate and protest**

Section 59 of the 2013 Constitution provides that everyone has the right to demonstrate and to present petitions, but these rights must be exercised peacefully. This right is a vitally important democratic right which allows citizens publicly to register their dissatisfaction with the performance of their government or particular policies of government and bring their grievances to the attention of government. In *The Bill of Rights Handbook* Iain Currie & Johan De Waal 6th ed (2014) at 378, the authors make the following observation about freedom of assembly:

“Freedom of assembly creates the space both to speak and to be heard. A single voice is likely to be drowned out in our polity. A choir is far more likely to get its message across. Power in modern nation states invariably concentrates in and around large social formations. As a result, meaningful dialogue often requires the collective efforts of demonstrators, picketers and protesters.”

Similarly, in the case of *S v Turrell* 1973 (1) SA 248 (C) 256, it was held that:

“Free assembly is a most important right for it is generally only organized public opinion that carries weight and it is extremely difficult to organize it if there is no right to public assembly.”

In the case of *In re Munhumeso & Ors* 1994 (1) ZLR 49 (S) the Supreme Court addressed extensively the constitutional right to assemble and protest. It highlighted that public assemblies and protests are a highly effective method of bringing grievances to the attention of the authorities and seeking redress for grievances. However, it pointed out there was a need to reconcile this important right with the governmental responsibility to ensure sound maintenance of public order to prevent members of the public from being harmed by violent protest action.

Section 58 of the Constitution also guarantees the right to assemble peacefully.

## Limitations on the right to protest

In terms of section 86(1) of the Constitution this right must be exercised reasonably and with due regard for the rights and freedoms of other persons in the Declaration of Rights.

Under section 86(2) the right to demonstrate may be limited only in terms of a law of general application. It may only be limited to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom and in deciding whether any limitation meets this criterion a number of relevant factors must be taken into account. These factors are—

- the nature of the right concerned;
- the purpose of the limitation and in particular whether it is necessary in the interests of such things as defence, public safety and public order;
- the nature and extent of the limitation;
- the need to ensure that the exercise of the right does not prejudice the rights of others;
- the relationship between the limitation and its purpose, in particular whether it imposes greater restrictions on the right concerned than are necessary to achieve its purpose; and
- whether there are less restrictive means of achieving the purposes of the limitation.

In re *Munhumeso & Others* 1994 (1) ZLR 49 (S) at 64B-C the court pointed out that:

“What is reasonably justifiable in a democratic society is an elusive concept – one which cannot be precisely defined by the courts. There is no legal yardstick save that the quality of reasonableness of the provision under challenge is to be judged according to whether it arbitrarily or excessively invades the enjoyment of a constitutionally guaranteed right.”

In *Nyambirai v National Social Security Authority & Another* 1995 (2) ZLR 1 (S) at 13C-F, GUBBAY CJ elaborated the test as follows:

“In effect the court will consider three criteria in determining whether or not the limitation is permissible in the sense of not being shown to be arbitrary or excessive. It will ask itself whether:

1. the legislative objective is sufficiently important to justify limiting a fundamental right;
2. the measures designed to meet the legislative object are rationally connected to it; and
3. the means used to impair the right or freedom are no more than is necessary to accomplish the objective.”

Section 86 of Zimbabwe’s Constitution is headed “*Limitation* of Rights and Freedoms” (emphasis added). The word “limitation” also appears in the substantive portion of that section. According to the *Oxford English Dictionary* “limit” means “confining within limits, set bounds to, restrict.” It is clear, therefore, that section 86 does not authorize the state to “eliminate” rights contained in the Declaration of Rights or to “hollow out such rights, so that they no longer have any meaningful content.” Thus, the power to limit rights does not go beyond the power to restrict rights. Writing about the limitation provision in the *Canadian Charter of Rights*, Peter Hogg

(2003:35-10) says that "... not every Charter infringement is a 'limit', and any infringement that is more severe than a limit cannot be justified." In *Ford v Attorney-General Quebec* [1988] 2 SCR 712 at 772 the Canadian Supreme Court drew a distinction between "the negation of a right or freedom and a limit on it." (A similar approach was put forward in an earlier Canadian case, *Attorney General Quebec v Quebec Protestant School Boards* [1984] 2 SCR 66 at 88).

Thus the courts must uphold the fundamental right to demonstrate and any limitations upon this right must be reasonable and must not take away completely or eliminate the right or remove the essential core of the right. In this regard the Constitution in section 46 (1) (c) provides that our courts "must take into account international law and all treaties and conventions to which Zimbabwe is a party."

Zimbabwe is a party to the International Covenant on Civil and Political Rights which guarantees various rights including freedom of assembly (Article 21). The Human Rights Committee established in terms of Article 28 of this Covenant has commented upon what limitations on rights are permissible. In its General Comment No 31: The Nature of the General Legal Obligations Imposed on State Parties to the Covenant, it used the notion of "the essence" of a human right and emphasized that restrictions on a right must never impair that essence. The question of core rights and the distinction between limiting and negating rights is discussed below in relation to the *DARE* case.

## **THE CASES ON THE POLICE BANNING OF DEMONSTRATIONS IN HARARE**

Both the cases below were brought in to challenge the police order banning all public processions and demonstrations in the Central Business District of Harare.

### **Case before Chigumba J**

*Democratic Assembly for the Restoration & Empowerment (DARE) & Ors v The Commissioner of Police & Ors* HH-554-16

In this case, the applicants, a political party, a political activist and chairperson of a national vendors union, a Harare residents association and a consortium of political parties formed to address the issue of electoral reform. The applicants had planned a series of peaceful demonstrations to air their grievances over a range of issues such as electoral reform and alleged police brutality. One applicant said that previous demonstrations mounted by the applicant had been peaceful except when the police had initiated violent attacks on the demonstrators. The applicants stated they had already notified the police about their impending demonstrations.

On the other hand, the respondents maintained that previous marches by the applicants had been violent and had led to unspecified destruction of property and looting of shops and some persons had been physically injured. They argued that the ban on demonstrations was necessary to protect the public and even argued that "the two week prohibition is actually inadequate to guarantee safety and to ward off the threat of terrorism."

The applicants then filed an urgent chamber application challenging the validity of the statutory instrument. Chigumba J who heard this application issued a provisional order in favour of the applicants. The court decided that the issue for determination by the court was whether section 27 of the Public Order and Security Act violated the constitutional right to engage in peaceful

demonstrations and whether any such violation fell within the limitations provided for in terms of section 86(2) of the Constitution.

The court decided the matter simply on the basis that the police had failed to follow the procedures set out in section 27 and had thereby violated the applicants' right to administrative justice in terms of section 68 of the Constitution, particularly the right to be heard before a decision is taken that affected them and the right to be given reasons for a decision that affected them. Before issuing a banning order the regulating authority had to formulate reasonable grounds for its belief that using the powers conferred in section 26 of the Act would not be sufficient to prevent public disorder and there must be evidence of the grounds upon which they held this belief and the evidence must be of public disorder in the district concerned. The authority must publish notice of its intention to ban demonstration in the district and if it claims that it was not practicable to publish such notice, there must be evidence to show why this was so. All interested parties must be given an opportunity to make representations about the proposed ban and those parties must be provided with reasons why the authority has decided to go ahead with the ban despite the representations that it has received.

The judge, therefore, held that the failure to follow these procedures rendered the notice invalid. In the interim relief it granted, the court declared the police banning order invalid but the declaration of invalidity would be suspended for seven days to allow the authority to correct these defects. At the end of the seven days the authorities must then process notifications of intended demonstrations and the Commissioner of Police and Minister of Home Affairs will be interdicted from unlawfully interfering with citizens' rights to mount peaceful demonstration in terms of section 59 of the Constitution read with section 12 of the Public Order and Security Act.

This judgment was hailed by those who believed that it upheld the constitutional right to protest but utterly condemned by those who believed that protestors were bent on violently seeking to bring about "regime change."

### **A further challenge to the banning order**

Another case was brought on the police banning order. This was the case of *Zimbabwe Divine Destiny v Newbert Saunyama N.O. & Ors* HH-589-16 the applicant was an ecclesiastical church that had never been involved in any violence nor had it ever partaken in political activism. On the 13 September 2016, the first respondent published a 'Notice of Proposed Prohibition Order' in the *Herald*. The notice was also published in the *Government Gazette* under Extraordinary General Notice No. 239A of 2016 (hereinafter referred to as "the Prohibition Order"). By way of this notice, the police officer commanding Harare indicated his intention to institute a blanket prohibition in respect of all public demonstrations and processions in the Harare Central Policing District for the period 16 September 2016 to 15 October 2016.

The notice did not state the purpose or reasons behind the prohibition. It further did not indicate that persons affected by the prohibition were entitled to make representations. Particularly, it did not state where and to whom any objections or representations could be lodged.

Also on 15 September 2016, the applicant wrote to the police officer commanding Harare, out of an abundance of caution, to notify him that its churches planned to carry out a march on the 23rd September 2016 between 10 am and 12 pm. The march was to start at Karigamombe Centre, along Sam Nujoma St proceeding onto Nelson Mandela St and ending at Parliament.

The church highlighted that it was exempt from the provisions of the Public Order and Security Act [*Chapter 11:17*].

On 15 September 2016, the Church further wrote to the police in an effort to make representations in respect of the Prohibition Order. The applicant raised, among other things, the unconstitutionality of the notice.

The police officer did not furnish the Church with any opportunity to be heard following the 'Notice of Proposed Prohibition Order'. It did not respond to the Church's letter. The Police did not invite the applicant to a consultative meeting nor did it indicate that there existed any threat to public order. The police did not afford the Church an opportunity to explore options to avert any perceived threat.

On 16 September 2016, the first respondent gazetted a further ban on demonstrations in terms of section 26 of the Public Order and Security Act.

### **Consolidation of cases before Chiweshe JP**

The Judge President dealt with the *DARE* case and the Divine Destiny cases together.

*Democratic Assembly for Restoration and Empowerment (DARE) & Ors v The Commissioner of Police & Ors; Zimbabwe Divine Destiny v Sauyama & Ors* HH-589-2016.

In this case the judge set aside the interim order by Chigumba J.

The matter then came before Judge President with the applicants seeking a final order setting aside the police banning order. The issue with which the court had to decide was whether section 27 of the Public Order and Security Act violated sections 58, 59, 60, 61, 62 and 67(2) of the Constitution. More specifically the issue was whether the power of the police to ban demonstrations in a district for up to one month was unconstitutional on the basis that it violated the right to engage in peaceful protest action guaranteed by section 59 of the Constitution. The second issue was whether the derogations from the right to protest fell within the permissible limitations provided for in section 86 of the Constitution.

The starting point, as the court pointed out, was section 2 of the Constitution which provides that the Constitution is the supreme law of the country and any law that is inconsistent with the Constitution is invalid to the extent of the inconsistency.

It is laid down in section 46(1) of the Constitution that in interpreting the provisions of the Declaration of Rights a court *must give full effect* to the rights and freedoms that are enshrined in the Declaration of Rights and 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.

Chiweshe JP acknowledged that in interpreting constitutional provisions the court must employ a purposive and generous rather than a pedantic and restrictive interpretation. He later referred to the Canadian case of *R v Big M Drug Mart Ltd* 1985 1 SCR 295 where it was stated that the interpretation of a constitutional freedom:

“... should be a generous rather than a legalistic one, aiming at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection.”

The judge might usefully also have quoted this dictum from the case of *Rattigan & Ors v Chief Immigration Officer & Ors* 1994 (2) ZLR 54 (S) at 57 F-H where the Court held:

“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. All relevant provisions are to be considered as a whole and where rights and freedoms are conferred on persons, derogations therefrom, as far as the language permits, should be narrowly or strictly construed.”

Although the judge accepted that the right of peaceful protest was a fundamental constitutional right, he decided that section 27(1) of the Public Order and Security Act that empowers the police to ban all demonstrations for up to one month is not *ultra vires* the Constitution because it satisfies the requirements set out under section 86(1) and (2) of the Constitution in that the limitation it imposes on the constitutional right to demonstrate is “fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom.”

His value judgment on the limitation issue was arrived at in the following manner. The purpose of s 27(1) of the Act is clearly to prevent public disorder and to protect public safety. No democracy can function if there is public disorder and anarchy and thus the security of any community is of paramount importance. Section 27(1) seeks to promote a peaceful environment conducive to the enjoyment of fundamental human rights by citizens and the community at large.

The blanket ban on all demonstrations upheld by Chiweshe JP clearly constitutes a negation of a right rather than a mere limitation. The judgment does not address the issue of negating the core of the right concerned. However, the Judge President did accept that the limitation imposed by section 27 (1) of POSA “has the effect of imposing *greater restrictions than are necessary* to achieve its purpose” (at page 13 of the cyclostyled judgment; emphasis added).

This in itself ought to be a decisive point in favour of the application. A restriction that goes beyond what is necessary to achieve its purpose must be unconstitutional. But CHIWESHE JP quickly qualified his finding on the effect of the limitation thus: “Its effect is limited in terms of the duration and the restricted geographical area in which the ban may be imposed” (at page 13 of the cyclostyled judgment). He held that the limited effect of the restriction in relation to duration and geographical area rendered constitutional a ban that would otherwise have been unconstitutional.

With respect, this kind of reasoning is faulty. If the restriction goes beyond what is necessary, it is unconstitutional. The fact that the restriction only applies in a limited area for a limited time does not change the position.

Implicit in the court’s finding that the ban on demonstrations went beyond what is necessary is the idea that less stringent restrictions would have catered for the concerns of the police. Chiweshe JP decided that the imposition of lesser restrictions was an option. This was because (he said) “the enabling legislation (POSA) does not give the regulating authority options other than those provided for under section 27.” If in fact no such options are available, then this too is a reason for striking down section 27.

The police stated that they opposed the holding of the demonstration because they believed it would result in violence. Section 27 (1) confers on a regulating authority a discretionary power to decide whether a demonstration should be prohibited on the ground that it might lead to

public disorder. However, the regulating authority may only arrive at this decision if he “believes on reasonable grounds” (section 27 (1)) that disorder will result. This means that the regulating authority must act in good faith. Thus, he must sincerely and genuinely believe that disorder will result, but this is not enough. It is also necessary that reasonable grounds exist which underpin the belief. The regulating authority must be able to point to objective facts which justify and make explicable the belief held.

So, were the police able to point to facts which indicated that violence would arise if the demonstration went ahead? Did a dangerous situation in fact exist? In *Forum Party of Zimbabwe & Ors v Minister of Local Government* 1996 (1) ZLR 461 (H) ADAM J said at 486: “A situation cannot be said to have arisen if it is not so factually.”

In the *DARE* case, Chiweshe JP decided that the possibility of violence was real, but only on the basis of an assertion to that effect by the police. No facts or evidence were presented to the court to justify this assertion apart from an assertion that violence had occurred at other demonstrations. Nevertheless the court held that this sufficed to satisfy the “reasonable grounds” requirement stipulated in section 27 (1) of POSA.

This conclusion is very difficult to support. The blanket ban on demonstrations was more than just a limitation of the right to demonstrate contained in section 59 of the Constitution: it was a complete negation of the core or essential essence of that right. But even if the ban were to be regarded as merely a severe limitation of the right, it would still be unconstitutional.

In *S v Manamela and Another (Director General of Justice intervening)* 2000 (5) BCLR 491 (CC), a decision of the South African Constitutional Court, O'REGAN J said at para 53: “The level of justification required to warrant a limitation upon a right depends on the extent of the limitation. The more invasive the infringement, the more powerful the justification must be.” This is undoubtedly the correct approach.

Thus, in *DARE*, Chiweshe ought not to have upheld a blanket ban in the absence of *serious evidence* that could *properly* satisfy the “reasonable grounds” requirement. (Of course if – as has been argued above – the ban was a negation rather than a limitation, then even the production of such serious evidence would not suffice to save the constitutionality of the ban).

To ban a demonstration simply on the basis of an unsupported assertion that violence will occur if it takes place would inevitably lead to abuse. The state would always be able to ban demonstrations without being under any real pressure from the courts to justify the ban. In a modern constitutional state courts must subject bans on demonstrations – particularly blanket bans on demonstrations – to intensive scrutiny. As Woolman (2013:389) notes, courts must “require the state to demonstrate that no other means of dealing with a threat of public order ... is available.”

The judge accepts that the provision allows the regulating authority to impose a blanket ban on all demonstrations and its effect is to impose greater restrictions than are necessary to achieve its purpose. Nonetheless, he decides the effect is limited because the ban is of limited duration and applied to a restricted geographical area. On the issue of whether there were less restrictive measures means of achieving the purpose of the limitation, the judge first makes the unhelpful remark that “the enabling legislation does not give the regulating authority options other than those provided for under s 27.” He then goes on to point out that the authority is limited because the authority can only impose the ban where it has reasonable grounds for doing so. He implies that the authority had reasonable grounds for imposing the blanket ban because on two

previous occasions that had been violence leading to destruction of property and the authority feared that such violence would recur unless demonstrations were disallowed to allow for a “period of healing”. Thus every time some violence occurs even though the organisers of the public demonstration had planned only a peaceful demonstration, the police would be entitled to impose a ban on all demonstrations in a whole district for up to thirty days.

Additionally, this is clearly a case where the courts ought to have stepped in to prevent the state from exploiting the provisions of the Public Order and Security Act in order to suppress demonstrations which it disapproves – contrary to the Constitution. A more generous interpretation of “peaceful” should be applied to uphold the right to demonstrate when the organisers have organised a peaceful demonstration and most of the demonstrators remain peaceful but a few members of the assembly engage in violence. Such an approach finds support in *The Bill of Rights Handbook* Iain Currie & Johan De Waal<sup>132</sup>, where the learned authors state that:

“A generous interpretation of the ‘peaceful’ proviso is necessary to prevent the state from exploiting this requirement in order to suppress unpopular positions. This generous interpretation ensures that if some members of an assembly resort to violence, while the majority of the participants remain peaceful, the assembly remains protected. This result is necessary to prevent a peaceful assembly from being hijacked by violent supporters, opponents or agents provocateurs. When such a hijacking occurs, the police must attempt to act solely against the violent minority without depriving the rest of the assembly of protection.”

## Conclusion

It is respectfully submitted that the stated basis for the judgment by Chiweshe JP in the *DARE* case is tenuous and inconsistent. The learned judge upholds a blanket ban in the capital city on all demonstrations irrespective of whether the demonstrations are intended to be peaceful and of whether any likelihood of a breach of peace or public order could be averted by attaching conditions upon the conduct of protests and providing police security for the protests. The fact that some previous demonstrations have turned violent cannot justify banning *all* demonstrations. This approach in effect completely negates the right to engage in peaceful protest. It should be incumbent on the police to provide a sufficient police escort to forestall any outbreaks of violence. Once the judge conceded that the restrictions exceeded what was necessary to achieve their purpose, it became unavoidable to rule that these restrictions could not meet muster in terms of the provisions of section 86 of the Constitution.

It is long overdue that we abandon the ethos that was reflected in the Law and Order (Maintenance) Act. When people are disgruntled by what they consider to be failed governance and harsh socio-economic conditions, it is likely that they will seek to signify their dissatisfaction by protest action. The complete suppression of protest action will only worsen the situation.

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<sup>132</sup> Currie & de Waal, *op cit* note 3 at 384

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## **Constitutionality of the offence of deliberately transmitting HIV:**

### **Case note on the case of *S v Mpofo & Anor* CC-5-16**

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#### **The nature of HIV and Aids**

Before commenting upon the *Mpofo* case it is first necessary to set out the nature of HIV and AIDS. The following medical facts are taken from information provided by an organisation called AVERT.<sup>1</sup>

“Human immunodeficiency virus (HIV) is a virus that attacks the immune system, which is our body’s natural defence against illness. The virus destroys a type of white blood cell in the immune system called a T-helper cell, and makes copies of itself inside these cells. T-helper cells are also referred to as CD4 cells. As HIV destroys more CD4 cells and makes more copies of itself, it gradually breaks down a person’s immune system. This means someone living with HIV, who is not receiving treatment, will find it harder and harder to fight off infections and diseases. HIV is found in semen, blood, vaginal and anal fluids, and breast milk. HIV cannot be transmitted through sweat, saliva or urine. Using male condoms or female condoms during sex is the best way to prevent HIV and other sexually transmitted infections. If HIV is left untreated, it may take up to 10 or 15 years for the immune system to be so severely damaged it can no longer defend itself at all. However, the speed HIV progresses will vary depending on age, health and background. Although there is currently no cure for HIV, with the right treatment and support, people with HIV can live long and healthy lives. To do this, it is especially important to take treatment correctly and deal with any possible side-effects. There is effective antiretroviral treatment available so people with HIV can live a normal, healthy life. The earlier HIV is diagnosed, the sooner treatment can start – leading to better long term health.

Acquired immune deficiency syndrome (AIDS) is not a virus but a set of symptoms (or syndrome) caused by the HIV virus. AIDS is also referred to as advanced HIV infection or late-stage HIV. A person is said to have AIDS when their immune system is too weak to fight off infection, and they develop certain defining symptoms and illnesses. This is the last stage of HIV, when the infection is very advanced, and if left untreated will lead to death. Treatment for HIV means that more people are staying well, with fewer people developing AIDS.”

HIV infection used to be a death sentence but it is no longer so provided that the infected person receives anti-retroviral treatment. This treatment can enable an infected person to live a long life. Nonetheless HIV infection is still a very serious matter. As the court pointed out in the *Mpofo* case

“It is well known that infection with the HIV virus can have fatal consequences particularly where the infected person is not in receipt of remedial treatment either because he is not aware of the fact of his infection or because although aware of his status, he takes a conscious decision not

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<sup>1</sup> <https://www.avert.org/about-hiv-aids/what-hiv-aids>

to avail himself of such treatment which can only be obtained upon disclosure of his condition to a care giver.”<sup>2</sup>

### **Incidence of HIV/ AIDS in Zimbabwe**

Although the adult HIV prevalence rate in Zimbabwe has been declining over the last few years due to prevention programmes aimed at sexual behavioural change such as encouraging condom use and reducing multiple partners<sup>3</sup> it was still high – in a 2015 UNAIDS report it was stated as being at 14.7 per cent for adults between 14 and 49 with an estimated 1 300 000 adults aged 15 and over living with HIV. The figure of death due to AIDs was 29 000.<sup>4</sup>

The high incidence of HIV and AIDs in Zimbabwe and other countries has led to a clamour for the criminalisation and imposition of harsh penalties on those who intentionally engage in activities that will lead to the transmission of HIV. This led to the creation of such an offence in Zimbabwe. This offence is provided for in section 79 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The objective of this offence is to try to prevent the deliberate transmission of HIV.

### **The offence**

The heading for this offence is “Deliberate transmission of HIV”. This is somewhat misleading. Although the offence can be committed if the accused actually infects the complainant, it can also be committed without proof of actual infection of the complainant by the accused. Where the accused realises that there is a real risk that he or she may be infected and he or she has sexual intercourse with another realising that there was a real risk or possibility of infection, he or she is guilty of the offence. This formulation does not require actual proof of infection.

Where the State is alleging that the accused actually infected the complainant, it would have to establish that the complainant did not already have HIV before the accused allegedly infected him or her. If, for instance, the accused rapes and infects a young girl who was a virgin, it will be clear that it was the accused who infected her unless, of course, her mother infected her when she gave birth to her. But with adults it may be difficult to establish which of the two partners was infected first as this cannot be determined by medical evidence.

In cases involving sexual intercourse the offence is committed in the two situations below:

1. The accused, who actually knows that he or she is infected with HIV, has sexual intercourse with another person knowing that this will infect that person with HIV and the complainant does not know that the accused has HIV when they have sexual relations.
2. The accused, who realises that there is a real risk or possibility that he or she is infected with HIV has sexual intercourse with another person realising the real risk or possibility

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<sup>2</sup> At para 12

<sup>3</sup> Ministry of Health and Child Welfare National HIV and AIDS Estimates Report 2014

<sup>4</sup> <http://www.unaids.org/en/regionscountries/countries/zimbabwe>

that the other person will be infected with HIV and the complainant does not know that the accused has HIV when they have sexual relations.

It is explicitly provided that this offence is committed by an accused “whether or not that he or she is married to the other person.”

It is a defence for the accused to prove (on a balance of probabilities) that the person with whom he or she had sexual relations knew that the accused was infected with HIV or consented to have sexual relations with him or her appreciating that the nature of HIV and the possibility of becoming infected with it. This defence requires the accused to prove not only consented to sexual intercourse but also that the complainant appreciated the nature of HIV and that that the sexual intercourse could lead to that person being infected.

### **The constitutional case**

The two applicants had been charged with deliberate transmission of HIV in contravention of section 79 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. It was alleged that both applicants had unprotected sexual intercourse with their husbands knowing that they were infected with HIV. The applicants argued that the offence with which they had been charged violated:

Their right protection of law under section 18 of the pre-2013 Constitution because the offence in question is so wide, broad and vague that the law uncertain<sup>5</sup>; and

Their right under section 23 of the pre-2013 Constitution not to be discriminated against on any basis including HIV/AIDS status<sup>6</sup>.

In most cases, HIV transmission takes place through sexual intercourse although there are other ways of transmission, such as deliberately plunging into a victim a syringe known to have been contaminated with HIV. The paper will concentrate on situations involving sexual intercourse as in the cases of both the applicants the charge arose from sexual intercourse.

### **The basis of the constitutional challenge**

The challenge to the constitutionality of this offence was focused on the species of this offence requiring only that when the accused has sexual intercourse with another person the accused realised the real risk or possibility that he or she was infected with HIV and that there was a real risk that the other person will be infected with HIV. Counsel for the applicants argued that this formulation of the offence violated the constitutional right to protection of law as it is conjectural and vague. He contended that innocent persons are in danger of being convicted under this provision.

The court first set out the right to protection of the law requires that the law must “be expressed in clear and precise terms to enable individuals to conform their conduct to its dictates” and it

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<sup>5</sup> The 2013 Constitution does not contain a standalone protection of the law provision but it contains detailed provisions on the rights of a person who has been accused of a crime in section 70.

<sup>6</sup> The equivalent provision in the 2013 Constitution is section 56.

must “not be so widely that expressed that its boundaries are a matter of conjecture nor ... be so vague that people affected by it must guess at its meaning.”

Applying this to the offence in question, the court decided that the formulation of this offence did not violate the right to protection of the law as it was framed with sufficient clarity and precision to enable people to know what the offence entailed. For liability for crimes of intention in the Criminal Law (Codification and Reform) Act, the accused can be liable either on the basis of actual or constructive intention. Thus for the section 79 offence, the accused can be liable either if he or she knew that he had HIV and he or she intended to transmit HIV or if he realised that he might have HIV and had sexual intercourse realising that there was a real risk or possibility that he might infect the other person with HIV.

The requirements for proof of “constructive” intention are precisely set out in section 15 of the Code. The court decided that the definition in section 15 “of the phrase ‘real risk or possibility’ has dispelled any perceived vagueness in that phrase by the inclusion therein of the components of ‘awareness and recklessness’.”

In his argument, Counsel for the applicants argued that the offence as currently worded could lead to the conviction of “innocent persons.” He gave two examples of a person being unwittingly infected with HIV when receiving a blood transfusion and the example of a person infecting another with HIV despite using a condom because it has been scientifically established that condoms are not a hundred percent effective in preventing HIV transmission. As the court decided, neither of these situations can lead to conviction for this offence as neither actual nor constructive intention would be present.

Regarding the first example, the court correctly pointed out that the person who has no reason to believe that he or she is infected, for example where infection has, unknowing to him or her, been brought about by an injection with an infected needle, would not be convicted under section 79. Regarding the second example, the person who has reason to believe that he or she might be HIV positive, would not be liable to be convicted under section 79 if he disclosed this belief to his partner so that the latter could make an informed decision. It could have added on the second example that if the accused did not know that wearing a condom might not prevent the transmission of HIV, he or she would not even have subjectively realised that there was a real risk that HIV would be transmitted.

The court said that where the accused knows or has reason to believe that that he or she was infected with HIV “... public policy would require of such a person that he make full disclosure to his or her intended partner in order to afford that partner the opportunity to make an informed decision.”

The Constitutional Court thus found that the offence was not vague and imprecise even when the required form of intention takes the form of so-called constructive intent. What the court should have enquired into is whether it is appropriate for this offence that constructive intention should be sufficient basis for conviction.

Where a person deliberately and maliciously actually infects another person with HIV it is fully justified to punish that person severely under the offence set out in section 79. This would apply where the State can prove, for example, that an uninfected person was infected by the accused who knew he or she was HIV positive, such as where he or she has been tested, has been informed that he or she is positive and has been told of the precautions necessary to avoid transmitting it to others. Particularly blameworthy would be the person who, knowing that he or she is HIV positive, lies to his or her sexual partner telling him or her that he or she is not infected and that it is thus not necessary to wear a condom.<sup>7</sup>

However, it is very different if the State is alleging that he or she had sexual relations with another when he or she realized that there was a real risk or possibility that he or she might be infected and, despite that realisation, went ahead appreciating the real risk or possibility that the other person will be infected.

The accused will typically deny that he or she realised that there was a real risk that he or she had been infected and that he or she had sexual relations taking the risk that the partner would be infected. How will the State prove that the accused, despite his or her denial, took a conscious risk? If the accused has not been tested and told that he or she is HIV positive, would the State be able to rely on the fact that the accused, to his or her knowledge, was displaying symptoms of AIDS. Would this be enough for the State to persuade the court that the only reasonable inference was that the accused must have been aware he or she was infected with HIV and took a conscious risk? The accused could maintain that he or she was unaware that these symptoms meant that he or she had HIV and was unaware therefore that he or she could transmit HIV. Such a person would not have been tested, told the result of the test and been counselled on how to avoid transmission.

There is frequently a problem with so-called constructive intention. The very term “constructive intention” has been criticised by academic writers on the basis it could be taken to imply that an intention is artificially being attributed to the accused. The writers prefer the term “legal intention” or “*dolus eventualis*.” The problem with legal intention is that there is often a very thin dividing line between subjective realisation and negligence, and there is a danger that the court may wrongly find that the accused had legal intention simply because any normal or reasonable person in his or her situation would have realised the risk. This problem is particularly acute in the context of this offence if the accused denies that he or she realised that he or she was infected and might transmit HIV. It is difficult to see on what reliable basis the court could infer

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<sup>7</sup> However, the deterrent effect of criminalization may be reduced where the accused blames previous sexual partners for infecting him or her. Such a person may be fatalistic in outlook and may act out of resentment and anger when infecting others. If he or she knows that her or she has only have a limited time left to live, a threat of lengthy incarceration may not have great influence upon him or her. Nonetheless criminalisation is justified to try to curb such vindictive behaviour.

that the accused must have had the necessary realisation despite his or her denial. In this regard it is interesting to compare section 79 with the provision in section 78.

Section 78 deals with deliberate infection of another with a sexually-transmitted disease such as syphilis. Section 78 has a reverse onus provision which is not to be found in section 79. Section 78(3) provides that if the prosecution proves that the accused was suffering from an STD at the time of the crime, “it shall be presumed unless the contrary is proved, that he or she knew or realised that there was a real risk or possibility that he or she was suffering from it.” Although the constitutionality of this reverse onus is questionable, it was presumably inserted to try to overcome the difficulties of proving that the accused knew or realised the real risk that he or she was suffering from an STD. The same difficulties arise in respect of proving that the accused knew or realised that there was a real risk that he or she was suffering from HIV.

Additionally, the defence that the accused disclosed to the complainant that he or she was infected applies more appropriately to a situation where the accused definitely knows that he or she was infected rather than a situation where he or she has some reason to suspect that he or she is infected.

Thus, there is a strong argument for confining this offence to situations where actual intention can be proven. Justice Edwin Cameron an HIV-positive Justice of the Supreme Court of Appeal in South Africa has said: “The use of criminal law to address HIV infection is inappropriate except in rare cases in which a person acts with conscious intent to transmit HIV and does so.”<sup>8</sup> So too, the UNAIDS organisation has urged “governments to limit criminalization to cases of intentional transmission i.e. where a person knows his or her HIV positive status, acts with the intention to transmit HIV, and does in fact transmit it.”<sup>9</sup>

As regards the discrimination argument, the court pointed out that discrimination on the basis of HIV status is not prohibited by section 23. Thus while section 79 targets only persons infected with or exposed to the HIV virus, which can be regarded as discriminatory towards those persons, such discrimination is not unlawful in that it is not proscribed by section 23. It went on to say that in terms of section 23 (5), where a law discriminates on the grounds of sex or gender, the challenger bears the burden of showing that the law is not reasonably justifiable in a democratic society. It then applied the recognised criteria for deciding this matter as follows: The legislative objective is to halt or prevent the spread of HIV/AIDS. This objective is both important and laudable. It is sufficiently important to override the right of non-discrimination and the right to privacy. Because of the grave danger to life arising from HIV infection, the measure designed to meet the objective by prosecuting those who spread the disease deliberately or recklessly is rationally connected to, and calculated to achieve, the stated objective.

Prosecution for this offence will not be arbitrary or based on irrational considerations. A court is well equipped to assess the evidence in the matter in a rational manner. The means used by the legislation to achieve the objective does not impair the rights of people more than is necessary.

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<sup>8</sup> Burris S, Cameron E. “The case against criminalisation of HIV transmission” (2008) 300 *JAMA* 578–80

<sup>9</sup> Criminalisation of HIV transmission [policy brief] Geneva (Switzerland): UNAIDS 2008.

The sentence of up to twenty years is not disproportionate. Infection with HIV could be a death sentence for the victim. In grave cases the maximum sentence might be appropriate.

### **Will criminalisation make people reluctant to be tested?**

This issue was not dealt with in the *Mpofu* case but a short comment should be made about it. There are two main views on this issue.

The first is that criminalisation will discourage people from being tested. One such view is the following:

“The potential to be charged with willful HIV transmission may be a significant deterrent to being tested for HIV infection. After all, individuals who do not know that they are HIV-positive cannot logically be accused of its transmission. The consequence may be a failure to identify as many HIV-positive people as possible and higher rates of HIV spread. Studies have shown that individuals who are informed that they are HIV positive will commonly desist from high-risk sexual practices, but may not do so if they are unaware of their own status. This is important, since as many as 50 per cent of all new HIV transmissions are attributable to people who are only recently infected.”<sup>10</sup>

The second is that criminalisation will not have this effect. One such view is this,

“Some argue that criminal prosecution will dissuade persons from being tested for HIV and therefore promote HIV transmission by these persons who do not know their status. Such speculation is unsupported by a single published study. No informed and reasonable person would decline HIV testing, thus placing themselves at risk of grave illness and death, just because of the publicized prosecution of some HIV-infected individuals accused of unlawfully transmitting the disease to others. It is not one’s HIV infection itself that is the subject of prosecution, it is the intentional or reckless transmission of HIV to others.”<sup>11</sup>

The second view is surely the more supportable one. The thrust of our law must be to encourage people to be tested, especially if they suspect that they may be infected. If this criminal offence is confined to situations where the accused has been tested and as a result of the test knows that he or she is infected, then the question of the criminal offence acting as a disincentive to being tested will not arise.

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<sup>10</sup> Mark A Wainberg “Criminalizing HIV transmission may be a mistake” (2009) 180 *Canadian Medical Association Journal* March 17, no.6.

<sup>11</sup> Philip B. Berger, MD “Prosecuting for knowingly transmitting HIV is warranted” *Canadian Medical Association Journal* 2009 Jun 23; 180(13): 1368.

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