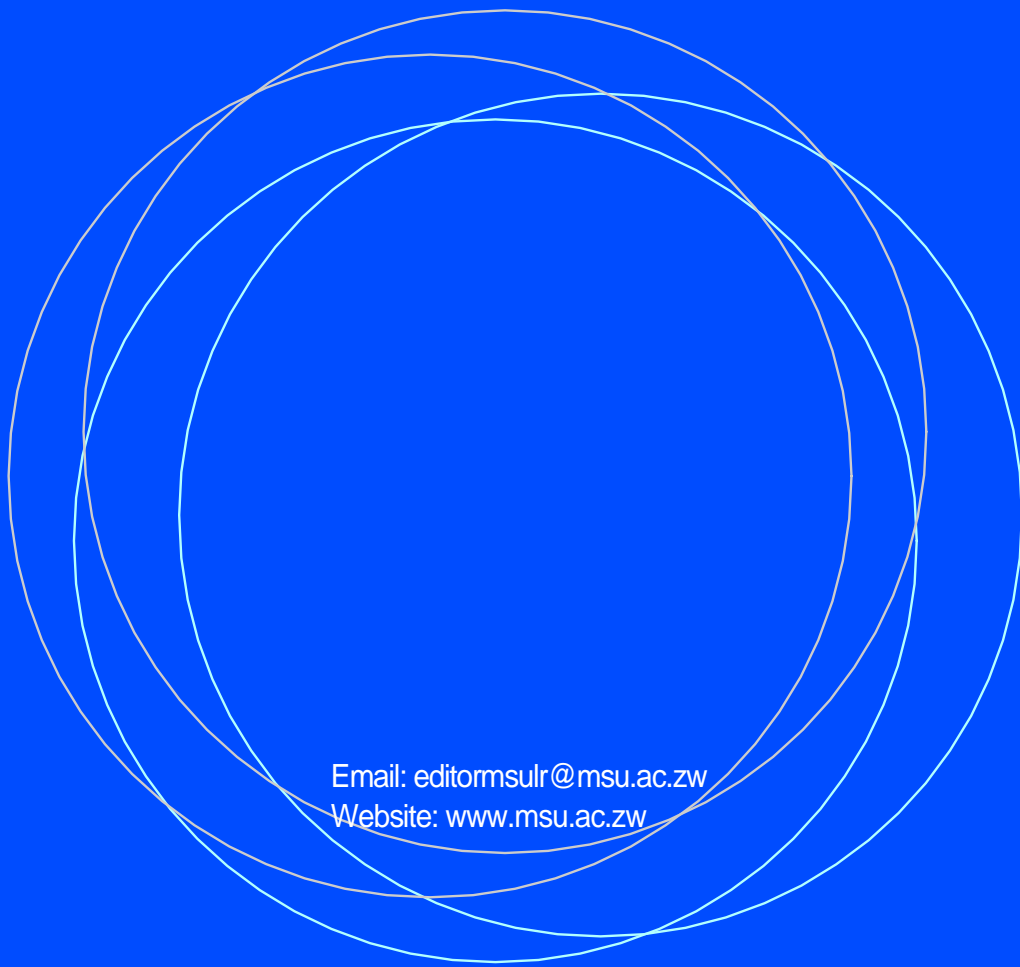




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INTRODUCTION

The thematic focus of this Inaugural issue of the Midlands State University Law Review is “The Jurisprudential Promise of a New Constitutional Dispensation in Zimbabwe”. Motivating this theme was the fact that, on the 22nd May 2013, Zimbabwe adopted Constitution of Zimbabwe Amendment (No. 20) Act, 2013) which effectively ushered in Zimbabwe’s new national Constitution. The new Constitution replaced the old 1979 Lancaster House Constitution, which was published as a Schedule to the Zimbabwean Constitution Order 1979 (Statutory Instrument 1979/1600 of the United Kingdom) and had been amended a total of 19 times.

Zimbabwean constitutional jurisprudence has long been based upon this old Constitutional framework and there is no doubt that such jurisprudence will not be entirely rendered archaic by the new constitutional framework. However, the new constitutional dispensation introduces the possibility of new trajectories in Zimbabwe’s constitutional jurisprudence. Indeed, it is hoped that this new Constitution will generate its own constitutional jurisprudence, in view of the different set of principles, values and norms that underpin it.

Importantly, to law academics, legal practitioners and all stakeholders in Zimbabwe’s legal system, the dawn of this new constitutional system provides an interesting normative framework to analyse the new directions, ideas, values and principles embodied in various provisions of the new Constitution. As such, this issue of the Midlands State University Law Review is intended as a platform allowing law academics, legal practitioners and other stakeholders in Zimbabwe’s legal profession to progressively explore the meaning, possible impact and implications of the new Constitution on Zimbabwean law and society.

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Constitutionalism and the new Zimbabwean Constitution

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1. Introduction

Codified constitutions are arguably the most celebrated type of Constitution in the world.¹ This is probably because codified Constitutions are contained in one document called 'The Constitution.'² As such, they offer a primary and singular source from which 'constitutional' provisions can be gleaned, making such Constitutions accessible and clear to citizens and to the world at large.³ Beyond this however, codified Constitutions are also celebrated because of their symbolic value.⁴ Here, it is worthwhile to consider that codified Constitutions typically emerge, and succeed, following an upheaval, the classical example of which is a revolution.⁵ As such, codified Constitutions are celebrated partly because they represent the turn to new constitutional dispensations in which things will be 'different' from the way they were previously. This symbolism is not to be discounted. Various states, most recently South Africa and Iraq, have relied on the symbolic value that codified Constitutions hold as the backbone for the transition to constitutional democracies which have united peoples across the nation and been regarded as a beacon of hope and change.⁶

Importantly, the celebration that typically accompanies codified Constitutions should not be taken to mean that other types of Constitutions are of a lesser standard.⁷ Various jurisdictions the world over rely on other types of Constitutions which, while not codified, are still the basis on which model constitutional democracies have been fashioned. This is the case in states such as the United Kingdom and New Zealand which feature written Constitutions that are not codified.⁸

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¹ A.W. Bradley and K.D. Ewing *Constitutional and Administrative Law* (12ed) (2007) 4-5.

² M. Ryan *Unlocking Constitutional and Administrative Law* (2ed) (2007) 13.

³ Bradley and King, (n 1 above) 7.

⁴ H. Barnett *Constitutional and Administrative Law* (4ed) (2003) 9.

⁵ Ryan, (n 2 above) 11-12.

⁶ Ryan, (n 2 above) 11.

⁷ Barnett, (n 4 above) 8-15. Ryan, (n 2 above) 13-15.

⁸ Ryan, (n 2 above) 13.

Of note, the fact that these other types of Constitutions achieve the same results as codified Constitutions points to the well established fact that, it is not the set of codified or un-codified principles that a state refers to as its Constitution that determines whether that state will successfully transition to a constitutional democracy based on constitutionalism.⁹ Instead, whether a Constitution forms the backbone of a state's transition to a constitutional democracy is significantly more dependent upon its capacity to capture the essence behind Constitutions. This essence has most commonly been referred to as constitutionalism.¹⁰

Constitutionalism has traditionally been difficult to narrow down into a few select phrases.¹¹ Despite this, it has previously been argued that 'constitutionalism suggests the limitation of power, the separation of powers and the doctrine of accountable responsible government.'¹² As such, it can reasonably be noted that there are two central requirements to be met if any semblance of constitutionalism is to be attained.¹³ The first requirement of achieving constitutionalism is ensuring that state power is not vested in a single institution which can arbitrarily use that power.¹⁴ To this end, a long-standing ideal of constitutionalism is that state power should be separated among central institutions along legislative, executive and judicial functions.¹⁵ This is part of a system that ensures that the three institutions 'check' and 'balance' each other's respective competencies.¹⁶ Closely related, upholding the rule of law through ensuring that no-one is above the law and that opportunities for arbitrary decision-making are limited, is also widely considered to be a central feature of constitutionalism.¹⁷ A second requirement for achieving constitutionalism is that states should feature a system of securing the accountability of the state to the governed. In part, this is achieved through the turn to the rule of law which calls for government to be subject to law.¹⁸ More commonly however, this is attained when the citizenry can directly hold the state to account for its actions through their

⁹ Barnett, (n 4 above) 6.

¹⁰ Barnett, (n 4 above) 5.

¹¹ Barnett, (n 4 above) 5-6. Ryan, (n 2 above) 15.

¹² Barnett, (n 4 above) 6.

¹³ See however, Ryan, (n 2 above) 11.

¹⁴ Ryan, (n 2 above) 60-92.

¹⁵ E. Petersmann 'How to Reform the UN System? Constitutionalism, International Law and International Organizations' (1997) 10 *Leiden Journal of International Law* 421, 426-428.

¹⁶ Petersmann, (n 15 above) 425.

¹⁷ E. Petersmann 'How to Constitutionalize International Law and Foreign Policy for the Benefit of Civil Society?' (1998) 20 *Michigan Journal of International Law* 1, 13, 17.

¹⁸ Ryan, (n 2 above) 11.

exercise of justiciable fundamental rights as well as through the provision for access to judicial review of the legality, rationality, and procedural fairness of state decisions.¹⁹

While these requirements may be central to the attainment of constitutionalism, it does not necessarily follow that if a Constitution should carry provisions which meet these requirements, that Constitution will facilitate a state's progression to a constitutional democracy based on constitutionalism. History is littered with examples of Constitutions which have incorporated provisions which are consistent with these two requirements but cannot reasonably be regarded as having formed the backbone of constitutional democracies based on constitutionalism. This suggests that the determination of whether the set of principles which a state refers to as its Constitution provides for these two qualities of constitutionalism alone is not an adequate measure of whether a Constitution can form the backbone for a country's transition to a constitutional democracy based on constitutionalism. Instead, the better measure of whether a Constitution secures constitutionalism is whether that Constitution actually ensures that citizens live in a state in which: there is separation of power; the rule of law is upheld; and in which citizens are actually able to hold the state to account for its decisions.²⁰

This dynamic between Constitutions and the attainment of constitutionalism is particularly interesting in the Zimbabwean context in light of the fact that the country enacted a codified Constitution in May of 2013.²¹ This Constitution is the second of its kind in the post independence era, having been preceded by the 1979 Lancaster Constitution which ushered in political independence and sustained the Zimbabwean legal system for the past three decades. The turn to such a codified Constitution was easily justifiable on varied grounds. Most obviously, this turn to a codified Constitution was driven by the need to establish a clear and accessible Constitution to replace the previous codified Constitution which had become bulky, unclear and inaccessible.²² In addition, that former Constitution had increasingly become shrouded in controversy, largely due to extensive amendments to its provisions.²³ Most importantly, the old constitutional setup had become the centre for political contestations, and resultantly, could not

¹⁹ S.B. Prakash and J.C. Yoo 'The Origins of Judicial Review,' (2003) 70 *The University of Chicago Law Review* 887.

²⁰ Ryan, (n 2 above) 11. Barnett, (n 4 above) 9.

²¹ Constitution of Zimbabwe Amendment (no.20) Act 2013.

²² 1980 Lancaster House Constitution, published as a Schedule to the Zimbabwean Constitution Order 1979 (Statutory Instrument 1979/1600 of the United Kingdom).

²³ At least 19 amendments were made to the Lancaster House Constitution.

be regarded by all and sundry as the embodiment of constitutionalism in Zimbabwe. In this context, it certainly made sense to pursue another codified Constitution as the symbol of constitutional democracy in Zimbabwe.

Considering this, it is hardly surprising therefore that in the time since it came into effect, the Zimbabwean Constitution has been rightly celebrated for its symbolic value as the beacon of hope and change. What has been overlooked, considering that the turn to a codified Constitution was intended as a much needed step in the country's transition to a new kind of constitutional democracy based on constitutionalism, and that codification of a Constitution is not a necessary condition for constitutionalism, has been thorough analysis of whether the new Constitution can rightly be regarded as a progressive step in the country's entrenchment of constitutional democracy based on constitutionalism.

As such, this paper critically assesses whether the 2013 Zimbabwean Constitution can reasonably be regarded as such a progressive step in the country's progression to a constitutional democracy based on constitutionalism. As part of conducting this assessment however, it is useful to note that even a cursory look at the Zimbabwean Constitution suggests that it seemingly meets the requirements of constitutionalism. In one sense this is because the Zimbabwe Constitution reads very much like the South African Constitution which has arguably been the backbone for that country's transition to a constitutional democracy based on constitutionalism. In another sense the fact that the 2013 Zimbabwean Constitution, in much the same manner as its 1979 predecessor, meets the requirements of constitutionalism can *prima facie* be inferred from the fact that the Constitution carries provisions which: call for the separation of powers; require that the rule of law be upheld and, bestow justiciable fundamental rights on citizens in a manner that enables them to hold the state to account for its decisions.

Despite this, it merits reiteration that the inclusion of provisions which meet the requirements of constitutionalism in a Constitution does not mean that constitutionalism will be attained. As such, the paper focuses attention on whether constitutional provisions which seemingly meet the requirements of constitutionalism in the Zimbabwean Constitution actually secure constitutionalism for Zimbabwean citizens. In pursuing this objective, the paper practically evaluates the context in which the Constitution was introduced, and critically assesses the extent to which constitutional provisions which call for separation of powers and the rule of law actually ensure that Zimbabweans live in a context in which power will be separated, and the

rule of law upheld. In addition, the paper critically assesses the extent to which provisions in the Constitution which empower citizens to effectively hold the state to account, actually place citizens in a position to do so. In conclusion, the paper rounds out the discussion with an assessment into whether the Zimbabwean Constitution can form the backbone for the country's transition to a constitutional democracy based on constitutionalism.²⁴

2. Pursuing constitutionalism in Zimbabwe

It is important to note that Constitutions are 'not the act of a government, but of a people constituting a government, and a government without a Constitution is power without right.'²⁵ As such, Constitutions are best regarded as 'dynamic organisms which are dependent for much of their meaning on and relevance on the societal framework which surrounds them.'²⁶ Simply put, if a Constitution should achieve constitutionalism, it is necessary for citizens to be placed in a position to be able to interact with the Constitution and understand and appreciate the important role they play in challenging state authority and holding the state to account for its decisions. With this in mind, it is interesting to note that Zimbabwe has always had a codified Constitution which purported to be an expression of the people's will.²⁷ However, the former Constitution, which was in effect since independence, had been amended so extensively that its clarity and accessibility to citizens had been compromised. Most importantly, there was no referendum before the 1979 Constitution was adopted, and this can justify the argument that its priority was political independence than attaining the essence of constitutionalism.

Importantly, it certainly seems to be the case that the 2013 Zimbabwean Constitution has addressed these deficiencies with the former Constitution through, the crafting of clear and accessible provisions which meet, at least in theory, the requirements of constitutionalism to the extent that they advocate the separation of powers, the rule of law, and through placing citizens in a position to hold the state to account for its decisions. Despite this, the 2013 Zimbabwean Constitution can hardly be said to capture the people's will to progress to a constitutional democracy based on constitutionalism. This is because the turn to a new Constitution was, arguably, not driven by citizens as a way of starting afresh in a constitutional dispensation which

²⁴ Ryan, (n 2 above) 11.

²⁵ Ryan, (n 2 above) 11. Barnett, (n 4 above) 7.

²⁶ Barnett, (n 4 above) 9.

²⁷ 1979 Lancaster House Constitution, published as a Schedule to the Zimbabwean Constitution Order 1979 (Statutory Instrument 1979/1600 of the United Kingdom).

would secure the separation of power among state institutions so that these institutions' opportunities for arbitrary exercises of power would be limited while giving citizens a real opportunity to hold the state to account for its decisions.²⁸ Instead, the political tensions and polarization preceding the turn to a new Constitution which characterized constitutional discussions and outreach programmes meant that the Constitution-making process was essentially driven by politicians in a politically chaotic but non-revolutionary context.²⁹ The participation of the citizens in this transition to a new Constitution was registered through the condition that the coming into effect of the Constitution was based on a 'yes' vote in a referendum. However, drawing from anecdotal evidence, it certainly appeared that even as citizens voted 'yes' to the Constitution, most did so based on political affiliation and fear of political reprisals rather than the desire to participate in the making of a new Constitution which would usher in a new constitutional dispensation.

In this context, the attainment of constitutionalism was particularly dependent on placing Zimbabweans in a position to interact with the Constitution and understand and appreciate the important role they were required to play in challenging state authority and holding the state to account for its decisions. Specifically, and in line with the requirements of constitutionalism noted above, the attainment of constitutionalism under these circumstances was contingent upon ensuring that citizens would live in a state in which power was actually separated in a manner which limits the potential for arbitrary exercises of power, and in a state in which citizens could hold the state to account for its decisions.

2.1. Separation of powers and the rule of law

In assessing whether the 2013 Constitution secures constitutionalism for citizens through ensuring that citizens live in a country in which state power would be separated so as to limit the

²⁸ Barnett, (n 4 above) 9.

²⁹ See, 'Vote 'NO' to draft Constitution: Madhuku' *Newsday* (Zimbabwe) 15 March 2013. Madhuku in his capacity as chairperson of the National Constitutional Assembly, observed that: "A democratic constitution must be people-driven. This is a constitution being imposed on us by three political parties, yet the people are bigger than these parties. No political party or group of political parties must be allowed to give the country a constitution. A constitution must come from the people." See also Zimbabwe Election Support Network: *Zimbabwe Constitution Referendum Report and Implications for the Next Elections* 16 March 2013. The Report observed (p7) that 'This process took almost three years due to deeply rooted and widely polarised views mainly between the two MDC formations and the ZANU-PF party'

potential for arbitrary use of power in a practical way, it is important to consider that, over the course of Zimbabwe's constitutional history, the separation of powers had deteriorated. Indeed, there had been periods in which it seemed that state institutions worked in concert in a manner that allowed arbitrary exercises of power to go unchecked with the result that citizens were deprived of exercising their rights and deriving the full benefits that such rights bestowed on them.³⁰

As such, it is certainly a welcome development that the 2013 Zimbabwean Constitution contains various provisions which separate state power among the different state institutions, ensuring that power is not pooled in one institution.³¹ For instance, section 3 (2) (e) of the Constitution explicitly provides that 'the principles of good governance which bind the state and all its institutions and agencies of government at every level, include observance of the principle of separation of powers.' More comprehensively perhaps, chapters 5, 6, and 8 of the Constitution separate and direct the constitution and powers of the executive, legislature, and judiciary respectively. Notable provisions in these chapters relate to: the creation of a Constitutional Court to sit atop the country's court structures as the highest court in all constitutional matters;³² the qualification that Executive authority derives from the people of Zimbabwe, and must be exercised in accordance with the Constitution;³³ and the directive to Parliament to ensure that the provisions of the Constitution are upheld, and that the State and all its institutions and agencies of government at every level act constitutionally and in the national interest.³⁴

Furthermore, the Zimbabwean Constitution also explicitly provides for the rule of law as a means of guarding against government overreaching. For instance, the Preamble notes the need 'to entrench democracy, good, transparent and accountable governance and the rule of law.' Furthermore, section 3 (1) (b) provides that 'Zimbabwe is founded on respect for...the rule of law.' The Constitution also provides for the rule of law in less explicit ways. For instance, this is apparent through the prohibition, in section 86 (2), on the arbitrary limitation of fundamental rights. Separately, provision for the rule of law in the Constitution is also apparent from

³⁰ See for example, *Mike Campbell (Pvt) Limited and Another v The Minister of National Security Responsible for Land, Land Reform and Resettlement and Another* SC 49/07.

³¹ Ryan, (n 2 above) 60.

³² See Section 67, and Section 65.

³³ See Section 88 (1) and (2) of the Constitution.

³⁴ Section 119 of the Constitution.

provisions which advocate good governance while admonishing arbitrary rule.³⁵ In addition, it is recognized in the Constitution that no-one is above the law, to the extent that section 2 (2) provides that the obligations imposed in the 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.' Other relevant provisions are: the directive to the judiciary to ensure that justice must be done to all, irrespective of status;³⁶ that Parliament has power to ensure that provisions of the Constitution are upheld;³⁷ and that Executive authority derives from the people of Zimbabwe and must be exercised in accordance with this Constitution.³⁸

These are certainly formidable provisions. However, whether they will prompt the country's turn to a constitutional democracy based on constitutionalism is questionable. This is because, while these provisions emerged from a seemingly concerted drive led by COPAC³⁹ and various public meetings held on the Constitution, this did not detract from the fact that, in a real sense, the drive to transition to a new Constitution was a political affair led by politicians.⁴⁰ Certainly, anecdotal evidence suggests that, by the time the Constitutional Referendum was held, citizens voted based on the basis of political affiliations rather than the more preferable interaction with constitutional provisions. Importantly, this suggests that even after the country had voted 'yes' to the Constitution, there remained a pressing need to ensure that citizens perceived, understood, and appreciated those provisions which made it into the Constitution so that they could insist on separation of powers and the rule of law in their daily interactions with state institutions. In some ways, the directive in section 7 of the Constitution to the state to promote awareness of the Constitution can be interpreted as prompting the state to lead the public to fully understand, and appreciate these provisions. However, in the light of Zimbabwe's constitutional history, getting the public to understand and appreciate their role in a constitutional democracy required that

³⁵ Section 3 (2); Section 9.

³⁶ Section 165 (1) (a).

³⁷ Section 119 (2).

³⁸ Section 88 (1) (a).

³⁹ Zimbabwe's Constitution Select Committee charged with the drawing up a new constitution for Zimbabwe by the Government of National Unity.

⁴⁰ For some relevant press articles see, various posts around the time, available at: http://www.swradioafrica.com/Zimbabwe_News_Radio_Short_Wave_politics/copac/. See also ZHLR Pre-Referendum Statement available at <http://www.hrforumzim.org/wp-content/uploads/2013/03/ZLHR-Pre-Referendum-Statement.pdf>

significantly more than this be done. Specifically, if citizens were to fully understand and appreciate the importance of the constitutional provisions in the context described above, it was necessary for actual changes to be made from the former approach to state government in which separation of powers had become diluted and the rule of law compromised, to a state in which actual separation was sought and the rule of law upheld.

These changes could have been achieved in different ways. For instance, considering that under the old Constitution, various decisions had been made by the state which seemingly excluded judicial review of legislation for its constitutional compatibility and judicial review of Executive decisions,⁴¹ there could have been efforts made to assert the importance of a separation of powers and the rule of law in at least two practical and perceivable ways.

First, a concerted effort should have been made to publicly and extensively undertake an exercise to review legislation which pre-dated the Constitution for its constitutional compatibility. Here, the goal would have been to ensure, in a manner apparent to the public, that such legislation was repealed. Alternatively, this legislation could have been revised in order to bring it into compliance with the Constitution, while affirming, in explicit terms, the prominence of the separation of powers and emphasizing the important role played by the Judiciary in checking the conduct of the Legislature. Second, the Legislature, acting in concert with the Executive, needed to actively enact legislation giving effect to constitutional provisions. This would have established in an apparent manner that the Legislature and Judiciary would actually act in a manner consistent with the power granted to them in terms of the Constitution. In addition, such a proactive approach would have easily established that both the Legislature and the Judiciary would act in a manner consistent with the Constitution and not in deference to the Executive where it exceeded its authority as provided for in the Constitution.

2.2. Accountability of the state to citizens

In assessing whether the new Zimbabwean Constitution secures constitutionalism for citizens, through placing citizens in a position to hold the state to account for its decisions, it is important to note that citizens most commonly hold the state to account for its decisions through exercising their fundamental rights, and through pursuing the judicial review of state decisions. In light of the fact that the Zimbabwean Constitution purports to be the basis for the country's

⁴¹ See for example, *Mike Campbell* (n 29 above).

transition to a constitutional democracy based on constitutionalism, it is hardly surprising therefore that it features provisions which empower citizens to hold the state to account for its decisions. These are mostly contained in the Declaration of Rights in Chapter 4 of the Constitution.⁴²

Some of the more prominent examples of rights bestowed upon citizens which empower citizens to hold the state to account are: the rights to freedom of assembly and association,⁴³ demonstration and petition,⁴⁴ access to information,⁴⁵ freedom of expression and freedom of the media,⁴⁶ and the right to a fair hearing.⁴⁷ A particularly important right in this regard, which is deserving of separate mention, is the right to administrative justice contained in section 68 of the Constitution. This right, more directly than most, allows the public to institute judicial review proceeding to challenge state decision-making on the grounds of lawfulness, promptness, efficiency, reasonableness, proportionality, impartiality, and substantive and procedural fairness.⁴⁸ In this way, the right ensures that the state at all times remains accountable to the citizenry.

The inclusion of these rights which empower citizens to hold the state to account for its decisions, in the Declaration of Rights is certainly a laudable development which bodes well for Zimbabwe's turn to a constitutional democracy based on constitutionalism. However, it is also worth noting that, 'regardless of the form in which rights are protected in any society, it will be the democratic political process, political practice and norms of acceptable governmental conduct which, while not having the force of law, provide constitutional standards which determine the respect accorded to individual rights.'⁴⁹ Considering this, it is quite disconcerting to note that the manner in which these rights have been made available to citizens to use in holding the state to account is hardly sensitive to the Zimbabwean context. Most notably, Zimbabweans are generally not litigious people. This quality was exacerbated under the tenure of the old Constitution when there seemingly grew to be citizen reluctance to take on the task of

⁴² Section 85.

⁴³ Section 58.

⁴⁴ Section 59.

⁴⁵ Section 62.

⁴⁶ Section 61.

⁴⁷ Section 69.

⁴⁸ Section 68 (1).

⁴⁹ Barnett, (n 4 above) 9.

holding the state to account for its decisions. It is quite telling that under the old Constitution, in those instances where Zimbabweans sought to hold the state to account for its decisions from a rights based perspective, they typically did so through requesting state-affiliated agencies, such as the Environmental Management Agency, to act on their behalf while they took a 'back seat.' Separately, it also needed to be considered that, in spite of the previous Zimbabwean Constitution granting Zimbabweans justiciable rights which they could rely on to hold the state to account for its decisions, Zimbabweans did not extensively rely on these rights to do so. In addition, it is useful to take note of the non-justiciable quality of socio-economic rights, coupled with the fact that these rights were enjoyed by citizens through relevant legislation giving effect to such rights, meant that the impression was cultivated among citizens that the enjoyment of rights was contingent upon the Legislature first giving effect to these rights in Statute. While section 85 of the 2013 Constitution has changed this and granted Zimbabweans a right to enforce all the rights contained in the Declaration of Rights, direct enforcement of their rights in order to enjoy the benefits that they bestow is something Zimbabweans are going to have to learn.

Considering all this, the manner in which rights have been provided for in the Constitution as a means of empowering citizens to hold the state to account for its decisions is unlikely to facilitate the turn to a constitutional democracy based on constitutionalism for at least two reasons. First, the fact that there was no citizen upheaval in the period preceding the turn to the new Zimbabwean Constitution means that, even if a drive is made to enhance public awareness of the Constitution is undertaken,⁵⁰ it is likely that in the new constitutional era, Zimbabweans will still shy away from relying on litigation to directly enforce their rights due to their non-litigious nature. Instead, citizens are more likely to continue relying on state agencies protecting their rights on their behalf. Second, the absence of upheaval in the period preceding the 2013 Constitution can be taken to suggest that, while they may have been empowered to directly enforce their rights in section 85 of the Constitution, Zimbabweans will remain committed to relying on legislation giving effect to their rights to derive the benefits their rights bestow on them, instead of directly relying on the rights contained in the Constitution to hold the state to account for its decisions.

⁵⁰ Section 7 of the Constitution.

As such, securing constitutionalism in this context required a decidedly more proactive approach to empowering citizens to hold the state to account for its decisions. For instance, one of the most obvious ways in which Zimbabweans could have been empowered to use their rights to hold the state to account, considering their marked preference for relying on legislation, would have been through quickly enacting new legislation to give effect to fundamental rights or through quickly revising existing legislation to ensure their consistency with constitutional provision. Separately, and considering that the right to administrative justice allowed citizens to hold the state to account in a most direct fashion, efforts could have been made to promptly enact Legislation giving effect to the right to administrative justice as provided for in section 68.

As it stands however, efforts to enact legislation giving effect to fundamental rights have been progressing at a pedestrian pace. For instance, there is as yet, no new legislation relating to labour rights contained in section 65 of the Constitution. Similarly, the existing laws have not yet been revised for constitutional consistency. As a consequence, the pre-Constitution Labour Act⁵¹ remains in effect, to the extent of its consistency with the 2013 Constitution.⁵² The same applies with other rights, such as the environmental rights contained in section 73 of the Constitution and the Environmental Management Act.⁵³ In addition, and despite the explicit directive to the Legislature to implement legislation giving effect to the right to administrative justice in section 68 of the Constitution, this is yet to be done.

3. Conclusion

In conclusion, the preceding analysis into whether the Zimbabwean Constitution manages to secure Zimbabwe's turn to a constitutional democracy based on constitutionalism has established that the Constitution carries an extensive array of important provisions which cater for separation of powers, the rule of law, and rights which empower citizens to hold the state to account for its decisions. This is laudable. However, it merits consideration that, Constitutions achieve constitutionalism when there is the active participation of citizens in the regulation of a constitutional state. As such, the measure of whether a Constitution can form the basis for any country's transition to a constitutional democracy based on constitutionalism is whether such Constitution places the public in a position in which they can interact with the Constitution and

⁵¹ Chapter 28:01.

⁵² Section 2 of the Constitution.

⁵³ Chapter 20:27.

understand and appreciate the important role they play in challenging state authority and holding the state to account for its decisions.

All this is important to consider in the Zimbabwean context because the turn to a new Constitution in Zimbabwe was arguably prompted by politicians and not citizens. In light of the fact that the attainment of constitutionalism is dependent on citizen participation, this necessarily meant that, if constitutionalism was to be attained, it was essential for the Constitution-making process to ensure that citizens appreciated the value of the separation of powers and the rule of law, so that they would actively challenge exercises of power which were in violation of these concepts. This has not been achieved, and in the absence of this, as is presently the case, it is submitted that it remains unlikely that the Constitution will pave the way for Zimbabwe's turn to a constitutional democracy based on constitutionalism regardless of the obvious quality of provisions in the Constitution.

Importantly though, the shortcomings of the Constitution are rooted in the fact that little efforts were made to effectively account for and accommodate the particularities of the Zimbabwean context, notably, the fact that the Constitution did not follow upheaval and that there was no watershed moment which prompted citizens to take an active role in the turn to a new constitutional dispensation, as in South Africa for example. This arguably led to the crafting of a Constitution which, while sound, and points to the pursuit of constitutionalism structurally, omits to account for the fact that the 2013 there was a need to place citizens at the centre of the Constitution and educate them to the important role they would need to play in order for constitutionalism to be achieved.

Looking ahead, it is encouraging to consider that all these issues which seemingly compromise the Zimbabwean Constitution's capacity to facilitate the country's transition to a constitutional democracy based on constitutionalism, are remediable. Indeed, to a significant extent, relevant provisions of the Constitution such as sections 7 and 85, promote public awareness of the Constitution and empower citizens to directly enforce their rights respectively. If citizens should be adequately educated with respect to critical Constitutional roles such as separation of powers, upholding the rule of law, and empowered to hold the state to account for its decisions, the Constitution in its present state carries all the relevant provisions necessary for leading Zimbabwe's transition to a constitutional democracy based on constitutionalism. What is

required for constitutionalism to be achieved now is something beyond anything contained in the Constitution itself.

Transfer of Undertaking Under Section 16 of the Zimbabwean Labour Act [Chapter 28:01]

T.G Kasuso*

1. Introduction

The contemporary corporate world has evolved to resemble a vicious jungle where “survival of the fittest” is the rule. In order to survive and adapt, businesses have adopted various strategies and business restructuring is one prominent example. Apart from adopting business restructuring as a survivalist strategy, businesses have also restructured due to other reasons such as technological changes, the changed nature of doing business, new management methods, finance related issues and new work methods. Since restructuring entails the act of reorganizing the legal, ownership, operational or other structures of a business for purposes of making it more profitable or better organized for its present needs, it can take various forms. These may include transfers due to sale of business, mergers, acquisitions and takeovers, exchange of assets and outsourcing of non-core functions or business activities.

Changes brought about by business restructuring to the workplace have significant implications to labour relations and employment law. For instance, such changes entail different consequences to both employers and employees. As noted by A van Niekerk¹ et al, “*in many of these instances, one employer transfers business or parts of businesses to another – a situation where commercial interests in greater flexibility and profitability are often in conflict with employee interests in the work security.*” Thus, in a bid to strike a balance between the employers’ interest in flexibility and the employees’ interest in work security,² as well as eliminate problems arising from transfer of businesses, the legislature inserted relevant provisions in the Labour Act (Chapter 28:01), in particular section 16 thereof. With section 65 of the Constitution now guaranteeing the right to fair labour practises, it can now be argued that section 16 of the LA has a strong constitutional backing.

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¹A van Niekerk, MA Christianson et al: *Law @ work* (2012) 325.

²Generally referred to as flexicurity – a portmanteau of flexibility and security.

This article seeks to review the current statutory framework regulating transfer of businesses under the common law, the constitutional framework and Zimbabwe's labour laws. This paper will thus commence with an overview of the common law position followed by a discussion of the constitutional framework. Thereafter, this paper provides an analysis of the purpose of Section 16 and further explores the implications of the transfer of a business from both the employer and employee perspective. Finally the paper makes a comment on the implications of Section 65 of the Constitution on the interpretation of Section 16 before making concluding remarks.

1.2 The Common Law

The common law operates as the background law of labour law in Zimbabwe. Though the application of most labour law principles have been modified by statute, a meaningful study of labour law is not complete without at least a rudimentary understanding of the common law principles. In any event, the position of the law in Zimbabwe is that the employment relationship remains regulated by the common law to the extent that legislation is inapplicable³.

The contract of employment is generally premised on the common law principle of *locatio conductio operarum*.⁴ In essence, this entails that the employment contract is a personal relationship between an employer and an employee and for this reason the relationship may not be transferred or substituted without the consent of the parties' concerned.⁵ Contractually, when an employment contract is transferred from one employer to another there is a cession and delegation of the employment contract and this requires the consent not only of the employee concerned but also the transferor and transferee's employers.⁶

It therefore follows that under common law, in the absence of consent of the parties involved, when a business is disposed of for whatever reason, the employment relationship comes to an end. The sale of a business results in the termination of contracts of employment between the

³ See *Hama v NRZ* 1996 (1) ZLR 664 (S).

⁴ The contract between the master and servant of the letting and hiring of services.

⁵ Beaumont *Coping with corporate re-organisation :Section 197 – Dramatic New Case Law*,(2002)136.

⁶As held in *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] All ER 549 HL, the employees right to choose an employer of his choice is the main difference between forced labour done by a servant and employment.

employer and employee and it is left to the purchaser of the business to decide whether or not to offer the employees re-employment.⁷

In view of the above position, it is clear that the common law does not offer any work security to employees in the event of a sale of business. The common law leaves transferees of business with the right to choose which employees to re-employ subject to the consent of the few chosen employees. An employer acquiring a new business who would want to maintain continuity by retaining the skills and experience of the old employer's employees has to negotiate with the employees and offer new contracts. In the event that the employees reject the offer the new employer will be left with no option but to look for new employees. It is as a result of these inherent inequalities in the common law which did not protect work security or make any commercial sense that the legislature intervened and enacted Section 16 of the LA. Section 16 changed the common law position by providing that certain legal consequences would automatically flow from the transfer of a business or undertaking as a going concern.

1.3 The Legislative Framework

1.3.1 The Constitution

On the 22nd of May 2013, Zimbabwe adopted a new Constitution with an expanded Bill of Rights. The most important section in the new constitution relevant to labour law is Section 65 which specifically deals with labour rights.⁸ Section 65 (1) of the Constitution specifically provides for every person's right to "fair and safe labour practices and standards".

The right to fair labour practices is unique, and the Constitution does not define it. This right could thus be understood from various perspectives, but it is generally not incapable of a precise definition. For instance, it must be noted that the Labour Act is the vehicle for giving effect to the Constitutional right to fair labour practices and is a codification of some of these rights. Since Section 16 was enacted before the adoption of the new Constitution, it follows that

⁷ D du Toit, D Bosch et al *Labour Relations Law :A Comprehensive Guide*, (2006) 447 and J Grogan *Dismissal Law* (2010) 413

⁸ Apart from Zimbabwe, South Africa also constitutionalised labour rights in Section 23 of its Constitution whilst Malawi did the same in Section 31 of its Constitution

it is now reflected in Section 65 of the Constitution. Similar to section 65 of Zimbabwe's Constitution, section 23 of the South African Constitution provides that everyone has a right to fair labour practices. For Zimbabwe, however, some of the important practices which fall under the heading of fair labour practices are the rights of employees on transfer of undertakings under Section 16 of the Act.

In general, the courts have declared that provisions of labour legislation must be interpreted purposively. For instance, the LA is a statute aimed at advancing social justice and democracy in the workplace and in terms of Section 2 A (2); it must thus be construed in a manner that best ensures the attainment of its purposes listed in Section 2A(1)(a)-(f). Given the constitutionalisation of labour rights in Section 65 of the Constitution any provisions of the LA must be interpreted in compliance with the Constitution. Employees are entitled under the Constitution to fair labour practices and this together with the objectives of the Labour Act are to be used in interpreting provisions such as Section 16 of the LA.

As already indicated above, transfer of businesses for whatever reason involve competing interests, that is, the employer's interest in profitability and flexibility and the employee's interest in work security. Since the concept of fair labour practices under Section 65 (1) of the Constitution applies to every person, that is employers and employees, Section 16 must be interpreted in a manner consistent with Section 65 of the Constitution, which is fair. Fairness and rigidity are uneasy bedfellows and some element of flexibility and balance is required.⁹ Though Section 16 is entitled rights of employees on transfer of undertakings, the fair labour practices jurisprudence introduced by Section 65 of the Constitution requires a labour law dispensation that pays due regard to the needs and interests of both employers and employees. The Constitution is the supreme law of the land and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency.¹⁰ Accordingly, Section 16 of the Labour Act has to be interpreted and analysed to the extent it is in compliance with the Constitution.

1.3.2 Section 16 of the Labour Act

⁹ Unpublished: L Biggs "The Application of Section 197 of the Labour Relations Act in an Outsourcing Context" *Unpublished LLM thesis, Nelson Mandela Metropolitan University*, 2008, 4

¹⁰Section 2 (1) of the Constitution of Zimbabwe

There is no doubt that section 16 is hugely progressive to Zimbabwe's labour law framework. As noted by Darcy du Toit,¹¹ Zimbabwe is the only Southern African country outside South Africa to have enacted legislation providing for the transfer of contracts of employment upon transfer of a business in the form of Section 16 of the LA. Its scope and application should be the starting point in any discussion of its importance.

Section 16 of the Act regulates the employment related consequences of the transfer of the whole or any part of a business and is titled "rights of employees on transfer of undertaking". Specifically Section 16 of the Act provides as follows;

".. 16(l) Subject to this section whenever any undertaking in which any persons are employed is alienated or transferred in any way whatsoever the employment of such persons shall unless otherwise lawfully terminated be deemed to be transferred to the transferor of the undertaking on terms and conditions which are not less favourable than those which applied immediately before the transfer and the continuity of employment of such employees shall be deemed not to have been interrupted.

Nothing in sub section (1) shall be deemed;-

- a) *to prevent the employees concerned from being transferred on terms and conditions of employment which are more favourable to them than those which applied immediately before the transfer from obtaining terms and conditions of employment which are now favourable than those which applied immediately before, or subsequent to the transfer,*
- b) *to prevent the employees concerned from agreeing to terms and conditions of employment which are in themselves otherwise legal and which shall be applicable on and after the transfer, but which are less favourable than those which applied to them immediately before the transfer.*

¹¹D du Toit 'The Transfer of Enterprises and the Protection of Employment Benefits in South and Southern Africa' (2004) *Law, Democracy and Development* 116.

Provided that no rights to social security, pensions, gratuities or other retirement benefits may be diminished by any such agreement without the prior written authority of the Minister:

- c) to affect the rights of the employees concerned which they could have enforced against the person who employed them immediately before the transfer and such rights may be enforced against either the employer or the person to whom the undertaking has been transferred or against both such persons at any time prior to, on or after the transfer,*
- d) to derogate from or prejudice to violate or evade to attempt to violate or evade in any way the provisions of this section”*

A similar provision to Section 16 is in Section 197 of the South African Labour Relations Act of 1995 (hereinafter referred to as the LRA). The relevant part of Section 197 provides as follows;-

- (2). If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6) –*
 - a) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;*
 - b) all rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee.*
 - c) anything done before the transfer by or in relation to the old employer, including the dismissal of an employee or the commission of an unfair labour practice or act of unfair discrimination, is considered to have been done by or in relation to the new employer, and*

- d) *the transfer does not interrupt an employees' continuity of employment, and an employee's contract of employment continues with the new employer as if with the old employer.*¹²

Both Section 197 of the LRA and Section 16 of the LA were enacted to advance and regulate the exercise of the right to fair labour practices, enjoyed by both the employers and employees. Given the similarity in the wording of Section 197 of the South African LRA and Section 16 of the LA, the jurisprudence developed in interpreting Section 197 is apposite to interpreting Section 16 of the LA.¹³ It is for this reason that this paper heavily relied on South African authorities as there is a dearth of authorities on the same issue in the Zimbabwean jurisdiction.

1.3.2.1 The Purpose of Section 16

As noted above, at common law, the acquisition and transfer of a business that was in operation led to the termination of contracts of employment. If the new owner wished to continue operating the business with the same workers, he would have to conclude new contracts with them. It is this position which was repealed by Section 16 which now regulates the employment related consequences of the transfer of the whole or a part of a business.

Employees have an interest in job security and in recognition of this interest, section 16 obliges the new employer to take all the old employer's employees as an inseparable part of the business bundle that is subject of a transfer. On the other hand, the employer has an interest in flexibility and profitability and an employer acquiring a new business has an interest in the continuity that is achieved by a transfer of employment contracts. The employer would retain the skills and experience of employees of the business that would have been acquired.

As acknowledged by Gubbay CJ in the *Mutare Rural District Council v Chikwena* case, the most important purpose of Section 16 is to protect employees against the loss of employment in the

¹² Section 197 A (i) provides for definitions in the following terms:
In this Section and in Section 197 A –

- a) “**business**” includes the whole or a part of any business trade, undertaking or service, and
b) “**transfer**” means the transfer of a business by one employer (“**the old employer**”) to another employer (“**the new employer**”) as a going concern.

¹³ See *Mutare RDC v Chikwena* 2000(1) ZLR 534 (S).

event of a transfer of business.¹⁴ It is unfair and against the right to fair labour practices for an employee to lose his employment for the simple reason that the business has been transferred.

In addition, it should be noted that section 16 has a dual purpose in that on one hand, the workers employment is safeguarded, whilst on the other hand a new owner is guaranteed a workforce to continue with the operation of the business. It is against this background that section 16 must be interpreted. This position is also fortified by comparable or similar foreign instruments and foreign case law interpreting the same, as illustrated below.

In the South African case of *National Education Health and Allied Workers Union (NEHAWU) v University of Cape Town and Others*,¹⁵ the Constitutional Court explained the dual purpose of Section 197 of the LRA eloquently and succinctly pronounced that;

“Section 197 strikes at the heart of this tension and relieves the employers and the workers of some of the consequences that the common law visited on them. Its purpose is to protect the employment of the workers and to facilitate the sale of businesses as going concerns by enabling the new employer to take over the workers as well as other assets in certain circumstances. The Section aims at minimizing the tension and the resultant labour disputes that often arise from the sales of businesses and impact negatively on economic development and labour peace. In this sense, section 197 has a dual purpose; it facilitates the commercial transactions while at the same time protecting the workers against unfair job losses...”

An essentially similar provision was almost certainly similarly considered in the EEC case of the *Acquired Rights Directive 77/187 EEC adopted by the European Commission in 1977 and the British Transfer of Undertakings (Protection of Employment), Regulation 1981/1794* which was enacted pursuant to the Directive. Though there are differences in language and context with Section 16, the purpose of the instruments is to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded. These foreign instruments are aimed primarily at the protection of employees.

¹⁴ *Schutte and Others v Powerplus Performance (Pty) Ltd and Another* (1999) 20 ILJ 655 (LC)

¹⁵ 2003 (3) SA 1 (CC).

Thus, despite the primary purpose of Section 16 being to protect employees and guarantee work security, it impacts positively on economic development and the protection of labour peace. It is also for these reasons that there is an automatic and obligatory transfer, irrespective of the wishes of the employer parties concerned under Section 16. In the same vein there is no obligation to consult the employees concerned and their consent is not required under Section 16.¹⁶ Security of employment is given priority than an employee's freedom of choice.¹⁷

1.3.2.2 Triggering Section 16 (1)

For Section 16 (1) to be triggered, there must be alienation or transfer of an undertaking in any way whatsoever. It therefore follows that for a transaction to fall within the ambit of Section 16 (1), the following elements must be present at the same time;

- (i) an undertaking, business or enterprise
- (ii) as a going concern
- (iii) is transferred or alienated

Given that the abovementioned three elements must simultaneously be present, courts are obliged to look at transactions holistically in order to determine whether all the elements of Section 16 are satisfied. On another note, the LA does not define these important elements and reliance will be placed on the jurisprudence developed by the courts and definitions from foreign legislation.

1.3.2.3 The meaning of an “Undertaking”

The LA does not provide a statutory definition of an undertaking. However, in *Mutare Rural District Council v Chikwena*, Gubbay CJ relied on South African and Australian case law and interpreted the term undertaking to mean a separate and viable business. In defining the word “undertaking” the court stated as follows;

“The word “undertaking” is of variable meaning. Basically the idea it conveys is that of a business or enterprise. In the Australian case of Top of the Cross (Pty) Ltd v Federal Commissioner of Taxation (1980) 50 FLR 19, Woodward J said at 36:

¹⁶See also *Aviation Union of South Africa and Another v South African Airways (Pty) Ltd and Others* 2012 (1) SA 321 (CC).

¹⁷P Lloyd *Labour Legislation in Zimbabwe* (2006) 52.

“...Frequently, the word “undertaking” is used in circumstances where it could be interchanged with either the word business or enterprise and with varying shades of meaning. Sometimes it is used alone, sometimes by way of distinction from the assets of the owner and sometimes as a synonym for business. Sometimes it is used to embrace the property which is used in connection with the undertaking as well as the debts and liabilities which have arisen in relation thereto....”¹⁸

It must be noted that section 197 (1) (a) of the South African LRA defines the term business to include, “*the whole or any part of a business, trade or undertaking, or service*” and the jurisprudence developed in interpreting this section by the South African courts is apposite to section 16 (1). South African courts have adopted the approach developed by the European Court of Justice (ECJ) in applying European Community Directives on transfer of undertakings and British Courts in interpreting similar legislation. As noted by A van Niekerk,¹⁹ “the ECJ has developed a concept of an “economic entity”, defined as “an organized grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective.”²⁰

In *Spijkers Gebroeders Benedik Abattoir v Alfred Benedik en Zonen*,²¹ the ECJ explained the test of determining whether an entity is an undertaking or business as follows;

“... The decisive criterion is whether the business in question retains its identity. Consequently a transfer of an undertaking; business or part of a business does not occur merely because its assets are disposed of. Instead it is necessary to consider whether the business was disposed of as a going concern, as would be indicated, inter alia by the fact that its operation was actually continued or resumed by the employer, with the same or similar activities....”

From the foregoing it is clear that for Section 16 to be invoked the entity or activity being transferred must amount to an organized grouping of resources which has the objective of pursuing an economic activity. A court will therefore be under an obligation to examine all the

¹⁸ n 13 above, 537.

¹⁹ A van Niekerk et al (n1 above, 330).

²⁰ See also *Suzen v Zehnacker Gebaudereinigung GmbH Kranken Hausservice* [1997] IRLR 225 (ECJ).

²¹ [1986] 2 CMLR 296.

relevant elements and components that comprise the business such as, goodwill, employees, assets, the way in which its work is organized etc, and determine whether they are sufficiently linked and structured so as to comprise an economic entity capable of being transferred under section 16 (1).

1.3.2.4 As a Going Concern

For purposes of Section 16 (1), an undertaking must be alienated or transferred as a going concern. Section 16 of the LA does not, however, include the term “going concern”. Despite this, the Supreme Court has regarded this element as critical. In *Mutare Rural District Council v Chikwena*,²² the Supreme Court held that a business, trade or undertaking must be transferred as a going concern, “that is to say, what is taken over must be an active and operating business, trade or undertaking.”

South African courts have had numerous occasions to delineate the meaning and scope of the term “going concern”. In the *NEHAWU v University of Cape Town* case, it was held that, the term going concern must be “given its ordinary meaning unless the context indicates otherwise”. What is transferred, the court further clarified, must be a business in operation “so that the business remains the same but in different hands.”²³

If a transaction involving the sale of a business specifies that it is or will be transferred as a going concern, it would constitute sufficient proof of that fact. However if the transaction is silent on this issue, a transfer as a going concern is established with reference to objective facts. The test for determining whether a business is transferred as going concern was laid down in the South African case of *NEHAWU v University of Cape Town*, and is apposite to Section 16 (1).²⁴ In that case, the Constitutional Court of South Africa stated that;

“...in deciding whether a business has been transferred as a going concern, regard must be had to the substance and not the form of the transaction. A number of factors will be relevant to the question whether a transfer of a business as a going concern has occurred, such as the transfer or otherwise of assets both tangible and intangible, whether or not the workers are taken over by the new employer, whether customers are

²²n 13 above, 537

²³ n 14 above, 119F

²⁴n 14 above,119F – 120A

transferred and whether or not the same business is being carried on by the new employer. What must be stressed is that this list of factors is not exhaustive and that none of them is decisive individually. They must all be considered in the overall assessment and therefore should not be considered in isolation...”

In essence there must be transfer of an economic entity that retains its identity after the change of ownership. It requires an examination of the substance and not the form of the transfer²⁵ and determining whether a transfer of a business amounts to a transfer as a going concern is an issue that must be decided on the facts of each case.

There are also circumstances in which there is no transfer as a going concern for purposes of Section 16 (1). Firstly, the mere sale of assets of a business does not amount to transfer of a business as a going concern since there is no operating business being transferred.²⁶ Secondly, it has also been held by South African Courts that the acquisition of a company through a purchase of shares does not amount to a transfer of a business as a going concern.²⁷ A change in shareholding does not change identity of employer and Section 16 (1) is not triggered by a disposal of shares in a company.

1.3.2.5 “Alienated or Transferred”

Once again the LA does not define the terms “alienated or transferred”. Section 197 (1) (b) of the South African LRA defines transfer to mean, “the transfer of a business by one employer (“the old employer”) to another employer (“the new employer”) as a going concern”. In interpreting Section 197 (1) (b), South African courts have held that for the section to apply the business must have changed hands, through a transaction that places the business in question in different hands.²⁸ Thus the word transfer, as noted by A van Niekerk et al, relates to the

²⁵ D Bosch ‘Of Business Parts and Human Stock: Some Reflections on Section 197(1) (a) of the LRA’ (2005) Vol 26 *ILJ* 1865.

²⁶ *Local Resources Trust v Shepherd Takaendesa* HH 317-12, *Malaba v Minaco Stone Germiston (Pty) Ltd and Another* (2000) 21 *ILJ* 1975 (LC) and *Kgethe and Others v LMK Manufacturing (Pty) Ltd and Another* [1997] 10 *BLLR* 1303 (LC).

²⁷ Lloyd (n 17 above) @ 53, *Waverly Blankets Ltd v CCMA* [2003] 3 *BLLR* 236 (LAC) and *Long v Prism Holdings Ltd and Another* (2010) 31 *ILJ* 2110 (LC).

²⁸ *NEHAWU v University of Cape Town* (n15 above).

method of the transfer of a business and two distinct employers must be included in the transaction.²⁹

Alienation or transfer of an undertaking as indicated in Section 16 (1) by use of the word, “in any way whatsoever,” may take many forms, as long as, there is a change of hands in the business. Usual business transfers occur through a sale of business. However other corporate restructuring exercises such as mergers, takeovers, exchange of assets, and outsourcing of business activities,³⁰ donations³¹ and resignation of a partner in a partnership³² are transfers or alienation of businesses for purposes of Section 16 (1).

Determining whether a transfer or alienation as contemplated in Section 16 (1) has occurred is a factual question. It must be determined with reference to the objective facts of each case. In *Aviation Union of South Africa and Another v South African Airways (Pty) Ltd and Others*, it was held that, “for a transfer to be established there must be components of the original business which are passed on the third party”. These components would include the taking over of employees, assets (tangible or intangible), customers, debtors and the business would maintain or continue its activities whilst keeping its identity.

1.3.3 Section 16 (1) and Outsourcing

A notable business practise in the modern world is the outsourcing of non-core functions or business activities so as to maintain a flexible workforce and maximize profits. Outsourcing generally involves contracting with another entity to perform a particular service currently rendered by a specific department at an agreed fee. Support services which are usually outsourced are non-core activities or services such as provision of security; the vehicle maintenance component of a business, catering services, maintenance of grounds, gardening and cleaning services.³³ Section 16 (1) does not deal directly with the question whether

²⁹ A van Niekerk et al (n1 above) 328.

³⁰ *NEHAWU v University of Cape Town* (n 15 above), *Aviation Union of South Africa and Another v South African Airways (Pty) Ltd and Others* (n 16 above) and Wallis ‘Is Outsourcing In An Ongoing Concern’ (2006) Vol 27 ILJ 1.

³¹ *Tekwini Security Services v Mavana* (1999) 20 ILJ 655 (LC).

³² *Burman Katz Attorneys v Brand NO* [2001] 2 BLLR 125(LC).

³³ Described in *NEHAWU v University of Cape Town* (n 15 above) as the “putting to tender of certain services for a fee. The contractor performs the outsourced services and in return is paid a fee for its troubles by the employer.....An outsourcing transaction is usually for a fixed period of time at the end of which it again goes to tender and existing contractor could lose the contract to another contractor.

outsourcing of services can be a transfer or alienation of an undertaking. The South African courts have made some interesting comments regarding outsourcing. In commenting on the applicability of Section 197 of the South African LRA to outsourcing transactions the South African courts have held that as long as such an agreement amounts to a transfer of the business of the contracting company, Section 197 will apply.³⁴

Given that Section 197 of the South African LRA applies to outsourcing, there is nothing that precludes Section 16 of the LA from being applied to such arrangements. An outsourcing contract will not automatically constitute a transfer of a going concern. For Section 16 to be applicable to outsourcing agreements there must be alienation or transfer of an undertaking as a going concern. It is therefore submitted that Section 16 does not only apply to permanent transfers but also temporary transfers in outsourcing situations.

1.3.4 The Effect of Transfer of an Undertaking as a Going Concern

The text of Section 16 (1) makes it plain that its application is dependent on the existence of a transfer of an undertaking as a going concern. It states that if a transfer contemplated in Section 16 (1) takes place, the legal consequences it specifies will be activated. The main consequences of a transfer of a business as captured in Section 16 (1) are that, "...the employment of such persons shall unless otherwise lawfully terminated be deemed to be transferred to the transferor of the undertaking on terms and conditions which are not less favourable than those which applied immediately before the transfer and the continuity of employment of such employees shall be deemed not to have been interrupted...."

It is clear from the above section that the new employer is automatically substituted for the old employer in respect of all contracts of employment in existence immediately before the date of transfer, unless such contracts have been lawfully terminated. All rights and obligations between the old employer and the employee are included in the basket of what is transferred. As held in the South African case of *Aviation Union of South Africa and Another v South African Airways ((Pty) Ltd and Others* (supra) which is of striking pertinence to Section 16 (1) of the LA,

"This simultaneous transfer of business and contracts of employment does not require any declaration by a court. The employment contracts are automatically

³⁴*NUMSA v Staman Automatic CC and Another* [2003] 11 BLLR 1187(LC) and *COSAWU v Zikthetele Trade (Pty) Ltd* [2005] 9 BLLR 924 (LC).

transferred together with the business. The person to whom the business is transferred replaces the old employer in terms of those contracts and assumes all obligations of the previous employer. He or she also acquires the contractual rights of the previous employer...³⁵

From the foregoing, it is clear that the transfer does not interrupt an employee's continuity of employment and Section 16 (1) provides a general rule that employees shall not be offered less favourable conditions on such transfer or alienation. However Section 16 (2) (b) provides an exception to this general rule and it would be proper for employees to accept less favourable conditions. The parties may agree on whatever new terms as long as they are consistent with the nature of employment, and are not illegal or ***contra bonos mores***. Other rights such as social security, pensions, gratuities or other retirement benefits may only be diminished or reduced with the prior written approval of the Minister of Labour.³⁶ Under Section 16 (2) (a), there is also nothing that bars the employees from being transferred on more favourable terms and conditions. This conforms to the principle of fairness as parties are given an opportunity to negotiate and make choices which are compatible with their needs.

From a reading of Section 16(1), it is clear that there is no obligation to consult the employees concerned. Their consent to the transfer of their contracts of employment is not required. In the same vein, the new employer has no right to choose which employees to re-employ. The question which then arises is whether this position is fair and in line with the constitutional right to fair labour practices.

In terms of Article 20 of the International Labour Organisation (ILO), Termination of Employment Recommendation 166 of 1982 an employer who contemplates the introduction of major changes in production, programmes, organisation structure or technology that are likely to entail terminations must consult the workers concerned. The LA gives effect to this obligation in Section 2A (1) (e) which provides that the purpose of the Act is to advance social justice and democracy in the workplace by promoting the participation by employees in decisions affecting their interests. This is one of the fair labour practices envisaged by Section 65(1) of the Constitution. It is therefore fair that whenever Section 16 is triggered the employees concerned

³⁵ n 16 above 329.

³⁶ *Dhege v Bell Medical Centre* HB 50-04.

must be consulted and given an opportunity to choose whether they want to be employed by the new owner or not.

From an employer's perspective it can also be argued that fairness demands that the new employer be given an opportunity to choose which employees to offer re-employment. However to avoid defeating the primary purpose of Section 16, that is protecting work security, such a choice must be dependent on viability of the business being transferred. Where a business being transferred is insolvent as a result of the shortcomings of employees it is only fair that the new employer choose who to re-employ. Under such circumstances a new employer who would want to start in a different direction must not be compelled to inherit underperforming employees as this does not make any commercial sense. It must only be in circumstances where the business being transferred is viable, that the contracts of employment must automatically be transferred to the new owner together with the business.

Another disquieting aspect in Section 16(1) is that Section 16 (1) does not prevent the lawful dismissal of employees prior to transfer of the business. In *Mutare Rural District Council v Chikwena*, it was held that, "...S16 (1) permits all or some of the employees to be excluded by agreement from the alienation or the transfer of the undertaking to the new employer". The phrase "deemed to be transferred" makes this clear." Thus, employees excluded from the transfer will have their employment terminated lawfully by the old employer either through mutual termination or through retrenchment³⁷. By allowing employers to exclude some of the employees by agreement, the purpose of Section 16 (1) which is to protect security of employment is defeated.

In terms of Section 16 (2) (c), anything done before the transfer by or in relation to the old employer is considered to have been done by or in relation to the new employer. It is for this reason that any rights which employees could have enforced against the old employer immediately before the transfer may be enforced against the new employer or old employer or against both such persons at any time prior to, on or after the transfer. Requesting an employee to enforce his rights against an old employer who is no longer in business and whose

³⁷ Retrenchment is defined in Section 2 of the LA and is regulated by Sections 12C and 12D of the LA read with the Labour Relations (Retrenchment) Regulations, 2003. Insolvency situations are covered by the retrenchment laws however if the insolvent business is transferred or alienated as a going concern then Section 16 (1) will be triggered and retrenchment laws will not be applicable.

whereabouts may be difficult to ascertain can be an exercise in futility. Since all rights and obligations are transferred to the new employer it is fair that the employee assert his or her rights against the new employer only.

2. Remedies for Breach of Section 16 (1)

In terms of Section 16(3) of the LA, it shall be an unfair labour practice to violate or to attempt to violate or evade in any way the provisions of Section 16 of the LA. An unfair labour practice is defined in Section 2 of the LA. Unfortunately Section 16 (3) seems to contradict Section 16 (1) which allows employers to evade the requirements of Section 16 by excluding other employees. As noted earlier on section 16 (1) does not prevent the dismissal of employees prior to the transfer of a business. By giving employees this opportunity, the legislature literally countenanced the employer to evade provisions of Section 16, thereby diminishing protection of employees. This is inconsistent with Section 16 (3) and the purpose of Section 16 as a whole.

The resolution of unfair labour practices is provided for under Part X11 of the LA and is beyond the scope of this article. In the event that employees are dismissed, where the reason for the dismissal is the transfer of the business as a going concern such employees can claim unfair dismissal through dispute resolution mechanisms established under the LA. If they succeed they would be entitled to a potpourri of remedies such as reinstatement, damages in lieu of reinstatement and back pay. As can be gleaned from Section 16(2) (c) any such claims can be brought against the new employer or the old employer or both.

In the event that there is a dispute relating to whether there has been a transfer of business as a going concern or not (or status of employees concerned) the parties can approach the High Court and seek a declaratory order to the effect that a transaction is subject to Section 16 (1). The Labour Court is a creature of statute and its exclusive jurisdiction is limited only to those matters set out in Section 89 (1) of the LA. In terms of Section 89(6) of the LA, *“no court other than the Labour Court shall have jurisdiction in the first instance to hear and determine any application, appeal or matter referred to in subsection (1).”* Though the Labour Court has exclusive jurisdiction, Section 89 of the LA did not take away the inherent power of the High Court and jurisdiction of the Labour Court remains explicitly confined to the matters enumerated in Section 89(1) (a) – (j). Unfortunately there is no provision in Section 89 (1) authorizing the Labour Court to issue declaratory orders, the High Court remains vested with full and

unimpeded jurisdiction to hear and determine every labour matter other than those referred to in Section 89(1) and (6).³⁸ Thus the High Court can make a declaratory order and declare that a transaction falls or will fall within the scope of Section 16.

This parallel jurisdiction between the Labour Court and High Court defeats the purpose of the LA in Section 2A and that of establishing specialist dispute resolution mechanisms. It evokes concerns regarding legal certainty, forum shopping and undermines legislative intent in enacting certain rights. Section 16(3) creates an unfair labour practice of violating or attempting to violate Section 16. Such an unfair labour practice is resolved through dispute resolution forums under Part X11 of the LA. It therefore follows that there is no need for approaching the High Court for relief. The Labour Court must have exclusive jurisdiction in all labour matters including the granting of declaratory orders in transactions falling under Section 16.

3. Conclusion

It should be noted that despite the fact that Section 16 balances and protects interests of both employers and employees, its primary purpose seems to be to protect interests of employees in job security, and is thus generally in sync with international best practice. Given the constitutionalisation of labour rights in Section 65 of the new Constitution, courts have an obligation to interpret and apply Section 16 (1) of the LA expansively and holistically. It must be interpreted in light of its purpose, as well as the purpose of the LA as evinced in Section 2 A of the Act. There is therefore an obligation on the courts to develop a clear and coherent jurisprudence as to when Section 16 is triggered and the consequences that flow from its application.

Nevertheless, there is still need for the legislature to refine Section 16 (1). For example, Section 16 (1) does not prevent an old employer from excluding some of the employees from the transfer of an undertaking, by simply terminating their contracts. This considerably reduces the protection of employees and defeats the primary purpose of enacting Section 16. Any attempts to evade the consequences of Section 16 must be eschewed and employers must not be given an unlimited right to terminate contracts of employment before the transfer of a business. There

³⁸ *UZ-UCSF Collaborative Research Programme in Women's Health v Shamuyarira* 2010 (1) ZLR 127 (S), *Agribank v Machingaifa and Another* 2008 (1) ZLR 244 (S), *Mushoriwa v Zimbabwe Banking Corporation* 2008 (1) ZLR 125 (H) and *Mazarire v Old Mutual* HH 187-14.

is need to balance interests of both employers and employees. This would entail that employees must be consulted when Section 16 is invoked and given an opportunity to choose whether to accept an offer of re-employment. In the same breadth, a new employer depending on viability of the business being transferred must also be given an opportunity choose employees to re-employ. Furthermore, the remedies available to employers and employees under Section 16 must not be an avenue for forum shopping and parallel litigation. Dispute resolution mechanisms established under the LA must not be divested of their exclusive jurisdiction. They must have jurisdiction to grant declaratory orders not only in matters involving Section 16 but the LA as a whole. In the interim, Courts can only give employees and employers refuge by interpreting Section 16 in a manner that gives effect to its dual purpose. It must be interpreted ebulliently and in the context of the purpose of Section 16, the objects of the LA in section 2A and Section 65 of the Constitution.

The new Constitution and the Death Penalty: a justified discrimination?

Ignatious Nzero¹ and Peacemore Mhodi²

1. Introduction

The adoption of a new Constitution³ in 2013 marked a significant development in the country's legal history. The Constitution as the supreme law of the land⁴ not only impacts upon the country's legal system, but also on every aspect of life, be it social, political or economic. Given this significance, it is with no surprise that the arrival of the new Constitution has attracted interests from various sectors of the society whose expectations have somehow been raised by the development.

The new Constitution has modified and in some instances, altered the country's legal landscape. One such area is through the insertion of an extensive 'Declaration of Rights' in Chapter 4. These provisions largely borrowed from international human rights standards and can be said to be an attempt to align the country's human rights and constitutional approach to international developments.

The right to life in section 48 is one of the fundamentally enshrined human rights in line with international human rights instruments.⁵ Provision is however made in terms of which the right to life can be limited, that is, where death penalty can be imposed upon only males of between twenty-two and sixty-nine years.⁶ The Constitution allows for the imposition of the death penalty on males within the specified age group. Express provision is made to the effect that women are totally excluded from the death penalty as well as males falling outside the designated age groups. In this regards, the Constitution effectively modifies and repeals the country's penal

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³ Constitution of Zimbabwe Amendment (No.20) Act 2013 (herein after 'the Constitution.').

⁴ Section 2(1) of the Constitution.

⁵ See for instance art. 3 of the United Nations' Universal Declaration on Human Rights (UDHR) of 1948; art. 2 of the Council of Europe's European Convention on Human Rights (ECHR) of 1950; art. 6(1) of the International Covenant on Civil and Political Rights (ICCPR) and art. 4 of the African (Banjul) Charter on Human and People's Rights of 1982.

⁶ Section 48(2) (c) and (d) of the Constitution.

laws which prior imposed the death penalty on all persons who commit murder in aggravated circumstances regardless of their gender or age.⁷

The selective application of the death penalty in limiting the right to life raises questions as to whether the drafters of the new supreme law have managed to balance the fine line between gender and age in applying the discrimination mantra in rights limitation. This contribution seeks to explore this issue by firstly presenting and discussing the Constitution's founding principles and values. This is aimed at contextualizing the discussion particularly whether or not the death penalty clause is discriminatory thus and contrary to the spirit and purport of the Constitution. This will be followed by a discussion of the fundamental right to life clause and the limitation thereof. Here the writers will argue that the draft death penalty clause is discriminatory as it unjustifiably prefers one gender group ahead of another. Although the age discrimination can somehow be justified, it will be argued that the same cannot be said of gender based discrimination using the very same Constitution's limitation of rights clause. Further arguments will be made that the gender based discrimination will potentially create challenges for the criminal justice system particularly when sentencing of offenders in 'aggravated murder' cases committed under similar circumstances where the offenders are males and females. Finally the article will beg the question as to whether there is any need for capital punishment in a country that purports to be founded on the respect for fundamental human rights, such as the right to life. The writers use international jurisprudence such as the landmark South African decision in *Makwanyane*⁸ to argue that the death penalty clause is an unnecessary compromise on the right to life and has outlived its usefulness in a modern society founded upon human dignity.

2. The Constitutional values and principles

Section 3 is a remarkable provision in that it is an express articulation of the type of state the country should be. The section lists nine values and principles which are foundational to the constitutional order of Zimbabwe.⁹ The values embodied in section 3 'animate' the operation of other provisions contained in the Constitution. The provisions it animates include among others,

⁷ See section 337 of the Criminal Procedure and Evidence Act [Chapter 9:07]. However, it is submitted that as a matter of public policy pregnant women and minors cannot be subjected to death as a punishment.

⁸ *S v Makwanyane and Other* 1995 (3) SA 391 (CC).

⁹ Section 3 (1) (a) – (i) of the Constitution.

provisions contained in chapters 1,¹⁰ 4¹¹ and 8¹² of the Constitution. Further significance of values enunciated in section 3 is highlighted by the fact that there is a symbiotic relationship between the values entrenched in section 3 and the constitutional provisions captured in the Declaration of Rights. That is, the values in section 3 afford 'substance' to the constitutional rights enshrined in chapter 4, the 'Declaration of Rights'. Section 3 thus becomes the Constitution's '*quasi* basic structure and premises,' that is the basis upon which any law, practice, custom or conduct is subordinate to the Constitution.

Therefore, as will become evident later, the uneven handedness nature in which the constitution treats men and women in respect of the death penalty does not pass constitutional muster. It will be shown that the gendered nature of the discrimination flies in the face of 'gender equality' which is at the epicentre of the envisaged constitutional order. It cannot be gainsaid that gender inequality is one of the 'fundamental mischief' the new constitution seeks or sought to remedy. This is evident in that the constitution is replete with provisions calling for the eradication of gender discrimination.¹³ The constitution in taking with one hand whilst giving with the other undermines the objective of gender equality and renders it illusory.

2.2. The right to life

The right to life is arguably the most fundamental of all rights. The sacrosanct nature of the right to life stems from the fact that the right to life is the source of all other personal rights. In other words, it is only when one is alive that he or she can enjoy other rights. Section 48 provides that 'everyone has the right to life.'¹⁴ This provision is also common in many other national jurisdictions as well as international human rights instruments. For instance, section 11 of the South African Constitution¹⁵ provides a similar provision on the right to life verbatim. Article 3 of

¹⁰ 'Founding Provisions', this, for example, declares in s 2 that 'law, practice, custom or conduct inconsistent with [the Constitution] is invalid'.

¹¹ 'Declaration of Rights' which for example, in s 85 allows any person 'to approach a court, alleging that a fundamental right or freedom enshrined in the Declaration of Rights has been, is being or is likely to be infringed' and the court has to 'grant appropriate relief'.

¹² 'The Judiciary and the Courts' which, for example, permits in s175(6) (a) a court to 'declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency'.

¹³ For example, s 17(2) of the Constitution provides that the 'State must take positive measures to rectify gender discrimination and imbalances resulting from past practices and policies'.

¹⁴ Section 48 (1) of the Constitution.

¹⁵ Constitution of the Republic of South Africa, 1996.

the Universal Declaration of Human Rights; article 4 of the African Charter; article 6(1) of the International Covenant on Civil and Political Rights (ICCPR); article 2(1) of the Europe's European Convention on Human Rights (ECHR) and article 7(2) of the American Convention¹⁶ all contained the right to life. The right's universality largely makes it peremptory and thus can be regarded as *jus cogens*.¹⁷ However, as much as this can be true in other jurisdictions where the right is non-derogable,¹⁸ the same cannot be said of the Zimbabwean Constitution. Section 86 (3) in Part 5 which relates to limitation of fundamental rights provides

'No law may limit the following rights enshrined in this Chapter, and no person may violate them-

(a) The right to life, except to the extent specified in section 48.'

Section 48(2) provides:

'A law may permit the death penalty to be imposed on a person convicted of murder committed in aggravating circumstances...'

The preceding highlights that the right to life under the new Constitution is protected with reservation. That is, the right to life is not protected in unequivocal terms. Although section 48 recognises the right to life it also contains an in-built limitation clause, in that the right may be limited by application of a law which may permit the death penalty.¹⁹ It is thus clear that the Constitution though intending the right to life to be a fundamental human right, expressly provides for its limitation. It is the manner in which the right is limited that will be discussed in ensuing parts of this contribution.

2.2.1 Limitation of the right to life

Section 48 (2) allows for the limitation of the right to life by the imposition of a death penalty on a person convicted of murder committed in aggravating circumstances. However, the limitation is qualified by excluding certain categories of persons from the death penalty regardless of the whether they have been convicted of murder committed under aggravating circumstances.

¹⁶ The American Convention on Human Rights (ACHR) of 1969 ('the San Jose Pact.')

¹⁷ Z Motala and C Ramaphosa *Constitutional Law: Analysis and Cases* (2002) 226.

¹⁸ See for instance section 37(5)(c) of the South African Constitution and art. 4(2) of the ICCPR.

¹⁹ Section 48(2) of the Constitution.

Provision is made to the effect that ‘the penalty [death] must not be imposed on a person- (i) who was less than twenty-one years old when the offence was committed; or (ii) who is more than seventy years old.’²⁰ Furthermore, ‘the penalty must not be imposed or carried out on a woman.’

A few comments can be made regarding the above provision. Firstly, the drafters of the Constitution made it clear that the death penalty cannot be imposed on women. Similarly, it cannot be imposed on males who were below the age of twenty-one at the time the offence, that is, aggravated murder, was committed and who, presumably, at the time of conviction, would be above seventy years of age. The use of the term ‘must’ means that the prohibition of death penalty is peremptory.²¹ Secondly, it is stated that the death penalty ‘must not be imposed’ on males within the specified category and ‘must not be imposed and carried out on a woman.’ The inclusion of an additional ‘carried out’ when referring to woman raises confusion. Surely if it cannot be imposed then one wonders how it can still be carried out. It is submitted that there is no need for that additional emphasis for it amounts to nothing more than bad drafting. Lastly, the limitation only applies to males who at the time of commission of the condemned conduct, were above the age of twenty-one years and at the time of imposition of sentence, would be below seventy years of age. This raises the question as to whether the said males are discriminated against. Similarly, only males are subjected to the death penalty since women are expressly precluded therefrom. Again the question is whether the provision is discriminatory, and if so, whether such discrimination can be justified under any circumstance.

2.3. The Constitutional values and principles and the discrimination question

The proviso relating to the limitation of the right to life by the imposition of the death penalty upon only males between ages of twenty-two and sixty nine is *prima facie* discriminatory. The *prima facie* discriminatory nature of the proviso finds in chapter 1 specifically section 3 which provides the respect for, *inter alia*, ‘fundamental human rights and freedoms;’²² ‘recognition of the equality of all human beings’²³ and ‘gender equality’²⁴ as some of the founding values and

²⁰ Section 48 (2) (c) (i) and (ii).

²¹ See generally *Messenger of the Magistrates’ Court, Durban v Pillay* 1952 (3) SA 678 (A).

²² Section 3 (1)(c) of the Constitution.

²³ Section 3(1)(f).

²⁴ Section 3 (1) (g).

principles of the constitution. The fact that these aspects are part of the founding values and principles signifies their importance in giving effect to objectives of the Constitution.

In assessing whether the *prima facie* discrimination contained in the built-in limitation to the right to life can be justified, the starting point is to appreciate it within the broader Constitutional objectives. The need to give expression to the underlying values of the constitution has been recognized as paramount when interpreting constitutional concepts²⁵ such as justification of discrimination in this case. Thus effect must be given to such values as the promotion of fundamental human rights, including the right to life and equality. It follows then whether the apparent discrimination in section 48 gives effect to such values?

It is submitted that it is unclear as to why the two forms of discrimination, that is, age based and gender, were preferred in justifying the limitation to the right to life. In trying to clear such ambiguity, one can look at two of the various methods of constitutional interpretation namely, the purposive and the protection of vulnerable groups or representation-reinforcement theory.²⁶

2.3.2 *The Purposive approach*

This approach in its widest form, favours advancing an interpretation that leans towards the recognition and protection of all the constitutional values and principles, particularly the protection of fundamental human rights.²⁷ Thus, in assessing the justification or otherwise of the discriminatory nature of the built-in limitation clause to the right to life, there is a need to interpret the discriminatory concept in a manner that interprets the constitution 'purposively and as a whole, bearing in mind its manifest objectives.'²⁸

2.3.2. *Protection of vulnerable groups: representation-re-enforcement theory*

This theory advances the position that the law, through the Constitution and courts, do not only protect fundamental human rights, but also the vulnerable groups against the tyranny that may

²⁵ *Makwanaye* (n 8 above) para 9.

²⁶ For a general discussion of the constitutional interpretation methods see Z Motale & C Ramaphosa (n 17 above) 13-45.

²⁷ See *S v Mhlungu and Others* 1995(3) SA 867 (CC). Cf narrow purposive approach in *Mhlungu*, Ketrledge AJ dissenting views and also *Du Plessis and Others v De Klerk and Others* 1996 (5) BCLR 658 (CC); 1995 (1) SA 40 (T) par 76.

²⁸ *Du Plessis* (n 27 above) par. 123.

accompany majoritarian impulses.²⁹ There is thus a need to protect certain groups that are not able to fully participate in the political process.³⁰

The above theory can to some extent, explain why the drafters of the constitution employ the identified two forms of discrimination in limiting the fundamental right to life. It is common cause that the children, women and the elderly are the most vulnerable members of our society. However, in the absence of evidence to suggest that these groups are excluded from participation in the political process and any other forums aimed at enforcing fundamental human rights, it remains difficult to justify the identified forms of discrimination.

2.4. Equality clause and non-discrimination

By providing for a right to equality, the Constitution conforms to international human rights standards. It has been said that a country's adherence and respect to human rights is measured in how it treats each and every citizen. The United Nations Charter asserts the equal rights of men and women³¹ and provides as one of its objectives the achievement of equal rights.³² Article 1(3) of the UN Charter further emphasize the importance of equality by providing as its purpose the promotion and encouragement of the respect for human rights and fundamental freedoms for everyone regardless of race, sex, language, or religion.

The preamble to the UDHR also asserts 'the equal and inalienable rights of all members of the human family.' Article 1 went further to provide that:

'[E]veryone is entitled to all rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

Article 7 of UDHR provides for equal treatment before the law without discrimination as well as protection against discrimination. Similar provisions are found in the ICCPR,³³ the African

²⁹ Z Matola and C Ramaphosa (n 17 above) 32; *Larbi-Odam and Others v MEC for Education (North West Province) and Another* 1997 (12) BCLR 1655 (CC); 1998 (1) SA 745 (CC) paras 27-28.

³⁰ See GR Stone *et al Constitutional Law* 3rd ed (1996) 70-1.

³¹ Preamble to United Nations Charter of 1945.

³² Art. 1(2) of UN Charter.

³³ Article 26 of the ICCPR.

Charter,³⁴ the American Convention³⁵ and the South African Constitution.³⁶ The equality jurisprudence of both foreign jurisdictions and international human rights instruments is expected to influence the development of constitutional human rights jurisprudence in Zimbabwe following the adoption of the new Constitution.

Section 56 (1) provides that '[a]ll persons are equal before the law and have the right to equal protection of the law.' Subsection (2) asserts the right to equal treatment between men and women. This proviso is positively phrased so as to bestow upon every person, the right to equality.

Significantly and relevant to this discussion is the proviso further stating that:

'(3) Every person has the right not to be treated in an unfairly discriminatory manner on such grounds as theirsex, gender....age....'

'(4) A person is treated in a discriminatory manner for the purpose of subsection (3) if : (a) they are subjected directly or indirectly to a condition, restriction or disability to which other people are not subjected ; or (b) other people are accorded directly or indirectly a privilege or advantage which they are not accorded.'

'(5) Discrimination on any of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair, reasonable and justified in a democratic society based on openness, justice, human dignity , equality and freedom.

The negatively phrased subsection 3 precludes discrimination on such grounds as age, gender or sex. It is submitted however, that this is what section 48 does: discriminates on the said grounds. Section 48 thus *prima facie* falls afoul of the equality clause. However, it is submitted that in interpreting the equality clause, the favoured approach will be not to construe the provisions as 'watertight compartments'³⁷ but rather entirely as a guarantee to equal treatment

³⁴ Article 3(1) of the African Charter.

³⁵ Article 24 of the American Convention.

³⁶ Section 9 of the Constitution of the Republic of South Africa of 1996.

³⁷ Per Ackermann J in *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC) pars. 20.

under the law.³⁸ For it is through such an approach that each matter will be considered upon its own merits and thereby promoting the basic Constitutional values and freedoms include equality and non-discrimination.

2.4.1 Test for discrimination

It is not uncommon to have a law requiring some form of legal distinctions or differential treatment. These legal distinctions constitute some form of discrimination.³⁹ However, the equality clause as enshrined in the constitution prohibits discrimination if it is unfair. Thus for any form of legal categorization to pass the constitutional muster it must be justified, that is, must clear the hurdle of the limitation clause.

It is instructive to adopt the approach adopted by the courts in South Africa in testing justifiability because the equality clause in South Africa is couched in similar terms as that of Zimbabwe.⁴⁰ The test has crystalized into a three pronged one, with the court asking whether there is discrimination, if so whether such discrimination is unfair, and if is unfair whether it can be said to be justifiable.⁴¹ However, within the test for justifiability is contained the enquiry of unfairness. That is, the court will enquire into whether a provision is unfair. The unfairness enquiry enjoins the court to look at the position of the complainants in the society and whether they have suffered in the past from patterns of disadvantage; the nature of the provision or power and the purpose sought to be achieved by it; and the extent to which the discrimination has affected the rights and interests of the complainants and whether it has led to an impairment of fundamental human dignity or an impairment of a comparably serious nature.⁴²

3. The right to life and the general limitation clause

Section 86 which contains the limitation clause provides that:

³⁸ See *National Coalition for Gay and Lesbian Equality and Another v Minister of justice and Others* 1998 (12) BCLR 1517 (CC); 1999(1) SA 6 (CC) pars 60-61.

³⁹ See PW Hogg *Constitutional Law of Canada* 3rded, (1992) 1164.

⁴⁰ See s9 of the Constitution of South Africa, 1996.

⁴¹ *Harksen v Lane* 1997 (11) BCLR 1489 (CC), para 53.

⁴² *Ibid*, para. 51.

'(2) The fundamental rights and freedoms set out in this Chapter may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society...'

'(3) No law may limit the following rights enshrined in this Chapter, and no person may violate them- (a) the right to life, except to the extent specified in section 48.'

The use of the word 'may' cast some doubt on the seriousness of the drafters on conferring the said right on individuals. It is accepted that the right is not absolute. Section 86(6) already provides that the rights may be limited implying that they are subject to limitation. However, by an additional proviso in subsection 3 the impression is that the listed rights and freedoms are absolute. And this appears correct until one comes to the right to life which even under the general limitation clause, is subjected to an additional internal limitation in section 48. It is submitted that there is no need to include the right to life on the list of seemingly unalienable rights when it is already known that is subjected to limitation under section 48.

Further, it can be argued that the discriminatory nature of section 48 largely fails the test under s 56(4) for it fails to meet the basic requirements of the limitation clause due to its inherent discrimination and hence unjustifiability. However, a court will be enjoined to consider whether the limitation of the right to life on the basis of gender is reasonable under section 86. The question to be considered under section 86(2) is whether the limitation is reasonable. The text of the constitution reveals that in ascertaining reasonableness we have to engage on a two pronged analysis. The first analysis is to weigh up or balance the right against limitation, and the second is the proportionality analysis where the enquiry is whether the means used are proportional to the right.⁴³ Thus, the limitation is unreasonable in light of the right that has been limited, and the fact that there are less restrictive means that could have been used to achieve the same objective.

Moreover, there is force in using the dicta in *Makwanyane* where the court found that the carrying out of the death sentence annihilated human dignity as such the death penalty was cruel, inhuman and degrading.⁴⁴ The right to human dignity in the constitution is protected without reservation. This is evident in s 86(2) which provides that no law may limit the right to

⁴³ *Makwanyane* (n 8 above) para. 94.

⁴⁴ *Ibid* para 95.

human dignity. Also the constitution unreservedly protects the right not be tortured or subjected to cruel inhuman or degrading treatment or punishment.⁴⁵ This means that by providing for the death penalty the constitution contradicts itself in that it undermines the same right it seeks to protect.

In the final analysis, the unconstitutionality of the discriminatory nature of section 48 is confounded by the interpretational clause of the constitution.⁴⁶ The constitution enjoins a court seized with interpreting the constitution to promote the values and founding principles enshrined in section 3.⁴⁷ Further, it is mandatory to take international law into cognizance.⁴⁸ A court, tribunal, body, or forum adjudicating on the constitutionality of the death penalty would be hard pressed to find the clause unconstitutional. The reason is because human dignity and equality are at the epicentre of the constitutional interpretation project and thus, providing for the death penalty and, let alone discriminating on the basis of gender cannot be reasonably construed to be justifiable in a democratic society. Ironically, by permitting the death penalty together with its discriminatory nature section 48 contradicts the ethos, spirit and purports of section 3 of the constitution.

4. Impact on the criminal justice system: justifying discrimination in sentencing

Section 48 allows for the selective application of the death penalty in a case where persons are convicted on a similar offence that is murder committed under aggravated circumstances. This potentially presents challenges for the court for the only differentiating factor in mooted sentence would be based on grounds of age and gender. Whereas one cannot expect the court to commit either a young or an elderly person to death, the blanket exclusion of women is difficult to justify. At least the drafters of the constitution must have qualified the women who must be excluded from the application of the death penalty. In any case, the courts can properly consider in mitigation, the gender of the offender as well as any other special circumstances such as pregnancy, age and family status of a woman before committing them to death. It is thus submitted current death penalty clause does nothing more than impose an unjustified and unfair burden upon the courts to try and twist the principles of equality and fairness in sentencing.

⁴⁵ Section 53 of the Constitution.

⁴⁶ Section 46

⁴⁷ Section 3.

⁴⁸ Section 46.

Thus in a bid to promote fundamental human rights through the constitution, the drafters largely succeeded in producing an instruments that only limited the application and enjoyment of fundamental constitutional rights and freedoms. The death penalty clause as it stands only differs from the previous system in that it simply moved from it being universally applied to being selectively applied. However, it is this selective application that these writers feels is difficult to justify under the very constitution.

5. Death penalty in a modern society: does Zimbabwe need it?

The unfair discriminatory nature of the death penalty clause contained in section 48 of the Constitution as well as the potentially complicated challenges that it imposes on the Zimbabwean criminal justice system inevitably raises the question as to whether there is any room for the death penalty in a modern society purportedly founded on the respect for fundamental human rights? As much as it is true that the UDHR and the ICCPR did not foreclose capital punishment,⁴⁹ the global trend in international human rights law has been a gradual shift towards the abolition of capital punishment.

In 1983 the European Convention was amended to abolish the death penalty.⁵⁰ The European Court of Justice went on to rule that no member state can extradite any person if that person faces the risk of death penalty in the requesting state.⁵¹ This ruling confirms the earlier argument that the existence of the death penalty in Zimbabwe in whatever form presents changes for the administration of the country's criminal justice system. This is particularly so give than it will increasingly become difficult to find co-operation from foreign jurisdictions which do not have death penalty on their statutes.

A clear condemnation of the death penalty as an affront to the enjoyment of fundamental human rights and freedoms was demonstrated by the South African Constitutional Court in *Makwanyane* where it was held that the death penalty as was contained under that country's

⁴⁹ See Z Motala & C Ramaphosa (n 17 above) 229.

⁵⁰ See Protocol 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty (1983) 22 *ILM* 538.

⁵¹ *Soering v United Kingdom* (1989) 11 *EHRR* 439.

penal statutes constituted a violation of the then Interim Constitution⁵² and further that ‘an individual’s right to life is the most fundamental of all human rights.’⁵³

The recent trend in the global community evinces a move towards the abolition of the death penalty. International treaties also evidence seismic shift towards the abolishment of the death penalty. The Second Optional Protocol to the ICCPR provides that:⁵⁴

1. No one with the jurisdiction of a state party to the present Protocol shall be executed.
2. Each state party shall take all necessary measures to abolish the death penalty within its jurisdiction.

In 2007 the United Nations through the General Assembly adopted a resolution urging retentions states to observe a moratorium on death penalty.⁵⁵ On a regional level, in 2008 the African Commission adopted a Resolution calling on State Parties to Observe a Moratorium on the Death Penalty, in which it:

“urge[d] State Parties that still retain[ed] the death penalty to observe a moratorium on the execution of death sentences with a view to abolishing the death penalty in conformity with Res ACHPR/RES 42 (XXVI) of the African Commission and 62/14 of the General Assembly of United Nations “.⁵⁶

The fact other jurisdictions are moving away from the imposition of capital punishment is not necessarily the sole basis upon which the death penalty must be abolished in Zimbabwe. *Makwanyane* found no scientific evidence to suggest that the death penalty is an effective deterrent against serious offences such as murder.⁵⁷ Whether or not the same can be said in Zimbabwe can only be proved if similar research confirms the same. However, relevant to this

⁵² Constitution of the Republic of South Africa, 1993.

⁵³ *Makwanyane* (n 8 above) para 144.

⁵⁴ Second Optional Protocol to the ICCPR, 1989.

⁵⁵ Resolution 62/149 of the United Nations General Assembly.

⁵⁶ Resolution 42(XXVI) of the African Commission and Resolution 62/149 of the General Assembly of the United Nations.

⁵⁷ *Makwanyane* (n 8 above) para 128. Other reasons advanced generally against the death penalty includes the fact that it is irremediable once enormously carried out given that margins of errors exists in criminal matters and the psychological burden and torture that death row inmates went through before the sentence is carried out.

discussion is the fact that the selective imposition of the death penalty can only deter, if it is proved, the commission of murder in aggravated circumstances, against males within above twenty-two and below seventy years of age. Females and males outside the stated category can thus not be deterred from committing the targeted offence.

Another difficulty attendant to s 48 is interpretational challenge. The section provides that, 'a law may permit the death penalty to be imposed only on a person convicted of murder committed in aggravating circumstances'.⁵⁸ The Constitution does not define the term 'aggravating circumstances' but leaves it to the wisdom of the legislature to define the phrase in relevant legislation such as those dealing with criminal proceedings. This raises the risk of the legislature providing an interpretational definition that might be at variance with the Constitutional drafters' intention.

6. Conclusion

Theoretically, it is possible that the death penalty has been done away with since the legislature might chose not to enact a legislation dealing with the death penalty. According to section 48 it is not a peremptory injunction to enact a legislation permitting the death penalty. As such, it is in the discretion of the legislature whether or not to enact such a law. However, this does not detract from the fact that the right to life is the most paramount right and must be unqualified if a human being is to enjoy all the other rights.

Further, in light of the above analysis it appears that there is no tangible evidence attesting to the utility of the death penalty in crime prevention. It has been noted above that the international standards demonstrate a shift towards respecting, protecting and promoting life through the abolition of the death penalty. It is hoped that Zimbabwe could join that fold by unequivocally protecting the right to life in unqualified terms. This hope is emboldened by the fact that the new Minister of Justice, Legal and Parliamentary Affairs is opposed to the death penalty. He traces his opposition to the death penalty to his own experience as an inmate on death row before Zimbabwe's independence where he says "my views on the death penalty are, to a large extent,

⁵⁸ Section 48(2) of the Constitution.

informed by the harrowing experiences I went through while on death row, the sanctity of life and the need to rehabilitate offenders”.⁵⁹

⁵⁹ “*Death penalty should not have room in new charter*” Newsday 19 October, 2011.

**The challenge of constitutional transformation of society through judicial adjudication:
*Mildred Mapingure v Minister of Home Affairs and Ors SC 22/14.***

James Tsabora*

1. Introduction

The adoption of a new Constitution in Zimbabwe in 2013 to replace the Lancaster House Constitution of 1979 potentially represents an important milestone in the country's legal history, and also, in the evolution of Zimbabwe as a constitutional democracy. Most importantly, the new Constitution sets an interesting platform for the transformation of society through judicial activism, adjudication and constitutional interpretation and also through the realignment of the country's laws by the government. Such transformation is necessary in the progressive development of Zimbabwe as a constitutional state.¹ This is particularly true considering the fact that the previous 1979 Lancaster House Constitution succeeded in signaling the dawn of political independence in Zimbabwe and putting a break to generations of colonialism, racial domination and oppression. The 2013 Constitution is therefore yet another step in the advancement of the ideals of a constitutional and democratic state and its adoption is a cause for optimism, in the least.

In general, the abandonment of a past constitutional order and its replacement by a new one has traditionally been welcomed by political societies, particularly those transitioning from revolutions or periods of political domination. In contemporary African political societies however, constitutional changes not preceded by revolutionary conflict have led to few celebrations and guarded optimism. Conceding that the reasons for this do vary from place to place and from time to time, it is however argued that the most prominent reason for limited celebrations and guarded optimism when it comes to new constitutions is that there seems to be a general belief that there is no direct, tangible benefit that the new framework brings to local

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¹ See A van der Walt 'Dancing with Codes: Protecting, Developing, Limiting and Deconstructing Property Rights in the Constitutional State' a seminar presented in the Faculty of Law, PUCHE, on 2- 3 November 2000, under the theme, *Development in the South African Constitutional State*.

communities and social groups.² Thus, any positive changes introduced by the new Constitution into the legal system are at first viewed with skepticism, and only tentatively experienced.

It can further be argued that, another important reason why constitutions are hardly celebrated in Africa may be the fact that African societies appear more reliant, not on national Constitutions, but on other forces and systems to achieve their social, economic or political goals. For instance, historical studies claim that social transformation in Congo has been driven more by perennial wars in the Great Lakes region³ and in Somalia,⁴ by political conflicts, oil resources and coups in Nigeria⁵ and by the new post-apartheid economic system in South Africa.⁶ Further, economic research demonstrates that it is the nature and strength of a country's economy that has, perhaps more than other factors, shaped social transformation in, for instance Libya, Angola, Botswana and South Africa.⁷

The ultimate argument for limited celebrations and guarded optimism when it comes to constitutions is that the preeminent role of economic, political and other social drivers seems to relegate the importance of constitutional documents in social transformation. African constitutions, it is argued, seem to surrender the front seat to other more dominant social forces that predominantly shape and define contemporary African society such as religion, war, culture, adverse climatic conditions, political conflict and population movement among others. Combined, it is difficult to refute that indeed, this set of forces seem to have been more responsible for shaping norms and behavior and social attitudes, or for deeply affecting and regulating the affairs of ordinary African communities. As a consequence, albeit with the exception of very few, African national constitutions seem destined to fail recasting or (re) developing local economies, influencing social systems or transforming political experiences.

² See for instance K Prempeh 'A new jurisprudence for Africa' 1999 (10.3) *Journal of Democracy* 135. Prempeh suggests that African judicial institutions seem unable to achieve any fundamental social outcomes without the domineering influences of the executive organs of the state.

³ F Reyntjens *The Great African War: Congo and regional geo-politics 1996 – 2006* (2009) Cambridge University Press, New York.

⁴ JR Beloff 'How Piracy is affecting economic development in Puntland, Somalia' 2013 (6:1) *Journal of Strategic Security* 47.

⁵ A Ikelegbe 'The economy of conflict in the Oil rich Niger Delta region of Nigeria' 2005 (14:2) *Nordic Journal of African Studies* 208.

⁶ H Marais South Africa: Limits to change: The political economy of transition (2001) 8, highlighting the critical influence of economic developments on South African society.

⁷ See Africa Progress Report (2013): *Equity in extractives: Stewarding Africa's natural resources for all*, 20.

Put differently, it would seem that, in the African context, new constitutions introduce a new constitutional *framework*, but not a new constitutional *system*. These new constitutional frameworks, it can be argued, do not necessarily chart a fundamentally new course in a country's legal system.⁸ In contrast, a new constitutional system is a clear break from a previous constitutional and legal order, and rests on an entirely new foundation. Thus, while a new constitutional framework rests on pillars fundamentally similar to its predecessor, a new constitutional system represents a new dawn in a society's legal system, and aspires to erase the memory of the past with haste, albeit with care. Further, unlike the change of a constitutional framework where constitutional interpretation and adjudication by the judiciary basically follows previously trodden contours, judicial dispute resolution and constitutional adjudication where a constitutional system is replaced by another, takes a paradigm shift with the objective of establishing a new social, economic or political order altogether.

1.1 The 2013 Constitution of Zimbabwe

Having considered the context of African constitutions, it becomes necessary to explain in brief, Zimbabwe's constitutional setup. To this end, it is not in doubt that in Zimbabwe, as with various other Constitutions, the old constitutional setup had its relatively fair share of successes in relation to social development.⁹ However, it is difficult to contest that the footprint of other more dominant social forces such as politics and political struggles has been larger and more visible than the impact of the 1979 Constitution on society. Perhaps it could be argued that it was for this reason that the country necessarily had to take another giant step to constitutional democracy by adopting a new Constitution in 2013.

It should however be noted that there has always been attempts to retain particular aspects and systems from the old constitutional framework,¹⁰ especially in relation to the political, legislative and judiciary system. For instance, the 2013 Constitution is predicated on largely the same

⁸ E Muirenik 'A bridge to where? Introducing the interim Bill of Rights' 1994 (10) *South African Journal of Human Rights* 31.

⁹ See for a general legal analysis G Linington *Constitutional Law in Zimbabwe* (2001) Legal Resources Foundation.

¹⁰ The new Constitution borrows heavily from the old 1979 Constitution in various important aspects. A study of the exact provisions is beyond the scope of this work. However, this trend has also been witnessed in relation to the draft constitution rejected in 2000 after a referendum, the Kariba draft and another draft presented for consideration by the National Constitutional Assembly.

political, legislative and judicial system that defined the old constitution,¹¹ whilst clearly acknowledging the same set of historical and social facts that shape a nation's aspirations.¹² Critically, despite clearly broadening access to court opportunities,¹³ the new Constitution is enforced in much the same manner as the old Constitution,¹⁴ despite the fact that there have been some notable improvements and changes.¹⁵

It is certainly still too early to determine whether the changes introduced by the new Constitution are of such depth as to fundamentally steer the ship in another new direction. A useful measure in determining the potential of the new constitutional framework is to consider the judiciary's treatment of cases of constitutional import that come before superior courts. The judiciary is a useful measure in this regard because it has a fundamental role to play in constitutional transformation of society, and its role is clearly stated in the Constitution.¹⁶ Such a responsibility can never be shirked or abdicated and indeed, the courts cannot wait for other social forces to lead the constitutional transformation agenda; they are the guardians of the Constitution.¹⁷

Social transformation through constitutional interpretation and adjudication ensures that society and the law move in tandem and that the values and principles defining the constitutional framework are put to action. Germane to this contribution is the judicial role that critically relates to the development of the common law. The courts cannot sit where principles of the common law appear to move at a pace more tedious than that of society, or where those time-tested concepts and maxims threaten to stifle social progress. The power to develop the law is now a constitutionally granted power, and there is little doubt that such power should be actively

¹¹ See for instance the provisions on the Legislative, Judicial and Executive system (Chapter 5, Chapter 6 and Chapter 8) in the 2013 Constitution.

¹² There is an expanded set of fundamental rights and freedoms. However, there is no fundamental shift in rights discourse implicit in the given rights and freedoms. For instance section 16, 16A and 16B of the old Constitution is reproduced almost verbatim in the 2013 Constitution, and is now section 71 and section 72.

¹³ The 2013 Constitution has a new rights enforcement section. (see Part 4 of the 2013 Constitution).

¹⁴ See for example Part 5, which is the general limitation clause for all fundamental rights and freedoms. The criterion in this Part is similar to criteria adopted by the Supreme Court prior to the 2013 Constitution. For instance see generally, *In re Munhumeso & Ors* 1994 (1) ZLR 49 (S); and generally, *CoT v CW (Pvt) Ltd* 1989 (3) ZLR 361 (S).

¹⁵ For the raft of changes that makes the new document more appealing, at least on paper, see T Madebwe 'Constitutionalism and the new Zimbabwean Constitution' above, para 2.1.

¹⁶ See Part 8 of the 2013 Constitution.

¹⁷ See Chapter 8 of the Constitution of Zimbabwe Amendment No. 20, 2013.

exercised where appropriate in order to respond to the complexities of society.¹⁸ Indeed, it can be argued that a questionable approach by the judiciary to exercising such power is a useful indicator of whether the same disappointments that attached to the jurisprudence of the old constitutional framework, especially the failure to apply the Constitution in transforming society, could similarly characterise the new constitutional framework.

This paper is an analysis of one such important decision passed by the Zimbabwean Supreme Court in 2014, namely the case of *Mildred Mapingure v Minister of Home Affairs and Ors*.¹⁹ As acknowledged by the Court, the *Mapingure* case was a novel one. Considering this important facet of the case, this paper critically analyses the Supreme Court's appreciation of the salient facts and issues of the case and the greater need to comprehensively lay down the law, develop it in line with constitutional standards and expectations and, of course, create precedent. In addition, the paper also analyses the Supreme Court's preparedness to seize the moment in important and appropriate cases in order to respond to the complexities that define contemporary society.²⁰ Ultimately, the paper considers whether the turn to the new Constitution, at least as far as this case is concerned, truly signals the dawn of a new beginning in constitutional interpretation, adjudication and development of the law by Zimbabwe's superior courts.

1.1 The *Mapingure* Case: Salient Facts

Mildred Mapingure's darkest hour left her not only a victim of a robbery, but a traumatized, injured and violated victim of rape. Frantically, she had rushed to seek medical treatment for her injuries, and also to ensure that she would not fall pregnant. The doctor she visited advised her that the medication had to be administered within 72 hours and in the presence of a police officer. Rushing to and fro, she returned to the doctor in the company of a police officer, only to

¹⁸ In *Pearl Assurance Co. v Union Government* 1934 AD 560, Lord Tomlin (at 563) commented of the common law, that; "That law is a virile, living system of law, ever seeking, as every such system must, to adapt itself consistently with its inherent basic principles to deal effectively with the increasing complexities of modern organised society"

¹⁹ Judgment No. SC 22/14 (Civil Appeal No. SC 406/12).

²⁰ Innes CJ in *Blower v Van Noorden* 1919 TS 890 at 905 precisely pointed this truism, stating that; "There come times in the growth of every living system of law when old practice and ancient formulae must be modified in order to keep in touch with the expansion of legal ideas, and to keep pace with the requirements of changing conditions. And it is for the courts to decide when the modifications, which time has proved to be desirable, are of a nature to be effected by judicial decision, and when they are so important or so radical that they should be left to the Legislature."

be told that the doctor needed a police report before treatment could be availed. Three days after, she appeared before the same medical doctor with a different police officer and was advised that 72 hours had elapsed and the necessary medication could not be administered. She immediately sought audience from the public prosecutor, informing him of her intention to terminate the pregnancy. She was advised that she had to postpone terminating the pregnancy until the rape trial was over.

She returned to the Public Prosecutor four months after the rape incident and was advised that she required a pregnancy termination order before she could terminate the pregnancy. A magistrate who was consulted by the Public Prosecutor stated that her Office was unable to assist because the rape trial had not been finalized. After further delays and frustration, Mildred finally obtained the magisterial certificate nearly six months after the rape incident. To her further dismay, the hospital matron who was assigned to carry out the termination opined that it was no longer safe to carry out the procedure and declined to do so. On 24 December 2006, Mildred gave birth to a child. She approached the High Court claiming damages for pain and suffering arising from failure to prevent the pregnancy. She further claimed damages for the maintenance of her minor child till it became self supporting.

1.2 The High Court Decision

The High Court dismissed the appellant's claim in its entirety. The court *a quo's* decision, which was passed in terms of the Lancaster House Constitution, was summarized in the briefest of terms by the Supreme Court. The High Court blamed the victim, Mildred Masingure, as having suffered misfortune as a result of her own ignorance concerning the correct procedure to follow in relation to termination of the pregnancy. In addition to absolving the concerned officials from negligence, the court *a quo* stated that it was Mildred's responsibility to initiate the process of terminating her pregnancy, and that it was not the mandate of the justice officials involved to advise her on the correct procedure to do so. The High Court dismissed Mildred's application for default judgment against the respondents, and ruled that they were not vicariously liable to Mildred

1.3 The Supreme Court's approach

The Supreme Court appreciated the seven grounds of appeal raised by Appellant, but opted to consider the Appeal under two issues:

- (i) Whether or not the concerned officials were negligent in their dealings with the Appellant
- (ii) Assuming the answer to (i) to be in the affirmative, whether or not the Appellant suffered any actionable harm as a result of such negligence, and if so, whether respondents were liable to Appellant in damages for pain and suffering and for maintenance of the child.

2. Professional Negligence

2.1 Medical Negligence

The first issue that the Supreme Court canvassed related to the Aquilian liability for medical negligence. In order to reach a definitive conclusion, the Court canvassed mostly South African cases with an essentially similar factual context. The first case, *Administrator Natal v Edouardo*, had a similar context of unwanted pregnancy, albeit due to the failure by a doctor to render a woman sterile. The Appeal Court allowed the claim for “child rearing expenditure”, arguing that it would enable the Appellant to support the child, and that allowing that claim “in no way relieved the respondent (wife) from the obligation to support the child,” but in fact, “enabled the respondent to fulfill” the obligation of supporting the child that resulted from the unwanted pregnancy.

The Court further made reference to *Mukheiber v Raath and Another*,²¹ a case where the South African Supreme Court had to rule on the liability of a doctor who had misrepresented to a couple, leading to an unwanted pregnancy. The Court ruled that the child maintenance costs were a “direct consequence of the misrepresentation” and that the doctor’s liability was similar to that which rests on parents to maintain the child until it becomes self supporting.

It should be emphasized that in both these cases, the South African courts allowed the claim for child maintenance expenditure against negligent medical practitioners. Further, it should be pointed out that the negligence of the medical professionals in both cases led to unwanted pregnancies, albeit as a result of lawful intercourse between consenting adult couples. Thus,

²¹ 1999 (3) SA 1065 (SCA).

despite the fact that there was the similarity that the pregnancies were unwanted as they had not been planned, these two cases were entirely distinguishable from the *Mapingure* case in that, in *casu*, the pregnancy in question was a result of violent and unlawful sexual intercourse. Finally, it is important to observe that the two decisions did not seek to blame the concerned women for consequent failure to seek abortion or termination of the pregnancy. The South African Appeal Court did not consider apportioning blame in both appeals and allowed both claims.

2.2 Police Negligence

It was not difficult for the Supreme Court to quickly rule that the police were negligent in their dealings with Mildred Mapingure. Again, the court made reference to mostly South African cases that had dealt with police negligence, most notably *Minister of Police v Ewels*,²² *Minister of Police v Skosana*,²³ *Minister of Law and Order v Kadir*,²⁴ *Van Eeden v Minister of Safety and Security*,²⁵ as well as the Zimbabwean case of *King v Dykes*.²⁶

In the *Ewels* case, the Court ruled that the lack of a positive statutory duty to act did not excuse the police from acting to protect a person in their custody, and that the failure to act positively was therefore an omission that founded delictual liability. In *Skosana*, the police were held negligent and thus liable for failing to timeously bring a deceased person to medical attention and care. However, in *Kadir*, the Court declared that the police were not to be held liable for “what was relatively insignificant dereliction of duty” such as failing to record the identity of a driver who had caused an accident. In the *Van Eeden* case, the South African Supreme Court ruled that the police owed a duty to act positively and prevent a serial rapist from escaping out of their custody. The police, the court reasoned, failed in their constitutional duty to prevent the escape of the dangerous criminal, and were thus liable for claims arising out of the criminal’s subsequent actions upon escape, in this case rape. Finally, in the *Dykes* case, the Zimbabwean Appeal Court had appeared timid and counseled caution in cases of omission, doubting whether

²² 1975 (3) SA 590 AD.

²³²³ 1977 (1) SA 31 (A)

²⁴ 1995 (1) SA 303 (A).

²⁵ 2003 (1) SA 389 (SCA).

²⁶ 1971 (2) RLR 151 (AD).

such cases should unquestionably attract liability on the basis of failure to act positively. The court concluded by holding that courts must have discretion in determining whether, in light of all relevant factors, omission can attract delictual liability.

2.3 Liability of Public Prosecutors and Magistrate

The Court noted that the Prosecutor's role included assisting the rape victim to obtain a magisterial certificate for pregnancy termination by compiling the necessary report and documentation for the attention of the magistrate. The magistrate's role would thereafter be the issuing of the requisite certificate for termination of pregnancy. The medical superintendent would subsequently authorize its medical practitioner to terminate the unwanted pregnancy. Most importantly, the Court observed that it might be "necessary, where appropriate, for these functionaries to give accurate information and advice, within the purview of their respective functions, to enable the victim to terminate the pregnancy". Having stated this, the Court's opinion was that the obligations of the concerned authorities (magistrate, public prosecutor) could not be extended to "any legal duty to initiate and institute court proceedings" on the victim's behalf.

Further, the Supreme Court held that, despite the fact that the prosecutors and magistrate seemed to have given the victim incorrect advice on the procedure to be followed in terminating the pregnancy, it was not "within the scope of prosecutorial or magisterial functions to give legal advice on the procedural steps required to terminate a pregnancy." Thus, the prosecutors and magistrate could not be held liable for failing to take such reasonable steps as may have been necessary for the issuance of the requisite certificate.

These findings formed the basis upon which the Court established the nature and amount of damages to be payable to Mildred. The Court consequently decided that "it was the Appellant's own failure to institute the necessary application that resulted in the inability to have her pregnancy timeously terminated."

The Supreme Court proceeded to reject the claim for child maintenance entirely. It reasoned that "the chain of causation" ended one month after the rape and upon confirmation of the pregnancy. The court therefore delineated damages to only cover this one month period. It was the Court's opinion that this was based on the reasoning that the responsibility for taking steps to terminate the pregnancy lay with Mildred "... and by the same token, the capacity to do so".

3. Supreme Court's Appraisal of General Principles

The Supreme Court admitted that the case was the first of its kind in the Zimbabwean jurisdiction. There was therefore little doubt that the case presented golden opportunities to explore the law, possibly develop the major principles or probably, introduce new trajectories in the area of delictual liability for professional negligence. The Court was dealing with a rape victim and her claim for the maintenance of an offspring of rape. Consequently, neither the deeply serious criminal origins of the case could be ignored, nor the even more harrowing reality that the rape victim was faced with having to maintain a rape child on her own, despite having done almost all in her power to terminate the pregnancy. Clearly therefore, the Supreme Court, it has to be argued, was under an expectation to approach, albeit dispassionately, the child maintenance claim with these considerations in mind.

It should be noted that the Supreme Court admitted to the novelty of the case. Such a finding raised expectations that the ultimate decision would be comprehensive. This was not to be, however, as the Court immediately surmised that the *Mapingure* case was covered by the ordinary time-tested principles of the *Aquilian* action. Patel JA expressed this view, stating that:

*"... I do not perceive any conceptual limitation to allowing a claim in general damages for foreseeable harm that eventuates from an unwanted pregnancy. Although the present claim is without precedent in this jurisdiction, its novelty does not involve any impermissible extension of Aquilian liability." In short, an unwanted pregnancy can, depending on the circumstances of its occurrence, constitute actionable harm.*²⁷

Apart from this rather bare comment and reference to a few South African cases, the Supreme Court's investigation into the law relating to delictual claims based on unwanted pregnancy eventuating from a criminal offence seemed done. Patently, the Court gave a cursory, if at all, appreciation of the criminal origins of the *Mapingure* case, and its traumatic consequences to the Appellant. It can be claimed that for this reason, Patel JA missed the importance of the distinction that, unlike the *Mapingure* case, the South African cases he made reference to and applied all dealt with unwanted pregnancy conceived in lawful social relationships, not from rape. The fact that the *Mapingure* case was groundbreaking, it can be argued, necessarily called for a comprehensive reiteration of the major pillars of the *Aquilian* action and the

²⁷ SC22/14, 29.

circumstances under which principles of the action can be extended, developed or modified. The Court was found wanting in this respect.

It would seem that in light of the seriousness of the crime and its extended traumatic aftermath, the imposition of a higher level of responsibility and a broader duty of care against qualified professionals who negligently rendered professional assistance was justified. Arguably, this would mean casting the net for delictual liability against negligent professionals a bit wider. The important question is however, whether in theory, such an approach to delictual liability for professional negligence could be justified and defended in the *Mapingure* case. An offshoot of this question is whether the superior courts are able to develop seemingly iron-cast and stringent principles of delictual liability for professional negligence in order to widen the liability net. This Supreme Court did not follow this line of reasoning, and chose a different path. Its consideration of applicable principles is carefully explored below.

3.1 Special Relationship

It would appear that the Supreme Court absolved the magistrate and prosecutors of liability on the basis that there was no legal relationship between Appellant and these officials. Further, that the lack of a special relationship meant that there was no duty upon the Magistrate or Prosecutor to supply correct information to the Appellant. The public prosecutor advised Appellant not to terminate the pregnancy until the trial had been completed. The magistrate repeated the same when Appellant had approached her for a termination order. The weight given to advice by court officials to lay persons who come into contact with the justice administration system should never be underestimated. In this case, it was solicited and the Appellant did not wish to proceed in a way that would prejudice the rape trial. She had an interest in the outcome of that trial, and there were few other options for her to inquire into the legal process apart from the public prosecutors and the magistrate.

Despite this background, it is clear that in cases of wrong advice or misstatements, as was the issue in the *Mukheiber* case, there ought to be a relationship between the person giving the advice and the recipient for a duty of care to be owed to the recipient of that advice. In the *Mapingure* case, this would translate into the need for a special relationship between Mapingure and the Magistrate or public prosecutor, before *Mapingure* could claim against these persons for wrong advice. Further, for a plaintiff to found a claim on negligent misstatements such as the

one in *Mukheiber's*, he should have a right to be given correct information and the defendant should have a legal duty to supply that information.²⁸ Consequently, the lack of that special relationship through, for instance, contractual agreement, means that the plaintiff has no right to information, and defendant cannot be liable for any information he gives.

In the *Mapingure* case, Patel JA did not dispute the professional relationship between the doctor and the Appellant. He followed the same approach and conclusion pertaining to the police. However, in relation to the prosecutor and magistrate, the learned Judge opted to consider whether these officials had an obligation or legal duty to initiate and institute legal court proceedings on behalf of Appellant under the Termination of Pregnancy Act. Unsurprisingly finding in the negative, Patel JA proceeded on the crucial question of whether the advice these officials gave the Appellant was correct or not. Regarding this, the Judge declared that an analysis of the Termination of Pregnancy Act leads to the conclusion that it was not “within the scope of prosecutorial or magisterial functions to give legal advice on the procedural steps required to terminate a pregnancy.” This sealed the fate of Mildred’s child maintenance claim against the magistrates and prosecutor. It is strongly contended that the learned Judge should have reverted not only to the Pregnancy Termination Act, but the general statutory and constitutional duties of the prosecutors and magistrates regarding victims of crime that they are obliged to assist. The proximity, it is argued, between the Appellant (in the rape case) and the state officials had been created by law, and could be read as pointing to a relationship that is crucial in determining liability.

3.2 Causation

As is clear from the case, an important part of the Supreme Court decision hinged on causation. The Supreme Court commenced by establishing the applicable principles and concepts, highlighting that there should be a causal link between a defendant’s conduct and harm suffered by plaintiff. Generally, for factual causation, the test used is the “But for” or *sine qua non* test,²⁹ which inquires whether the wrongful act is linked sufficiently closely or directly linked to the loss, or the loss is too remote. For legal causation, the test is whether the harmful consequences or loss is fairly attributed to defendant’s conduct. In the *Mukheiber* case, Olivier JA (quoting Boberg *The Law of Delict* at 381) noted that in relation to legal causation, courts often proceed

²⁸ M Loubser and R Midgley (ed) *The Law of Delict in South Africa* 2nd ed, 225.

²⁹ M Loubser and R Midgley (eds) *The Law of Delict in South Africa* 2nd edition, 6.

on the basis of the relative view, that inquires, “not whether the defendant’s conduct was wrongful and culpable, but whether the harm for which plaintiff sues was caused wrongfully and culpably by the defendant.”³⁰

The court clearly rejected the maintenance claim on the basis that Appellant’s claim failed the causation test. Surprisingly, the Court did not carefully explore the element of causation in delict before coming to the conclusion that “the chain of causation was broken.” Apart from just mentioning this, the Court did not highlight instances where such chain is said to be broken. There was no reference to authorities or precedent. Of course, this area is an ordinary stomping ground and might not require reiteration in straightforward ordinary cases. However, this was no ordinary case. A recap or appraisal of the applicable law was necessitated by the fact that this case is the first of its kind in the Zimbabwean jurisdiction, and involved claims based on professional negligence against three different professions.

Essentially, the chain of causation is broken by a new intervening cause (*novus actus interveniens*), which is defined as an independent event which, after the wrongful act has been concluded, contributed to the consequence concerned.³¹ The initial wrongful act is only disregarded if the new intervening cause completely extinguishes the causal connection between the initial wrongdoer’s conduct and the final consequence.³² In the *Mapingure* case, the Supreme Court obviously regarded the actions of Mapingure after pregnancy confirmation as a new intervening cause, concluding that after this one month, the Appellant failed in her responsibility of taking steps to terminate the pregnancy. Clearly, the Court was not impressed by the relentless efforts made by the Appellant to terminate the pregnancy. The Court, albeit without expressly saying so, regarded the Appellant as negligent in her efforts to terminate the pregnancy, and thus rejected the child maintenance claim. But why didn’t the Court come out in the open and say the Appellant had been negligent, and, most importantly, that the assessment of damages had to be determined on the basis that the post conception negligence is wholly, or partially attributable to the Appellant alone?

The question that was not asked by the Supreme Court, but which seemingly is one of the bases for its decision was whether the Appellant’s post-conception conduct could be read as

³⁰ *Mukheiber* case *supra*, paragraph 36.

³¹ Neethling, Potgieter and Visser *Law of Delict* 5th edition, 189.

³² *Ibid.*

negligent. If the answer is in the affirmative, then, whether the degree of that negligence necessitated a reduction or extinguishing of damages claimed by plaintiff. The other question is whether Appellant's conduct after confirmation of pregnancy was an intervening cause that acted to extinguish the initial negligent conduct of the police and medical doctor, and that consequently excluded the liability of these professionals altogether.

In *Gibson v Berkowitz*³³ Claasen J had to respond to a query of this nature. The learned judge remarked as follows:

"A distinction should ... be drawn between plaintiff's negligence prior to the harmful event and any relevant negligence after the harmful event. In the case of a plaintiff, his pre-delictual negligence will trigger the application of contributory negligence to reduce his damages. The plaintiff's post-delictual negligence will, however affect the principles of legal causation (or remoteness) which may reduce his damages."

From this case, there is no doubt that Patel JA regarded Appellant's post-delictual negligence as fundamentally affecting legal causation to the extent that such post-delictual negligence completely excluded respondents' liability for the child maintenance claim. There is however no analysis by Patel JA of these rather sophisticated principles, and in view of the fact that this was the first case of this kind before the Supreme Court, that lack of a comprehensive investigation into the law is regrettable.

A closer examination of the applicable delictual principles, it is contended, could have influenced a different conclusion to the case. This contention is based on the following general positions of the law of delict. Firstly, there was clear knowledge and foreseeability on the part of state officials (the police, the magistrate and the public prosecutors) that the Appellant ran the risk of conception, and subsequently, of giving birth to the rapist's child.³⁴ It was this knowledge or reasonable foreseeability by state officials that was critical in determining wrongfulness, and consequently delictual liability in the *Ewels* case mentioned above.³⁵

³³ 1996 (4) SA 1029 (W).

³⁴ J Neethling 'Delictual protection of the right to bodily integrity and security of the person against omissions by the state' 13 (2006) *South African Law Journal* 572,580.

³⁵ See *Minister van Polisie v Ewels* supra, at 590. See also *Nkumbi v Minister of Law and Order* 1991 (3) SA 29 (E).

A second basis is the fact that since the Appellant was now for all intents and purposes the main witness in the criminal case there was a special relationship (or proximity) between the state (complainant) and the victim that created a duty of care on the part of the state.³⁶ Such duty of care, it could be argued meant that the Appellant critically relied on the state and its officials in relation to any necessary steps that would affect the rape trial.

Finally, it is contended that the state has a constitutional duty to assist victims of crime particularly for the reason that the state is effectively in factual control of the criminal proceedings. The prosecutors are the *dominus litis*, and their advice to complainants and witnesses involved in the trial process is important. The argument is that, if the state inhibits a complainant from terminating a pregnancy, the state has assumed control of the situation, and should be delictually liable for any negligence of its officials committed in handling the dangerous situation.³⁷ The advice that the Appellant should not terminate the pregnancy until the completion of the rape trial was wrong, and for that reason, was sufficient to attract delictual liability for the magistrate and the prosecutors concerned. The Supreme Court ignored this line of reasoning, and in any case, insisted that complainant should have ignored such advice.

There is no doubt that in determining the case, the Supreme Court found it unnecessary to undertake a deeper doctrinal analysis of the law of delict, even after admitting that the case was rather a novel one. At best, where there was need to evaluate the law, the court chose to stick to doctrine. This approach ignores the constitutional imperative upon the judiciary to develop the law. Such an approach where courts will most probably play it safe (“err on the side of caution”) and refuse to develop the law along a particular trajectory that better serves society has to be condemned. One could argue such an approach by the superior courts means most judgments remain pedantic and run the risk of time-locking the law.³⁸ It is this view that leads to a conclusion that a better and comprehensive description of the law coupled with a fairer

³⁶ J Neethling ‘Delictual protection of the right to bodily integrity and security of the person against omissions by the state’ 13 (2006) *South African Law Journal* 572,580.

³⁷ See *Van Eeden* case supra, at 400.

³⁸ On the clear dangers of this approach, see D van der Merwe ‘Constitutional colonization of the common law: A problem of institutional integrity’ 2000 *Tydskrif vir die Suid-Afrikaanse Reg*12, 13. The author contends that “the outcome” of treating the common law like “a pre-determined, pre-cast legal form from which the judge, much as a shopper in a supermarket, can select – indiscriminately – from the shelves of legal scholarship, a rule, a principle, a doctrine or an insightful comment or pithy maxim appropriate to the determination of a solution in the instant case..... has been a brand of common law scholarship that, at times, has produced results more than mildly quaint and even quirky...”.

appreciation of the uniqueness of the facts at hand might have necessitated a different line of reasoning and eventually a different conclusion. The fact that the Court refused to swim out of the doctrinaire pool meant this was not to be. Surprisingly, South African authorities used by the Court in arriving at a decision had, in fact, attempted to break new ground and develop the law towards a more progressive direction appropriate at the time.

3.3 The Supreme Court and the Constitutional framework

It is worth noting that the origins of the case predated the 2013 Constitution. The High Court's decision, for instance, was passed in 2012.³⁹ This means that the 2013 Constitution was not applicable, and any constitutional analysis had to be confined within the previous Constitution.

In *casu*, the Supreme Court appeared to be preparing the ground for determining the constitutional consonance of applicable principles for delictual liability. This it did by making reference to prominent South African cases that had canvassed the important elements of wrongfulness and causation from a constitutional perspective. In relation to wrongfulness, the Supreme Court made reference to *Van Eeden v Minister of Safety and Security*. Pertinently, the Court reproduced a very interesting paragraph of this case, noting (at page 12):

“The concept of the legal convictions of the community must now necessarily incorporate the norms, values and principles contained in the (South African) Constitution. The Constitution is the supreme law of this country, and no law, conduct, norms or values that are inconsistent with it can have legal validity... The Constitution cannot, however be regarded as the exclusive embodiment of the delictual criterion of the legal convictions of the community, nor does it mean that this criterion will lose its status as an agent in shaping and improving the law of delict to deal with new challenges.”

This paragraph was neither explained nor interpreted to suit the Zimbabwean context. It is not clear from the whole judgment whether this approach now characterizes the courts' approach to the element of wrongfulness in delictual claims. Indeed, there is a disturbing lack of effort by Patel JA to approach the case at hand from a Zimbabwean constitutional perspective. This is quite lamentable as the learned judge fails to appreciate that it is the Supreme Court's

³⁹ The High Court case was HC 4551/07, suggesting that the case had even earlier origins than 2012.

responsibility to chart this course.⁴⁰ Indeed this was what Vivier ADP intended to do in the *Van Eeden* case. There is a limit to the application of ordinarily relevant foreign jurisprudence in a country's legal system, and once such limit is reached, the duty upon the superior courts to create jurisprudence unique to that country's legal system can never be shirked.

It is argued that the Supreme Court could have attempted to determine wrongfulness from a constitutional perspective. This, it could have done by necessarily incorporating the "norms and values" of the Constitution into the concept of legal convictions of the community.⁴¹ These norms and values could be inferred from constitutional jurisprudence. Currently such a task is made easy by section 3 of the new Constitution since it contains a list of founding values and principles and these include constitutional supremacy, recognition of the inherent dignity and worth of each human being, and equality of all human beings. In addition the Constitution provides for the right to human dignity and the right to personal security. It could therefore be argued that any test for wrongfulness arising from omissions by the state, through the negligence of its officials that result in the infringement of these rights had to take constitutional values and norms such as these into account.

4. Conclusion

It is often a constitutional requirement and an obligation for the superior courts to develop the common law, taking into consideration the interests of justice and most importantly the provisions of the Constitution. There is no other way in which this judicial function can be carried out except through judicial decision making and interpretation of the law in appropriate cases. The common law is a time tested institution, and an important edifice in the law of delict. Indeed, it sustains the law of delict and has served society well when appropriately applied. The judge's function is not to unnecessarily replace, ignore or seek to discard its principles, but to develop some of them in appropriate cases such as the *Mapingure* case in order to correspond to prevailing constitutional values and principles. The danger is not in the application of the common law in resolving cases, but in the belief that despite constitutional and legislative

⁴⁰ See for instance section 176 of the 2013 Constitution. The previous Constitution did not have such a provision.

⁴¹ See J Neethling 'Delictual protection of the right to bodily integrity and security of the person against omissions by the state' *South African Law Journal* 572,580.

instruments, the common law is immovable. Such belief freezes the law and gives an incorrect impression that social conflicts and disputes can always be resolved by a backward-looking approach to the law. Further, and most importantly, such an approach denies the judiciary the opportunity to advance ever mutating constitutional ideals through adjudication and interpretation of the law.

In view of the above arguments, it can be concluded that the failure by the Supreme Court to examine the constitutional consistency of delictual principles, or to expand and broaden the definitions of such principles in accordance with the Constitution in the *Mapingure* case is regrettable. The Supreme Court's approach was dangerously doctrinaire. The *Mapingure* case was one great opportunity for the courts to clearly expand and broaden the Aquilian liability for professional negligence. This opportunity was missed; the Supreme Court undertook a rather cursory, unconvincing treatment of relevant principles and followed a conservative and timidly rigid approach. It is hoped that in future, and in view of the clear provisions of the 2013 Constitution, the superior courts will seize such kind of opportunities and develop the law to appropriately respond to the needs and expectations of contemporary society rather than remain forever in thrall of "the clanking of mediaeval chains" of the common law.

Electoral Law, the Constitution and Democracy in Zimbabwe: A critique of *Jealousy Mbwire v Robert Mugabe N.O and 4 Others CCZ 1/13*.

Gift Manyatera* and Chengetai Hamadziripi.**

1.1 Introduction

The Zimbabwean elections held on the 31st of July 2013 were a direct consequence of the ruling that was handed down by the Constitutional Court in the case of *Jealousy Mbwire v Robert Gabriel Mugabe N.O and 4 Others*.¹ These elections were of great importance in that they marked the end of the Government of National Unity which was constituted under the Global Political Agreement.² Moreover, the 2013 elections marked the beginning of a new constitutional dispensation in Zimbabwe as the elections would see the coming into operation of most of the provisions of the new 2013 Constitution.³

The resolution of electoral disputes using the courts is a prominent feature in modern constitutional democracies, particularly those in Africa. The twenty first century has thus witnessed the increased 'judicialization of politics' with questions of pure politics including the fairness of electoral processes being referred to the courts for resolution.⁴ It is hardly surprising therefore that the decision by the newly created Constitutional Court on a matter of great significance for the democratic processes in Zimbabwe would not escape intense scrutiny. Having undergone more than a decade of political turmoil, hopes were high that the 2013 elections would bring stability in governance structures through credible and transparent elections. Clearly, the Constitutional Court was seized with an important matter which, it could be argued, had the potential of deciding the future of democratic processes and institutions in

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² This was a political agreement between the major political parties in Zimbabwe; the Zimbabwe African National Union Patriotic Front (ZANU PF) and the two major factions of the Movement for Democratic Change (MDC) to come together to form a transitional government of unity to tackle the challenges which Zimbabwe faced in 2008.

³ Amendment Number 20, Act of 2013.

⁴ R. Hirschl, 'The judicialization of Politics' in K Whittington et al (e.d), *The Oxford Handbook of Law and Politics*, Oxford, (2008) p. 119.

the country. In itself however, the exercise of constitutional interpretation is very delicate as more often than not, the final determination has a bearing on political disputes and matters of government. It is imperative that the Court be seen to be following laid down principles of interpretation as its judgments are susceptible to scrutiny and possible critique. This case note interrogates the difficulties which the Constitutional Court encountered in its quest to derogate from the laid down canons of constitutional interpretation.

1.2 Factual background of the case

The Applicant was Jealousy Mbwire Mawarire.⁵ The first Respondent was Robert Gabriel Mugabe,⁶ the second Respondent was Morgan Richard Tsvangirai,⁷ the third Respondent was Arthur Gusho Oliver Mutambara,⁸ the fourth Respondent was Welshman Ncube,⁹ and the fifth Respondent was the Attorney-General.¹⁰ The Applicant brought this application before the court under section 24(1) of the Lancaster House Constitution¹¹ on the basis that his rights enshrined in section 18(1) and 18 (1) (a) of the former Constitution had been contravened. Section 18(1) provided that every person was entitled to protection of the law. Section 18(1) (a) of the Constitution further provided that every public officer had a duty towards every person in Zimbabwe to exercise his or her functions as a public officer in accordance with the law and to observe and uphold the rule of law.

The Applicant contended that the failure by the first Respondent to set a date for elections when the life of Parliament was coming to an end violated his right as a registered voter and his legitimate expectation to protection of the law. It was common cause that the Parliament of

⁵ A citizen of Zimbabwe, a registered voter and the founding trustee for the Center for Elections and Democracy in Southern Africa.

⁶ He was cited in his official capacity as the President of Zimbabwe and as a signatory to the Global Political Agreement (GPA), representing his party, the Zimbabwe African National Union Patriotic Front (ZANU-PF).

⁷ He was cited in his capacity as the Prime Minister of Zimbabwe, and also as a signatory to the GPA, representing his party, the Movement for Democratic Change (MDC).

⁸ He was cited in his capacity as the Deputy Prime Minister of Zimbabwe and also due to the fact that he was a signatory to the GPA.

⁹ He was Minister in Government and was cited in his capacity as the representative of the other formation of the MDC which was a party to the GPA.

¹⁰ He was cited in his capacity as the principal legal advisor to the Government.

¹¹ Lancaster House constitution 1979, which was replaced by the coming into law of a new Constitution, Amendment 20, Act of 2013, on the 22 May 2013. However, it was not replaced in its entirety; the sixth schedule of the new Constitution provided for the repealing of the former Constitution and for the implementation of the new Constitution.

Zimbabwe would stand dissolved by the effluxion of time on the 29th of June 2013. However, when the Applicant brought his application to court, the President had not set a date for elections. The Applicant contended that a reading of the relevant constitutional provisions¹² showed that the President had to call for elections within the life of Parliament.

The issue before the court was a relatively simple one, and the court phrased is as follows, “when after the accepted dissolution of Parliament by the effluxion of time in terms of the Constitution should harmonised elections be held?”¹³ However, this simple question generated different arguments from the parties to the application. The second and the fourth Respondent were of the view that the former Constitution granted discretion to the President to call for elections on any date up to four months **after** the dissolution of Parliament. On the contrary, the Applicant and the first Respondent were of the view that elections should be held **within** four months **before** the life of Parliament comes to an end.¹⁴

1.3 Assessment of the majority judgment

The task before the Constitutional Court boiled down to that of constitutional interpretation. The court had to interpret section 58 (1) as read with section 63(4) and (7) of the former Constitution to determine when elections were due to be held. Section 58 (1) of the former Constitution dealt with the timing of elections and the fixing of dates for elections by proclamation. It provided that;

"(1) *A general election and elections for members of governing bodies of local authorities shall be held on such day or days within a period not exceeding four months after the issue of a proclamation dissolving Parliament under section 63(7) or, as the case may be, the dissolution of Parliament under section 63(4) as the President may, by proclamation in the Gazette, fix.*"

Chidyausiku CJ writing for the majority, came to the conclusion that a reading of section 58(1) produced two possible interpretations, that is, reading A and reading B.

In terms of Reading A

¹² Section 58(1) as read with section 63(4) and (7) of the former Constitution.

¹³ Jealousy Mawarire case *op cit* note 1 at p. 8.

¹⁴ *Ibid* p. 11.

“(1) A general election and elections for members of the governing bodies of local authorities shall be held on:

- i. such day or days within a period not exceeding four months after the issue of a proclamation dissolving Parliament under section 63(7) or
- ii. as the case may be, the dissolution of Parliament under section 63(4) as the President may, by proclamation in the *Gazette*, fix.”¹⁵

In terms of Reading B

“(1) A general election and elections for members of the governing bodies of local authorities shall be held on such day or days within a period not exceeding four months after:

- i. the issue of a proclamation dissolving Parliament under section 63(7) or,
- ii. as the case may be, the dissolution of Parliament under section 63(4) as the President may, by proclamation in the *Gazette*, fix.”¹⁶

In construing section 58(1) in line with reading A, elections had to be held within the life of Parliament. In contrast, construing section 58(1) in line with reading B meant that, elections could be held up to four months after the dissolution of Parliament. The court held that a reading of section 58(1) in line with reading B produced results which were absurd in that the framers of the constitution could not have intended general elections to be held outside the life of Parliament as this violated the separation of powers principle. In the face of two competing interpretations, the court favoured the interpretation which in its view did not produce absurd results.

One can argue that the words of section 58(1) were clear and unambiguous in their wording and only pointed to one meaning. The breakdown of section 58 (1) which was done in an effort to decipher its meaning had consequently produced an ambiguous and vague meaning. Malaba DCJ observed that the wording of section 58 (1) points to nothing more other than the plain and

¹⁵ *Ibid* p. 10.

¹⁶ *Ibid* p. 11.

unambiguous meaning.¹⁷ Patel AJA was also of the view that section 58 (1) of the Constitution pointed to noting more than the plain and ordinary meaning of the words.¹⁸ The plain and ordinary meaning of the words in section 58(1) pointed to fact that the President can call for elections on any date he may choose within four months after the dissolution of Parliament by the effluxion of time.

It has been argued that the interpretation exercise that was carried out by the learned Chief Justice violated the basic rules of grammar.¹⁹ Matyszak argues that ‘He(Chidyausiku CJ) inserted colons into the section (where none existed in the original) ostensibly to highlight what he claimed was the ambiguous nature of the provision, but in fact creating an ambiguity that did not exist before.’²⁰

The principles of constitutional interpretation have been clearly expounded by the courts. For instance, in the case of *Hewlett v. Minister of Finance*²¹ Fieldsend CJ held that;

‘...In general the principles governing the interpretation of a Constitution are basically no different from those governing the interpretation of any other legislation. It is necessary to look at the words used and to deduce from them what any particular phrase or words means having regard to the overall context in which it appears.’

This entails that when interpreting constitutional provisions, due regard has to be made to the words used and the meaning of the words in the overall context of the provisions. The grammatical rules of language must also be respected.²²

In the case of *Minister of Home Affairs (Bermuda) and Another v. Fisher and Another*,²³ the court observed that a constitution ought to be treated ‘as *sui generis*, calling for principles of its

¹⁷ *Ibid* p. 28. Malaba CJ commented “The Applicant has turned the clear and unambiguous language of the provisions into a subject-matter of a question of interpretation which has unfortunately plunged the court into irreconcilable differences of opinion.”

¹⁸ *Ibid* p. 47.

¹⁹ D. Matyszak, ‘“New Bottles- Old Wine”- An Analysis of the Constitutional Court Judgment on Election Dates’ (2013) *Research and Advocacy Unit* p. 2.

²⁰ *Ibid* p. 2. See also *Jealousy Mawarire case op cit* note 1 at p. 48, where Patel AJA argues that, ‘In my respectful view, dividing s 58(1) in this fashion detracts from its grammatical structure and leads to an inchoate rendition of the provision.’

²¹ 1981 ZLR 571.

²² G.M. Cockram ‘*Interpretation of Statutes*’ 3rd ed, Capetown, Juta & Co Ltd (1991) p. 36. See also the case of *Volschenk v Volschenk* 1946 TPD 487.

own, suitable to its character' The moot point is to determine the principles of constitutional interpretation which are in tandem with the *sui generis* nature of a constitution. It has been argued that the art of constitutional interpretation is no different from the art of construing a statute.²⁴ The modern trend in construing constitutional provisions supports a purposive approach over a strict adherence to a literalist approach.²⁵ However, in adopting a purposive approach, can the court disregard the plain and ordinary meaning of words?

In the case of *State v Zuma*²⁶ Kentridge JA stated as follows;

“While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument. I am well aware of the fallacy of supposing that general language must have a single ‘objective’ meaning. Nor is it easy to avoid the influence of one’s personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean . . . If the language used by the lawgiver is ignored in favour of a general resort to values, the result is not interpretation but divination.”

A purposive approach to constitutional interpretation is progressive but such construction must be supported by the language of the provision. A purposive approach cannot be implemented in disregard of the plain and unequivocal language of a provision. Invariably, a purposive approach ‘does not mean that judges are entitled to ignore the text of the constitution and invent an interpretation of the relevant provision that facilitates preferable moral consequences, but rather that judges may interpret the text in the light of the fundamental values that it is designed to protect.’²⁷ This recognises the duty of fidelity which is upon judges which imposes a constraint

²³ [1979] 3 ALL ER 21 (PC).

²⁴ L. Madhuku, ‘Constitutional Interpretation and the Supreme Court as a Political Actor: Some Comments on *United Parties v Minister of Justice, Legal and Parliamentary affairs*,’ (1998) Vol. 10:1, *Legal Forum*, p. 51.

“the purposive approach which is urged in constitutional interpretation is no different from the well known ‘golden’ and rules ‘mischief’ rules...the court must take us through the language of the relevant provision and show the manner in which that language supports the purposive meaning being decided upon.”

²⁵ *Ibid* p. 50. See also G. Carpenter, ‘Constitutional interpretation by the existing judiciary in South Africa- Can new wine be successfully decanted into old bottles?’ (1995) XXVIII *CILSA* 1995 p323-337; H. Botha, ‘Ablie and the politics of interpretation’ (2010) 25 *SAPL* p. 39-58; C. M. Fombad, ‘Constitutional Reforms and constitutionalism in Africa: Reflections on some current challenges and future prospects’ August (2011) *Buffalo Law Review* p.1007-1108.

²⁶ 1995 4 BCLR 401 (CC) 17-18.

²⁷ P. Lenta, ‘Constitutional Interpretation and the rule of law’ (2005) 2 *Stellenbosch law Review* p. 274.

upon interpretation.²⁸ The duty of fidelity entails that judges, in interpreting the constitution, should have due regard to the language of the constitutional provisions and place a construction upon the words which can be sustained by the language of the text. They cannot disregard the plain language of the text and place a meaning which gives an outcome favoured by the interpreter.

The same view was adopted in the Zimbabwean case of *Mike Campbell (Pvt) Limited and Another v The Minister of National Security Responsible for Land, Land Reform and Resettlement and Another*.²⁹ The Applicants in this case argued that Constitution of Zimbabwe Amendment (No. 17) Act, 2005³⁰ was unconstitutional on the grounds that it violated the Applicants' right to protection of the law and the right to a fair hearing within a reasonable time. Amendment number 17 to the Constitution introduced an ouster clause which precluded the courts from determining any challenge to the acquisition of land by the government carried out in terms of Section 16B of the Constitution. Applicant contended that the legislature had no power to take away the right of access to the court as this would undermine the balance of powers of the state between the legislature and judiciary. The court held that it was a valid exercise of legislative power. Further, it was held that the clear words of a constitution must be construed to override any doctrine of constitutionalism predicated on essential features or core values.³¹

The canons of statutory interpretation dictate that the Court should first start by interpreting the constitution as written by the framers (the plain meaning approach) and only resort to the other interpretive paradigms where the plain meaning approach fails due to ambiguity or absurdity.³² In light of the above, one can argue that in the *Mawarire case* a reading of section 58 (1) was plain and unambiguous in its meaning, hence the Court should have given effect to the words as there was no need to resort to a teleological approach.

²⁸ See L. Lessig, 'Fidelity and Constraint' (1997) Vol 65:4 *Fordham Law Review* 1365-1433 and R. Dworkin 'The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe and Nerve' (1997) Vol 65:4 *Fordham Law Review* 1249-1268.

²⁹ SC 49/07.

³⁰ Act NO. 5 of 2005.

³¹ Mike Campbell case *op cit* note 29 at p. 33-35.

³² S.K. Asare, 'Plain meaning v Purposive interpretation: Ghana's constitutional jurisprudence at a crossroad.' June (2006) *University of Botswana law Journal* p. 93.

An analysis of the constitutional jurisprudence of the Supreme Court³³ shows that the approach that the court has taken in constitutional interpretation has been inconsistent.³⁴ Some cases have been decided on a purely literalist approach whereas other cases have been decided on very broad principles of interpretation. Such an approach to constitutional interpretation is undesirable as it creates the perception that the Supreme Court favours the interpretative approach which gives effect to the results it wishes to achieve.³⁵ The selective application of different methods of interpretation has been attributed to the courts trying to adopt the interpretative approach that does not conflict with the executive arm of the government.³⁶ Prior to this application being brought before the court, the first Respondent wanted to have elections set on an earlier date, whereas the second Respondent was calling for elections to be set at a later date in order implement electoral reforms that were necessitated by the new constitutional dispensation.³⁷

In holding that section 58 (1) intended elections to be held within the life of Parliament, the majority's reasoning was that this interpretation favoured constitutionalism as there would be no violation of the doctrine of separation of powers. One is persuaded to agree with the dissenting judgments for a number of reasons. Firstly, holding elections outside the life of Parliament is not absurd or 'mind boggling' as many other constitutional democracies in the world also allow for Parliamentary or general elections to be held outside the life of Parliament. Malaba DCJ in his dissenting judgment highlights many examples of countries that have such a practice.³⁸ This

³³ Supreme Court dealt with matters of a constitutional nature in the old constitutional dispensation. In the new constitutional dispensation, it is the Constitutional Court that has the final decision on matters of a constitutional nature.

³⁴ Cases decided on a purely literalist approach: - *Davies and Another v Minister of lands, Agriculture and Water Development* 1996(1) ZLR 681; *Nyambirai v National Social Security Authority and Another* 1995 (2) ZLR 1 (S); *Public Service Commission, Austin and Another v Chairman, Detainees Review Tribunal and Another* 1988 (2) ZLR 21; *Hewlett v Minister of Finance* 1981 ZLR 571; *Mike Campbell (Pvt) Limited and another v. The Minister of National Security Responsible for Land, Land Reform and Resettlement and Another* SC 49/07.

On the other hand, cases decided on a purposive approach *Rattigan and Others v Chief Immigration Officer and others* 1994 (2) ZLR 54; *Woods and Others v Minister of Justice and Others* 1994 (2) ZLR 196; *In Re Mlambo* 1991(2)ZLR 339; *Conjwayo v Minister of Justice, Legal and Parliamentary Affairs* 1991(1) ZLR 105; *S v Ncube and others* 1987 (2) ZLR 246.

³⁵ L. Madhuku *op cit* note 24 at p. 52. He argues that a court which is inconsistent in the manner in which it approaches the task of constitutional interpretation risks being portrayed as playing pure politics.

³⁶ *Ibid* p. 51.

³⁷ D. Matyszak *op cit* note 19 at p. 2.

³⁸ Jealousy Mawarire case *op cit* note 1 at p. 39- 40. The Malaysian Constitution Section 55(4) provides that general elections shall be held within sixty days from the date of dissolution of Parliament; the case

clearly illustrates that no absurdity would have resulted from giving effect to the ordinary, grammatical meaning of section 58 (1), which allowed for elections to be held within four months outside the life of Parliament.

Secondly, there have been instances where the executive and judicial arms have operated without legislative oversight. In 2008, the executive arm continued to function without legislative oversight for five months between the dissolution of Parliament for the March 2008 election and the start of the seventh Parliament in 2008.³⁹ Hence, such a situation would not have been against Zimbabwean constitutional practice.

Thirdly, the majority did not take into account various other factors which would lead to a violation of separation of powers and a situation of rule by decree. The elections which were in dispute here were the 'first elections' as defined in the sixth schedule of the new Constitution.⁴⁰ The new Constitution provided that these first elections had to be conducted in terms of an electoral law which was in conformity with the provisions and standards laid down in the new Constitution.⁴¹ This entailed that major reforms needed to be carried out to the electoral law to bring it in conformity with the standards laid down in the new Constitution. However, the time limit that was imposed by the Supreme Court did not leave enough time to allow these reforms to be passed through Parliament and passed into law. This resulted in the President using his powers in terms of the Presidential Measures (Temporary Powers) Act⁴² to pass the necessary

of Kenya where section 9 the Sixth Schedule of their New Constitution provided that "the elections for the President, the national Assembly and Senate shall be held within sixty days after dissolution of the National Assembly at the end of its term"; Article 16.3 of the Constitution of Ireland provides that after dissolution of the Parliament a general election for members of Parliament shall take place not later than thirty days after the dissolution; Article 15(2) of the Constitution of Andorra provides that the President has the power to choose a date of an election to fall between the thirtieth and fortieth day following the end of the term of Parliament; Article 64.3 of the Constitution of Bulgaria provides that the date for an election shall fall within two months from the expiry of the life of Parliament; Article 73(1) of the Constitution of Croatia provides that elections for members of the Croatian Parliament shall be held not later than sixty days after the expiry of the mandate or dissolution of the Croatian Parliament.

³⁹ D. Matyszak *op cit* note 19 at p. 3.

⁴⁰ Section 1 of the sixth schedule of the new Constitution.

⁴¹ Section 8, sixth schedule of the Constitution, Amendment No. 20, Act of 2013.

⁴² Chapter 10:20.

changes into law.⁴³ This was an outright usurpation of legislative functions and thus a violation of the separation of powers principle.

Constitutionalism is a multi-faceted concept. Needless to say, free, fair and democratic elections are also important in upholding constitutionalism, good governance and accountability.⁴⁴ The electoral process and the electoral laws must facilitate electoral democracy so as to minimize electoral fraud among other electoral irregularities.⁴⁵ The *Mawarire* judgment resulted in a rushed electoral process which exposed these elections to irregularities. Although the July 2013 elections were approved by the Southern African Development Community (SADC) and the African Union (AU), there have been various allegations of electoral irregularities.⁴⁶ Invariably, a literal reading of section 58 (1) of the former Constitution would have allowed enough time to make changes to the electoral law and enough time to adequately prepare for elections.

Fourthly, the court overlooked the fact that the President had discretionary powers which were granted to him by section 58(1) of the former Constitution.⁴⁷ The vesting of discretion to the President gave him power to set dates for elections anytime within the time limits provided by section 58(1). Clearly, the canons of constitutional interpretation do not support the majority decision to order the President to set a date for elections.⁴⁸

1.4 Conclusion

The language of the section 58(1) as read with section 63(4) and (7) of the former Constitution was clear and unambiguous in its meaning. A literal reading of section 58 (1) of the Lancaster House Constitution shows that the President had the discretionary power to set a date for

⁴³ Mugabe gets away with amendments by decree *Zimbabwe Independent* (28 June, 2013) available at <http://www.theindependent.co.zw/2013/06/28/mugabe-gets-away-with-amendments-by-decree/> accessed 5/11/2013 at 15.15hrs.

⁴⁴ C.M. Fombad *op cit* note 25 at p. 1106.

⁴⁵ *Ibid* p. 1021. Fombad maintains that a common strategy has been for the ruling parties to tailor electoral codes and procedures to favor them and exclude their competitors from the race, hence the importance to ensure that electoral laws and processes are fair and facilitate a democratic electoral process.

⁴⁶ See 'Zimbabwe's election results marred by fraud' available at <http://www.sokwanele.com/zimbabwe-elections/evidence-of-fraud>. (Accessed 2/12/13 at 1428hrs).

⁴⁷ Words such as '...such days or days...as the president may, by proclamation in the Gazette fix' point to the discretionary power that was given to the President in setting the dates for elections.

⁴⁸ See *Mukwereza v Minister of Home Affairs* SC-7-04.

elections up to four months after the dissolution of Parliament. Moreover, an analysis of the constitutional practice in other constitutional democracies points to the same conclusion. Credible elections are important in a democratic country as they lend legitimacy to the government that is in power at the end of the day. The calling of elections is essentially the prerogative of the executive and the executive must take into account many considerations such as the prevailing socio, economic and political factors in setting a date for elections.

In order to enhance the prospects for free and credible elections in Africa, it is imperative that the courts abide by the long established canons of constitutional interpretation. Where the language of a statute is clear and unambiguous, the court must give effect to the commands of such language. Departure from the plain and ordinary meaning of the words of a provision is permissible only where sticking to the plain and ordinary meaning would result in an absurdity. The judiciary must be the vanguard of democracy and must be seen to be upholding the rule of law and constitutionalism. It is constitutionally unacceptable for the judiciary to go beyond the limits of judicial activism. The *Mawarire* case has once again highlighted the importance of the judiciary in shaping the democratic systems in emerging democracies in Africa. It is critical for the judiciary to appreciate the importance of fair and justified decision making, particularly in highly contested cases that define important political and democratic processes in the country.

Fick & Others v the Republic of Zimbabwe: A national court finally enforces the judgment of the SADC Tribunal as a foreign judgment – a commentary on implications on SADC Community Law

Tarisai Mutangi*

1. Introduction

The SADC Tribunal, notwithstanding its hibernation status as it currently goes through a legislative review, continues to somehow remain the subject of discussions in various fora including national judiciaries. This commentary is predicated upon two national courts judgments rendered in two different countries but largely emanating from the on-going ramifications of the judgment in *Mike Campbell & Ors v Government of Zimbabwe & Ors*.¹ On 29 January 2009, the High Court of Zimbabwe (herein Harare High Court) dismissed an application for the registration of the *Campbell* judgment for purposes of recognition and enforcement in the case of *Gramara (Pvt) Limited & ors v Government of Zimbabwe and Ors*.² Four years later, in the case of *Republic of Zimbabwe & Another vs Fick & Others*,³ the Constitutional Court of South Africa (herein CCSA) granted leave to appeal, but on the merits dismissed the appeal by Zimbabwe against the decision of the Supreme Court of Appeal⁴ of South Africa (herein SCASA) confirming the dismissal of an application for rescission of judgment by the Northern Gauteng High Court sitting at Pretoria.⁵ The decision Zimbabwe sought to be rescinded was an order granting the recognition and registration of the costs order rendered by the SADC Tribunal in the *Campbell* case.

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¹ SADC (T) 002/2008. Judgment available at: <http://www.sadc-tribunal.org/?cases=mike-campbell-pvt-Ltd-and-another-v-the-republic-of-zimbabwe-3> (accessed on 21 June 2014).

² HH 169/2009. Available at: <http://www.zimlil.org/zw/judgment/harare-high-court/2009/50> (accessed on 21 June 2014).

³ (CCT 101/12) [2013] ZACC 22; 2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC) (27 June 2013).

⁴ *Government of the Republic of Zimbabwe v Fick and Others* [2012] ZASCA 122.

⁵ *Fick and Others v Government of the Republic of Zimbabwe*, Case No 77880/2009, North Gauteng High Court, Pretoria, 13 January 2010, unreported.

This treatise is a short commentary in respect of a number of aspects dealt with by the two courts while presiding over the applications or motions. The two judgments certainly have implications in the SADC region regarding the future enforcement of decisions of the SADC Tribunal once it resumes operations.⁶ The commentary is important as it deals with implications of the two judgments that go beyond the SADC Tribunal, but in respect of recognition of judgments of international tribunals in South Africa and Zimbabwe, whether or not the ‘foreign’ decisions sound in money.

2.1 The Facts and Initial Proceedings

Full accounts of the facts can be found in the respective judgments. Suffice to state briefly that following the rendering of the *Campbell* decision by the SADC Tribunal in 2008, non-compliance with the order resulted in further proceedings where the applicants approached the SADC Tribunal for recourse.⁷ Thereafter, the SADC Tribunal referred Zimbabwe’s non-compliance to the SADC Summit for ‘appropriate action’ in terms of Article 32 of the SADC Treaty/Protocol on the SADC Tribunal and Rules of Procedure Thereof (herein Protocol on the SADC Tribunal).⁸

In the *Gramara* case, two of the applicants in the *Campbell* judgment approached the Zimbabwe High Court in Harare seeking to register a non-monetary order for recognition for purposes of enforcement of the *Campbell* order to the extent that that order in part sanctioned Zimbabwe not to expropriate these applicants’ farms. The application was based both on legislation, namely, the Civil Matters (Mutual Assistance) Act,⁹ as well as applicable common law principles. The application was dismissed on grounds and reasons to be discussed below.

On their part, the South African proceedings were initiated in 2009 in the Pretoria High Court, where some of the applicants in the *Campbell* decision sought to enforce the costs order.

⁶ Although the new-looking SADC tribunal must be divested with human rights competence per se, the author is reliably informed that the manner of execution of its judgments is not a contested issue hence the relevance of this commentary even after the on-going legislative review process.

⁷ Louis Karel Fick & Others v Zimbabwe Case No. SADC T 01/2010. Judgment available <http://www.sadc-tribunal.org/?cases=louis-karel-fick-others-v-the-republic-of-zimbabwe> (accessed 21 June 2014).

⁸ It is common cause that the refusal by Zimbabwe to comply with the SADC Tribunal decision was premised on the official position the SADC Protocol had not been ratified by Zimbabwe and not come into force in respect of Zimbabwe. For instance ‘SADC Tribunal not a court’ *New Zimbabwe* 22 September 2009 available at: <http://www.newzimbabwe.com/news-1023Tribunal%20a%20bush%20court%20Chinamasa/news.aspx> (accessed on 14 May 2014)

⁹ [Chapter 8:02].

Zimbabwe boycotted those proceedings relying primarily on the perceived immunity of sovereign states from lawsuits instituted in national courts.¹⁰ However, once the Pretoria High Court registered the costs order and the applicants sought to execute Zimbabwe's immovable property situated in South Africa, Zimbabwe interrupted its boycott by seeking the rescission of that judgment. The application for rescission of judgment was dismissed by the Pretoria High Court, Zimbabwe appealed to the SCASA. The appeal was dismissed.¹¹ Then Zimbabwe appealed against the refusal to rescind the judgment. The appeal was filed in the CCSA. Leave to appeal was granted as the matter was deemed to raise constitutional issues and interests of justice required it.¹²

2.2 The Issues and Legal Bases

The Harare High Court phrased its issues as follows:

The first is whether the SADC Tribunal was endowed with the requisite jurisdictional competence in the case before it. The second is whether the recognition and enforcement of the Tribunal's decision in that case would be contrary to public policy in Zimbabwe.¹³

On its part, the CCSA's main issue coupled with several sub issues was 'whether South African courts have the jurisdiction to register and thus facilitate the enforcement of the costs order made by the Tribunal against Zimbabwe'.¹⁴

Although issues were phrased and approached differently in the two proceedings, the contentions boiled down to the question of whether or not the judgment of the SADC Tribunal could be regarded as a foreign judgment for purposes of registration (recognition) and enforcement. As earlier stated, the aspect of the *Campbell* decision in the Zimbabwe proceedings was not monetary (interdict) while the costs order of the same decision in the

¹⁰ This strain of sovereign immunity of states from lawsuits instituted in national courts is well established in the domain of public international law. The origin of this doctrine was based on absolute immunity, where in no circumstances a foreign state would be subject to jurisdiction of national courts for any acts. However, as a result of the ever-transforming place of states in society,

¹¹ *Government of the Republic of Zimbabwe v Fick and Others* [2012] ZASCA 122.

¹² The dissenting judgment of Justice Jafta argued that it was not in the interests of justice to grant leave to appeal. Also the prospects of success were not addressed in the application for leave to appeal hence the application was, in the opinion of the judge, fatally defective.

¹³ *Gramara* Judgment, page 8.

¹⁴ *Fick* Judgment, para 23.

South African proceedings was purely monetary (order for costs). Central to the determination in both cases was whether national courts are required to recognise judgments of the SADC Tribunal as 'foreign' judgments.

In both proceedings, reliance was placed, correctly so, on the provisions of Article 32(5) of the Protocol on the SADC Tribunal, which provides that SADC Tribunal decisions are enforced by adopting the procedure used to enforce foreign judgments in SADC member states.¹⁵ Both countries have a clear procedure as they share the same common law traditions in the Roman-Dutch law. Over and above applicable common law principles, South Africa enacted the Enforcement of Foreign Civil Judgments Act,¹⁶ which serves to regulate the registration of foreign judgments by prescribing the salient factors a local court must take into account when presiding over a request for registration. In both proceedings, common law principles and legislation were relied on by the applicants. In other words, the legal bases conferred upon the respective applicants the standing to seek the registration of a part of the *Campbell* decision as well as vesting the national courts with competence to preside over such motions.

The only remarkable difference in these proceedings was the fact that in Zimbabwe, the international judgment was sought to be registered in the territory of and against the State which lost the lawsuit at the international level. In contrast, in South Africa, the international judgment was sought to be registered against a foreign sovereign state in the territory of another state. While the legal and political implications of the first scenario were unusual, the added twist in the South Africa scenario had a bearing on diplomatic relations between the two SADC member states.

In fact this was not the first time a South African court made a ruling with political implications on Zimbabwean territory. In 2013, a South African High Court ruled that failure and or delay by South African criminal investigation institutions, including the National Prosecuting Authority of South Africa, regarding war crimes and crimes against humanity perpetrated by Zimbabwe state security agents on members of the opposing political parties violated South Africa's

¹⁵ Article 32(1) provides that;

'The law and rules of civil procedure for the registration and enforcement of foreign judgments in force in the territory of the State in which the judgment is to be enforced shall govern enforcement'.

¹⁶ Act No. 32 of 1988.

international law obligations including those arising from the Rome Statute.¹⁷ As expected, this ruling did not go well with Zimbabwean authorities who made enraged public utterances as Zimbabwean army generals faced arrest upon entering South African territory.¹⁸

2.3 Consensus on the Binding Nature of the SADC Tribunal Decisions

In both proceedings, the courts set the scene by first dealing with the issue as to whether or not the Protocol had come into force under SADC Community Law well before delving into salient factors that regulate motions for the registration of a foreign judgment for purposes of recognition and enforcement. This was inevitable as the pedigree of a foreign judgment invariably depends on the status of the court that rendered it. As will be discussed below, once a foreign court has legitimacy issues, this avails all manner of arsenal to the defendant in opposing the registration of such a judgment. With relative ease, both national courts held that the SADC Tribunal Protocol had already come into force in 2001 contrary to Zimbabwe's persistent claims that it did not. The legal reasoning upon which this conclusion is based is very critical as it will dispel any future attempts to undermine the work of the Tribunal based on patently frivolous attacks on its legitimacy.

At the core of the dispute regarding the legitimacy of the SADC Tribunal was the allegation by Zimbabwe in both proceedings that the SADC Tribunal Protocol never came into force as it failed to amass the required two-thirds ratifications in terms of Article 38 of that Protocol. Both courts arrived at the same conclusion, albeit correct, that once Article 16(2) of the SADC Treaty was amended by Summit by way of the Agreement Amending the Treaty of the Southern Africa Development Community (herein Amending Agreement), the 'Protocol of the Tribunal constituted an integral part of the Treaty and became binding on all Member States without the need for its further ratification by them'.¹⁹ The amendment rendered the dictates of Article 38 redundant.

¹⁷ Statute of the International Criminal Court, Document No. A/CONF.183/9 of 17 July 1998 and corrected by process-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002. Available at http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf (accessed on 21 June 2014).

¹⁸ SA-ZIM at war over generals 29 November 2013 Newsday available at: <https://www.newsday.co.zw/2013/11/29/sa-zim-war-generals/> (accessed 15 May 2014).

¹⁹ *Gramara* Judgment, page 12.

The Amendment Agreement would only take effect upon adoption by two-thirds majority, which milestone according to Justice Patel,²⁰ was attained when '13 out of the 14 Heads of State or Government of the Member States, including Zimbabwe' ratified the Amendment.²¹ With a little variation in statistics, the CCSA held that the two-thirds majority was achieved when the Amendment 'was signed by 14 Heads of State or Government including Zimbabwe and South Africa'.²²

As a matter of fact 13 member states signed the Amendment Agreement in Malawi in 2001 thereby causing it to enter into force binding even those other states that did not sign the Amendment on account of the two-thirds majority requirement.²³ Angola is the only member state that did not append its signature on the day of its adoption probably as a result of non-attendance rather than dissent.

This finding by both courts laid to rest any potential protestations to the legitimacy of the SADC Tribunal. The pronouncement also rendered irrelevant all sorts of arguments mobilised to contest Zimbabwe's insistence that she is not bound by the SADC Tribunal Protocol. Such arguments included the 'acquiescence theory' to the effect that notwithstanding Zimbabwe's refusal to recognise the SADC Tribunal, by seconding a national judge to sit in that Tribunal, Zimbabwe had confirmed its recognition of the Tribunal, hence she is estopped from renegeing from that state of affairs. Therefore, the finding that Zimbabwe is bound by the SADC Tribunal Protocol following the amendment to the SADC Treaty, read together with the provisions of the Article 32(1) of the Protocol, boils down to confirming the binding nature of Tribunal decisions against SADC member states.

2.4 Legal Principles Relevant to the Registration of Foreign Judgments for Purposes of Recognition and Enforcement

It followed without saying that both courts had to deal with factors in domestic law that tend to confront foreign judgments whenever a motion for registration of same has been filed with the

²⁰ Justice Bharat Patel is a former Attorney-General of Zimbabwe who took office between May and December 2008 following the removal of Sobusa Gula-Ndebele in December 2007.

²¹ *Gramara* Judgment, page 12.

²² *Fick* Judgment, paragraph 11.

²³ See the signed copy available at: <http://sadc-tribunal.org/wpcontent/uploads/2013/03/AgreementAmendingTreaty.pdf> (accessed 15 May 2014).

relevant court. As already stated, these factors are located both in legislation and common law. Zimbabwe and South Africa share the same common law – Roman – Dutch law, although the respective legislation dealing with registration of foreign judgments is not necessarily identical.

In summary, these factors are that the foreign judgment must be final and sound in money, it must have been rendered by a foreign court with jurisdiction or competence to render same. The defendant against whom enforcement is being sought ought to have been given an opportunity to defend same, the judgment ought not to have been obtained through fraud, the judgment must not seek to enforce a penal law, and lastly, registration must not be against public policy that prevails in the territory where the registering court is situated.

It is important to note that the Harare High Court, though it made passing remarks on other factors, restricted itself to two issues (factors), namely, the jurisdictional competence of the SADC Tribunal and the public policy factor. On its part the CCSA dealt with all the factors as will be discussed below.

2.4.1 SADC Tribunal as a ‘foreign court’

When dealing with this aspect, both the Harare High Court and CCSA had no difficulty in interpreting the provisions of Article 32(1) of the Protocol. They both came to the conclusion that Zimbabwe and South Africa are parties to the Protocol, which, in terms of this provision, enjoins SADC member states to facilitate the enforcement of the Tribunal’s decisions by adopting the foreign judgments (recognition and enforcement) procedure. Effectively, the provision installed the Tribunal as a ‘foreign court’ for purposes of enforcing its decisions in SADC member states.

On this aspect, the Harare High Court sought to rely on the Civil Matters (Mutual Assistance) Act.²⁴ This piece of legislation is unique in the SADC region in that it designates international judicial and quasi-judicial institutions established under the United Nations and other political gatherings as ‘foreign courts’. The designation of international courts as foreign courts is very important in that such a legislative move would see decisions of other courts such as the African Court on Human and Peoples’ Rights (herein African Court) being enforced by way of the same procedure notwithstanding the absence under the African Court legal framework, of a provision

²⁴ [Chapter 8:02].

similar to Article 32(1) of the Protocol. This development would assist in expanding options for the enforcement of international human rights decisions/judgments.

However, the SADC Tribunal was not designated in that Act, and accordingly its decisions could not benefit from this statute for purposes of recognition. It is pleasing to note that the Harare High Court did not end there, but turned to common law after concluding that the statute does not preclude reliance on the common law where the statute has been found wanting.

The CCSA also relied on local legislation that regulates registration of foreign judgments, namely, the Enforcement Act. Coincidentally the SADC Tribunal was not designated as a foreign court in terms of Section 3(2) of that Act. The Court also declined the application of the Enforcement Act to the matter on account of the fact that the Act applied to the Magistrates' Court only. Just like the Harare High Court, the CCSA resorted to common law principles.

It is important to comment on the recurring issue of designation of foreign courts as a requirement of the recognition of foreign judgments. The attitude of the courts in both proceedings lead to the inevitable conclusion that SADC member states that perpetuate the 'designation approach' must ensure that their respective laws have been amended in order to specifically designate the SADC Tribunal as an international court. This is not window dressing. The designation of the SADC Tribunal (and other international courts and quasi-judicial organs) would guarantee compliance of states with Article 32(1) of the Protocol.

2.4.2 Jurisdiction of the SADC tribunal to render the foreign judgment

Zimbabwe's objection to the jurisdiction of the SADC Tribunal rests at the core of both proceedings. In fact this attitude goes back to the proceedings before the SADC Tribunal itself. However, as will be discussed below, the issue of jurisdiction took a number of dimensions. On one hand was the contention that the SADC Tribunal had no jurisdiction over Zimbabwe (jurisdiction *personae*) on account of the flawed argument that the Protocol had not come into force in general and in respect of Zimbabwe in particular. On the other hand, Zimbabwe contested the Tribunal's competence to preside over human rights-related disputes (jurisdiction *materiae*).

The common law regulating enforcement of foreign judgments requires that the foreign court have jurisdiction.²⁵ Zimbabwe, before the Harare High Court only raised the objection that the Tribunal had no jurisdiction over Zimbabwe on allegations that the Protocol never came into force. This objection has already been commented on in this piece. Suffice to state that the Harare High Court goes at length explaining how treaties enter into force in terms of the provisions of the Vienna Convention on the Law of Treaties, and specifically how the Protocol came into force following the amendment to the SADC Treaty. The climax of the reasoning was the Court's scoff at Minister Chinamasa's spirited public denouncing of the SADC Tribunal. The Court held that those '... official pronouncements repudiating the Tribunal's jurisdiction, is essentially erroneous and misconceived'.²⁶

Interestingly, the Harare High Court was very keen to deal with the jurisdiction *materiae* of the SADC Tribunal had it not been that the Respondents had not placed that argument before the Court. Nevertheless, the Court had to express its opinion on the omitted point but declined to make a ruling thereon. In a nutshell, the Harare High Court was so inclined to reject the existence of the competence. The Court held that;

*Despite this broad formulation, I am not entirely persuaded that the general stricture enunciated in Article 4(c) of the Treaty, which requires SADC and the Member States to act in accordance with the principles, inter alia, of "human rights, democracy and the rule of law", suffices to invest the Tribunal with the requisite capacity to entertain and adjudicate alleged violations of human rights which might be committed by Member States against their own nationals.*²⁷

In the CCSA, Zimbabwe raised the same objection to registration of the *Campbell* decision, namely, that the Protocol did not come into force hence not binding on Zimbabwe. The Court took notice of the fact that, in the *Campbell* proceedings, Zimbabwe never challenged the competence of the Tribunal over Zimbabwe on the basis of the alleged non-ratification of the

²⁵ *Jones v Krok* 1995 (1) SA 677 (A); *Purser v Sales*; *Purser and Another v Sales and Another* [2000] ZASCA 46; 2001 (3) SA 445 (SCA) ; North and Fawcett: *Cheshire and North's Private International Law* (13th ed. 2004); Forsyth: *Private International Law* (4th ed. 2003);

²⁶ *Gramara* Judgment paras 12 – 13.

²⁷ *Gramara* Judgment para 44.

Protocol.²⁸ This was taken by the Court as tantamount to submitting to the jurisdiction of the Tribunal.²⁹ As to the validity of Zimbabwe's objection, the Court held that;

The basis for objecting to the jurisdiction of a foreign court or tribunal whose order is sought to be enforced in a South African court must, in my view, be materially similar to the objections previously raised before the foreign court or tribunal that made the order to be enforced. Otherwise the objection should be dismissed.

In essence, by only focussing on jurisdiction *materiae* before the SADC Tribunal, Zimbabwe had acknowledged the competence of the Tribunal per se with objections only targeted to the perceived lack of jurisdiction to preside over human rights-related disputes on account of absence of specific human rights or treaties or protocols in SADC community upon which to form the legal basis.³⁰

In line with the Harare High Court approach, the CCSA had occasion to comment on the jurisdiction *materiae* although not brought before it by the parties. It concluded without hesitation that 'The Tribunal had jurisdiction over all disputes relating to the interpretation and application of the Treaty and over disputes between Member States and natural or legal persons'.³¹ The CCSA went on to hold that even assuming the SADC Tribunal had no human rights-related competence as follows;

'... having otherwise recognised and accepted the Tribunal's jurisdiction but for the alleged absence of standards on human rights or agrarian reform, Zimbabwe did, according to our law, submit to the Tribunal's jurisdiction. Broadly speaking, this meets the first common law jurisdictional requirement.'

The above pronouncement settled the issue regarding the jurisdiction of the SADC Tribunal as both Courts confirmed the legal force of the SADC Tribunal over all member states including Zimbabwe. It is pointless here to comment much about the difference in the Court's finding as to whether or not the SADC Tribunal has a human rights-related jurisdiction as this competence is subject to legislative review which is currently underway.

²⁸ *Fick* Judgment paras 40 – 50, generally.

²⁹ *Fick* Judgment, para 49.

³⁰ *Fick* Judgment paras 44 – 46.

³¹ *Fick* Judgment, para 48.

2.4.3 Finality of the judgment, sounding in money

Whether or not any of the two Courts had to deal with these two issues was determined by the manner in which issues were couched. The monetary character of the judgment is an issue never brought to the attention of the Harare High Court. Nonetheless, the matter presenting itself as highly novel, the Court had to make remarks on this aspect. The Court conceded that principles regulating enforcement of foreign judgments ‘... do not address judgments and rulings with broader proprietary implications and administrative consequences as is the case with the SADC Tribunal decision...’.³² However, for the sake of ‘international comity in a globalised world’ including the recognised competence of the Tribunal in question, there was no basis to deny registration solely on account of the non-monetary nature of the SADC Tribunal.³³

The Harare High Court did not deal with the aspect of the finality of the *Campbell* judgment perhaps as it could go without saying that the decision was final there being no other court or tribunal in SADC community law or anywhere else in which competence to review decisions of the Tribunal resides.

On its part the CCSA literally ran over these requirements to fulfil the ritual as it were. Perhaps this was a result of the fact that they were issues not contested by the parties. The Court simply held thus;

*It is not in dispute that the costs order is final and that it was not obtained fraudulently, it does not involve the enforcement of the revenue law of Zimbabwe and its enforcement is not precluded by the Protection of Businesses Act.*³⁴

2.4.4 Public policy

Incredibly, the CCSA again dismissed this aspect offhand. It simply held that ‘The enforcement of the costs order is also not against public policy, of which our Constitution is an embodiment’.³⁵ In other words public policy is rooted and reflected by the constitutional principles and precepts such as the promotion of democracy, rule of law and human rights embodied in that constitution.

³² *Gramara* Judgment, page 8.

³³ *Gramara* Judgment, page 8.

³⁴ *Fick* Judgment, para 39.

³⁵ *Fick* Judgment, paras 39 – 40.

Public policy was the last factor to be considered by the High Court in the judgment. It was readily acknowledged in that decision that public policy 'is a matter that eludes precise definition'.³⁶ It is believed public policy progressively varies with time and place as social morals, with morals more or less embedded in the public policy of particular societies. Although the High Court did not refer to any prevailing judicial precedent to the effect, jurisprudence and scholarship exist bolstering the view that public policy is an elusive concept. Accordingly, in *Re Beard* it was held that public policy is seemingly a 'variable thing' that fluctuates 'with the circumstances of the time'.³⁷ Furthermore, still unsure of the parameters of public policy, in *Re Jacob Morris (deceased)*, the court held that³⁸

The phrase public policy appears to mean the ideas which for the time being prevail in a community as to the conditions necessary to ensure its welfare; so that anything is treated as against public policy if it is generally regarded as injurious to the public interest...

In that case, the court arrived at the conclusion that 'public policy is determined by the circumstances of a given society at a particular historic juncture of the development of that society'.³⁹ Closer to the home of the judgment, Zimbabwe, the jurisprudence is quite clear on the proper course a court should take when dealing with public policy issues. It is unclear whether the High Court conveniently ignored such loud precedent. For the reason that public policy is always a moving target in any given time and geographical location, much caution is required of judges in the exercise of their discretion. As an 'unruly horse', public policy can take a judge to a destination never contemplated by them or any other persons.⁴⁰

³⁶ *Gramara* Judgment, page 13.

³⁷ *Re Beard* [1908] 1 Ch. 383, at 342.

³⁸ *Re Jacob Morris* [1943] N.S.W.S.R. 352.

³⁹ As above.

⁴⁰ This famous phrase came out of the mouth of Judge Burrough in the *Richardson* case where he held that 'Public policy ... is an unruly horse and when you get astride of it, you never know where it will carry you'.

In *Olsen v Standaloft*, Fieldsend CJ (as then he was) of the Supreme Court of Zimbabwe quoted with approval the famed words of Lord Atkin in *Fender v St John-Mildmay* when he immortalised the following words⁴¹

Public policy.... should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inference of a few judicial minds.

Dealing with a case involving interpretation of public policy to avoid the enforcement of a foreign arbitral award, the US Court of Appeals for the 2nd Circuit held that:

...the convention's public defence should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum State's most basic notions of morality and justice.⁴²

Furthermore, a Swiss Court, dealing with the enforcement of a foreign award in terms of an international treaty was of the view that caution ought to be exercised when applying the 'public defence', an equivalent of public policy in that jurisdiction, had that for this defence to succeed:

There must be a violation on fundamental principles of the Swiss legal order, hurting intolerably the feeling of justice ... This exception of public order should not be twisted in order to avoid application of international Conventions which are signed by Switzerland and which form part of Swiss Law.⁴³

Now, having set out the general approach to the application of public policy during judicial reasoning as preferred by courts in a number of legal traditions, it is high time the High Court of Zimbabwe's approach to public policy in the *Gramara* judgment be analysed.

⁴¹ *Fender v St John-Mildmay* [1938] A.C. 1, at 12. See also *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co* 1894 AC 535 at 553) where the Court held that 'there is high authority for the view that in matters of public policy the courts should adopt a broader approach than they usually do to the use of precedents'.

⁴² *Parsons & Whittemore v RAKTA* 508 F 2d 969 (2d Cir 1974).

⁴³ *Leopold Lazarus Ltd (UK) v Chrome Resources SA (Switz.)*, reported in (1979) 4 Yearbook of Commercial Arbitration 311, the *Cour de Justice*, Canton of Geneva

To begin with, one stands to be impressed by the approach taken by the High Court in its acknowledgment of the international dimension of public policy. In other words, with prevalent and evident international judicial and economic cohesion gravitating beyond national boundaries, that mere development of society introduces factors of an international nature, which in turn are crucial in determining public policy. Relying on Australian jurisprudence, the High Court correctly observed that the principle of legitimate expectation vis-à-vis Zimbabwe's international obligation to comply with international law and the recognition and enforcement of SADC Tribunal decisions, is a matter of public policy from a Zimbabwean perspective.⁴⁴ Consequently, it was concluded the idea that Zimbabwe should comply with judgments of the SADC Tribunal in general 'would not be contrary to the public policy of Zimbabwe.'⁴⁵ One would have expected the High Court to conclude the matter by declaring the *Campbell* judgment registered in Zimbabwe. However, the High Court went to the depth of the analysis of public policy.

Basing its reasoning on public policy, the High Court rejected the registration of the foreign judgment by citing a number of inter-connected issues such as the existence of constitutional provisions which allow acquisition of the applicants' land in the first place.⁴⁶ This was followed by the subsequent enactment of a specific legislation to that effect – the Land Acquisition Act.⁴⁷

Second, there exists domestic jurisprudence in the nature of the Supreme Court of Zimbabwe judgment in *Mike Campbell (Pvt) Ltd & Another v Minister of Security Responsible for Land, Land reform and resettlement & Another*.⁴⁸ That case confirmed the constitutionality of the land reform programme from the perspective of national law. The High Court ruled that in view of that

⁴⁴ Reference was made to the case of *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR273 [(1995) 128 ALR 353]. In that case it was held that notwithstanding lack of domestication, the mere ratification of the Convention on the Rights of the Child by Australia created an enforceable legitimate expectation [for whom?] that the state will act in accordance therewith.

⁴⁵ *Gramara* Judgment, page 15.

⁴⁶ Section 16B of the Constitution of Zimbabwe Amendment (No. 17) Act, 2005. It authorised the state to acquire land for public use with a promise for payment of compensation only in respect of improvements on the land, but not for the land itself.

⁴⁷ [Chapter 20:10].

⁴⁸ *Mike Campbell (Pvt) Ltd & Another v Minister of Security Responsible for Land, Land reform and Resettlement & another* SC 49/07.

ordination, it would be affront to public policy should the SADC Tribunal decision be registered as it has the effect of impugning the 'legality of the programme sanctioned by the Supreme Court'.⁴⁹

Third, the nature of performance envisaged by the *Campbell* judgment, namely, payment of fair compensation and protection of quiet possession of the applicants' land is contrary to national legislation in the Constitution and parliamentary statutes hence bolstering the rejection for registration of the foreign judgment. Arriving at a contrary conclusion would, according to the Court, be 'to require its government to act in a manner that is manifestly incompatible with what is constitutionally ordained'.⁵⁰ It is clear that at this juncture, the High Court was gunning towards its conclusion in favour of the state as it employed a positivist approach to interpretation and application of the law. Needless to state that the High Court emphatically contradicted its earlier findings that states that have subscribed to international treaty obligations cannot rely on national law to avert the same.⁵¹

Fourth, registering the decision would have the effect of causing the government of Zimbabwe to reverse all acquisitions of land that were carried out since 2000. The undesirability of that approach, argued the High Court, lies in the fact that the 'political enormity' of the process 'would entail evictions' and relocations of beneficiaries of the programme. According to the High Court, 'basic utilitarian precept would dictate that the greater good must prevail'.⁵² The prevailing view was that, by comparison, there are more Zimbabweans clamouring for the agrarian reform than there are who are opposed to it. Indeed it is incontestable that enormous work would have ensued had the judgment been registered.

However, 'greater good' in my view would have been one that recognised the fact that victims of violations of rights need to be afforded an effective redress.⁵³ The evictions and relocations were only going to take place on the few farms that belonged to the three applicants whose land had already been acquired. The Court created an impression that pursuant to the *Campbell*

⁴⁹ *Gramara* Judgment, page 16.

⁵⁰ *Gramara* Judgment, page 17.

⁵¹ See paragraph 3.1 of this contribution.

⁵² *Gramara* Judgment, page 18.

⁵³ See article 2 of the Covenant on Economic, Social and Cultural Rights, adopted in 1969.

judgment, everyone whose land had been acquired was going to have their land restored. It is trite law that court orders are usually binding only on the parties to the litigation in question. Taking into account that about 87 applicants in the *Campbell* case were yet to lose their land at the time of judgment, it is therefore clear that compliance with the order for undisturbed possession would not have resulted in any evictions and relocations. This argument seemed to be the most convenient to the High Court.

3. 1 SADC Member States Legal Systems Vs Article 32 (1) of the Protocol

The purpose of this part is to gauge the extent to which legal systems of SADC member states are prepared to give effect to the provisions of Article 32 of the Protocol. The question is whether SADC member states, upon ratifying the Amendment Agreement that ushered the Protocol into legal force, made deliberate legal reform efforts to prepare their legal fraternities to receive judgments of the SADC Tribunal. In other words, to what extent are fellow SADC states' judiciaries willing to engage judicial activism at least to accept decisions of the Tribunal into their domestic spheres. The CCSA had an occasion to deal with this prospective challenge.

3.1.1 The inadequacies of national legislation

As already discussed above, both courts had no hesitation in finding that the legislation of their respective countries was inapplicable in resolving the issues before them. The reason behind the inapplicability was the patent inadequacies in that law, which could not identify the SADC Tribunal as a foreign court and its decisions as foreign judgments at the national level. Accordingly, recourse was made to common law as the ready alternative. However, as it turned out, common law had its frailties as it also could not recognise the Tribunal and its judgments for purposes of enforcement. What matter is how each of the two national courts dealt with these inadequacies of both legislation and communal law.

On its part, the Harare High Court went as far as taking a brave judicial activist approach to the recognition of the SADC Tribunal as a foreign court and its decisions as foreign judgments notwithstanding that the order being sought to be enforced did not sound in money.⁵⁴ This approach deserves deliberate applaud. The Harare High Court could have simply dismissed the motion on the grounds that Article 32 of the Protocol has no binding force at the national level in

⁵⁴ *Gramara* Judgment, page 8.

the absence of domestication in accordance with the then Section 111B of the 1980 Constitution of Zimbabwe.⁵⁵ Undesirable as it might have been, a national court dealing with international law in a dualist legal tradition could be justified in arriving at that conclusion.

The CCSA took matters further. It resolved that the common law needs to be developed in view of its patent deficiencies when confronted by the Tribunal and its decisions. In its own words, the CCSA held that the motivation behind developing the common law is that ⁵⁶

It appears to me that that development was driven by the need to ensure that lawful judgments are not to be evaded with impunity by any State or person in the global village.

According to the Court, nipping in the bud impunity associated with non-compliance with court decisions is supported by the demands of 'international trade and commerce' as well as the need to ensure that legal accountability is not escaped by exploiting jurisdictional loopholes.⁵⁷ Further, it was stated that SADC member states are required by Article 32 to take all measures necessary for the enforcement of the decisions of the Tribunal. In compliance therewith, the CCSA held that since Article 32 is binding on South Africa, the Court must not shy away from frustrating the machinations of any member state to 'undermine and subvert the authority of the Tribunal and its decisions....'⁵⁸ Furthermore, the 'constitutional obligations to honour our international agreements and give practical expression to them' is another impetus to developing common law.

Furtherstill, the CCSA reasoned that enforcement of judgments lies at the heart of the principles of rule of law and access to courts. So is the right to an effective remedy.⁵⁹ Enforcement of court decisions lies at the core of right to a fair trial. In fact this finding has resonance with the findings of the Inter-American Court of Human Rights in the famed case of *Buena Ricardo et al v*

⁵⁵ Section 111B of the 1980 Constitution of Zimbabwe (as amended 19 times) provided that ratified international treaties will only have the force of law in Zimbabwe following approval by Parliament by way of a legislative act. This position is retained in the 2013 Constitution in Section 327(2) (a). However, without precedence in Zimbabwean constitutional history, Section 34 provides that 'The State must ensure that all international conventions, treaties and agreements to which Zimbabwe is a party are incorporated into domestic law'.

⁵⁶ *Fick Judgment*, para 54.

⁵⁷ *Fick Judgment*, para 55.

⁵⁸ *Fick Judgment*, para 59.

⁵⁹ As above.

Panama.⁶⁰ In that case, Panama was objecting to the active involvement of that Court in monitoring compliance by Panama with one of its judgments against that Organisation of American member state. As to execution of judgments, the Court held that;

*The effectiveness of judgments depends on their execution. The process should lead to the materialization of the protection of the right recognized in the judicial ruling, by the proper application of this ruling. Compliance with judgment is strongly related to the right to access to justice, which is embodied in Articles 8 (Right to a Fair Trial) and 25 (Judicial Protection) of the American Convention.*⁶¹

On this premise, the CCSA took the need to develop common law as constituting ‘execution-facilitating measures’ to ‘ensure execution of decisions of the Tribunal’ as required by Article 32(2) of the Protocol.⁶² In conclusion, the CCSA held that ‘the concept of a “foreign court” will henceforth include the Tribunal’.⁶³

The implications of this conclusion are profound in that, first, notwithstanding the preferred competence of the ‘new SADC Tribunal’ following the legislative review, a clear path has been charted for the execution of its decisions in South Africa. It will be inconsequential whether or not the Tribunal retains its human rights-related competence, which is highly unlikely as some SADC member states seem to be scared of adhering to rule of law, democracy and human rights issues.

Second, SADC Tribunal decisions against any other SADC member state stand good for execution in South Africa notwithstanding non-recognition of the same decisions in the affected state’s legal system. In other words, to the extent that the state in question has basis for founding jurisdiction in South Africa, the state could be sued successfully in South Africa. This puts assets of fellow SADC states in danger of being sold in execution of judgment.

⁶⁰ *Baena-Ricardo et al. v. Panama*. Judgment of February 2, 2001. (Merits, Reparations and Costs)

⁶¹ As above, paras 73 & 84.

⁶² *Fick* Judgment, para 59.

⁶³ *Fick* Judgment, para 70.

Third, this finding puts to shame the political spinoff of the SADC Tribunal saga. While it cannot be established with certainty which states supported the suspension of the Tribunal during the SADC Summit in Maputo in August 2012,⁶⁴ South Africa holds a collective responsibility for that decision at a political level. Contrary to the scenario, its national courts have taken a dramatic approach to the issue by recognizing the SADC Tribunal and the binding force of its decisions before going on to hold a fellow SADC member state, Zimbabwe, accountable to its commitments under SADC community law.

Fourth, in a way, Zimbabwe has also developed its common law to enable domestic execution of decision of the SADC Tribunal although this legal position remains to be confirmed by the Constitutional Court of Zimbabwe (herein CCZ). Nonetheless, until such a time that the CCZ is seized with that legal issue, the Harare High Court finding is law.

4. Conclusion

The above comment has summarized judgments of two national courts dealing with a similar international judgment in their respective legal spheres. A number of conclusions deserve re-iteration for emphasis. First, the Protocol on the SADC Tribunal came into force following the amendment of the SADC Treaty in 2001. Second, as a consequence, the Protocol is not only binding on Zimbabwe and South Africa, but all SADC member states.

Third, Article 32 of the Protocol binds all SADC member states to guarantee execution of decision of the Tribunal, and such execution requires member states to dig deep in guaranteeing execution on account of the dictates of rule of law, democracy and human rights that lie at the heart of the SADC community law.

Fifth, the development of common law by the two courts must be an approach that quickly resonates in other legal systems of SADC member states. It is commendable judicial activism. Sixth, execution of international judgments issued by a competent court must not be subverted by exploiting fluid concepts such as public policy. The public stands to benefit a great deal from

⁶⁴ This was the Summit session that took the decision to suspend the operation of the SADC Tribunal pending the legislative review that is still underway with no definite dates regarding its completion.

international cohesion as opposed to political isolation for the benefit of the political administration in charge at any given time.

International and domestic perspectives on disability and education: Children with disabilities and the right to education in rural Zimbabwe: A case study of Mwenezi District, Masvingo Province

Admark Moyo* and Gift Manyatera**

1. Introduction¹

Throughout history, children with disabilities have been denied access to education, normal family life; adequate health care; opportunities for play or training and the right to participate in childhood activities.² In every region in the world, persons with disabilities often live on the margins of society, deprived of the most basic human rights and fundamental freedoms. According to the United Nations -

*Persons with disabilities make up the world's largest and most disadvantaged minority. The numbers are damning: an estimated 20 per cent of the world's poorest persons are those with disabilities; 98 per cent of children with disabilities in developing countries do not attend school; an estimated 30 per cent of the world's street children live with disabilities; and the literacy rate for adults with disabilities is as low as 3 per cent—and, in some countries, down to 1 per cent for women with disabilities.*³

Due to barriers to access to education, fewer than five percent of children with disabilities (CWDs) in the world attend school and in some cases the figure is less than one percent.⁴ According to the Inter-Censal Demographic Survey (ICDS, 1997) Zimbabwe had a total of 218

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² See Committee on the Rights of the Child 'General discussion on the rights of children with disabilities', CRC/C/69 (1997) 51.

³ United Nations, *From exclusion to equality: Realising the rights of persons with disabilities: A handbook for Parliamentarians* on the Convention of the Rights of Persons with Disabilities and its Optional Protocol (2007) 1.

⁴ UNICEF address to the Committee on the Rights of Persons with Disabilities, Day of General Discussion on the 'right to accessibility', 7 October 2010.

421 (two percent of the country's total population then) persons with disabilities (PWDs). Of these, 56 % were male and 44 % were female. Seventy-five percent (75%) of PWDs lived in rural areas while 25 % lived in urban areas.⁵ It has also been reported that of every three children who are out of school in Zimbabwe, one is a child with a disability. Furthermore, it is estimated that one in three CWDs is out of school and that 75% of CWDs never complete primary school education.⁶

These are worrying statistics for a country striving to achieve the millennium development goal of universal primary education. A SINTEF study conducted in 2003 indicated that 32 per cent of PWDs in Zimbabwe have had no schooling (36 per cent had some primary schooling, and 32 per cent had some education beyond primary level). This is particularly disturbing if one considers the central role that education plays in fostering the enjoyment of other rights and promoting the development of children, communities and nations. Without educational opportunities, CWDs will not have the chance to develop to their full potential and will most likely face tremendous barriers to their full, social and economic integration in society. Part of the challenge appears to be that, disability has not been seriously tabled as part of the human rights and national development agenda. Instead, it is largely viewed as a charity or social welfare issue. As the Committee on Economic, Social and Cultural Rights (CESCR) has observed; –

Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities...Increasingly, education is recognized as one of the best financial investments States can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.⁷

⁵ UNICEF *Orphans and Other Vulnerable Children and Adolescents in Zimbabwe: A study of children and adolescents in Zimbabwe* (2001) 74.

⁶ See L Dube 'The plight of deaf and dumb children in education', Manica Post, 20 December 2011.

⁷ See CESCR General Comment 13 'The right to education (article 13 of the Covenant)' (Hereafter General Comment 13) (1999) para 1.

In this article, we discuss impediments to access to education by CWDs in rural Zimbabwe and propose how these impediments may be overcome. First, the article discusses the right of CWDs to education at international law and the obligations this right imposes on States Parties. We discuss the right to education under the Standard Rules on the Equalization of Opportunities for Persons with Disabilities (the Standard Rules); the Convention on the Rights of the Child (CRC) and the Convention on the Rights of Persons with Disabilities (CRPD). These instruments create obligations which States Parties should observe in order to enable CWDs to develop and play an important role in society. Second, the article discusses the national legal framework for the protection of CWDs' right to education. This includes a survey of the relevant constitutional provisions and an analysis of other statutory instruments such as the Education Act,⁸ and the Disabled Persons Act (DPA).⁹ A discussion of the case study data collected in Mwenezi District leads to the conclusion of this article.

2.1 International legal framework

In this section, we discuss the international regulatory framework for the right to education of CWDs. We discuss the relevant provisions of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities; the Convention on the Rights of the Child, the Convention on the Rights of Persons with Disabilities and the African Children's Charter

2.2 The Standard Rules on the Equalization of Opportunities for Persons with Disabilities (Standard Rules)¹⁰

The Standard Rules constitute a whole document on disability policy, containing a much higher degree of specification and giving more guidance on what should be done to equalize opportunities for CWDs in the context of education. Under the Standard Rules, the principle of 'equalization of opportunities' means the process through which the various systems of society and the environment are made available to all, particularly to PWDs.¹¹ The purpose of the

⁸ Chapter 25:04.

⁹ Chapter 17:02.

¹⁰ See General Assembly Resolution A/Res/48/96.

¹¹ Para 25 of the Standard Rules.

Standard Rules is to ensure that all PWDs, as members of their societies, exercise the *same rights and obligations* as others.¹²

In terms of Rule 6 (dealing with education), States should recognize the principle of equal educational opportunities for PWDs, in integrated settings. The education of PWDs should be an integral part of the education system.¹³ The State should ensure that adequate accessibility and support services, designed to meet the needs of children with different disabilities, are provided.¹⁴ Special attention should be given to the rights and needs of very young CWDs and adults, particularly women, with disabilities.¹⁵

The Standard Rules require the State, as part of reasonable accommodation of CWDs, to (a) have a clearly stated disability policy, understood and accepted at the school level and by the wider community; (b) allow for curriculum flexibility, addition and adaptation; and (c) provide for quality materials, ongoing teacher training and support teachers.¹⁶ These sub-rules are designed to ensure that the core principles of availability, acceptability, adaptability and accessibility of educational settings are always complied with. Availability connotes that every State Party should have, within its geographical territory, functioning educational institutions and programmes in sufficient quantities.¹⁷ Acceptability requires the State to ensure that the form and substance of education, including curricula and teaching methods, have to be acceptable. Adaptability requires the State to ensure that education is flexible so that it can adapt to the needs of changing societies and communities and respond to the needs of students within diverse social and cultural settings. Accessibility implies that educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State Party concerned. This is critical in ensuring equal access to education by CWDs.¹⁸

The Standard Rules further make room for the provision of special education where the general school system does not yet adequately meet the needs of all CWDs. For instance, the Standard

¹² Para 15 of the Standard Rules.

¹³ Rule 6(1) of the Standard Rules.

¹⁴ Rule 6(2) of the Standard Rules.

¹⁵ Rule 6(5) of the Standard Rules.

¹⁶ Rule 6(6) of the Standard Rules.

¹⁷ CESRC General Comment 13, para 6.

¹⁸ For further details on the scope of these essential features of education, see para 5 of the Standard Rules.

Rules provide that due to the particular communication needs of the deaf and the blind, these classes of children may be more suitably educated in schools specially made for such children or special units in mainstream schools.¹⁹ This is often the case where the school is poorly equipped to deal with children with multiple and severe disabilities. Even then, however, special education should be aimed at preparing students for education in the general school system and the quality of such education should reflect the same standards as general education.²⁰ To foster the gradual integration of special education services in mainstream schools, CWDs should be afforded the same portion of educational resources as children without disabilities.

In order to implement such an approach, States should ensure that teachers are trained to educate CWDs within regular schools and that the necessary equipment and support are available to bring CWDs up to the same level of education as their non-disabled peers. This requires the introduction of sign language, Braille and other modes of communication to ensure that CWDs have equal access to education.²¹ It is encouraging to note that Zimbabwe adopted the Standard Rules and should act in a manner consistent with them.

2.3 The Convention on the Rights of the Child (CRC)

Under the CRC, 'States Parties recognize the right of the child to education'. This right must be achieved progressively and on the basis of equal opportunity'.²² States Parties, including Zimbabwe, are legally bound to 'respect and ensure the rights set forth in the present Convention [including the right to education] to each child within their jurisdiction without discrimination of *any kind*, irrespective of the child's or his or her parent's or legal guardian's ... disability, birth or other status'.²³ These provisions outlaw disability-based discrimination against CWDs. Disability-based discrimination includes any distinction, exclusion, restriction or preference, or denial of reasonable accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights.²⁴ The prohibition of discrimination enshrined in Article 2 (1) of the CRC is subject to

¹⁹ Rule 6(9) of the Standard Rules.

²⁰ Rule 6(7) of the Standard Rules.

²¹ See for instance General Comment 5, para 35.

²² Article 28(1) of the CRC.

²³ Article 2(1) of the CRC.

²⁴ See CESRC General Comment 5 'Persons with disabilities' (hereafter General Comment 5) para 15 and article 2 of the CRPD.

neither progressive realisation nor the availability of resources. It applies fully and immediately to all aspects of education and encompasses all internationally prohibited grounds of discrimination, including disability. Thus, while Articles 28 and 29 of the CRC do not mention CWDs, application of Article 2 precludes their discrimination in accessing education.²⁵

However, the adoption of transitory special measures intended to bring about equality between CWDs and their able-bodied counterparts does not constitute a violation of the right to non-discrimination with regard to education. This observation is subject to two provisos. First, the remedial measures should not lead to the maintenance of unequal or separate standards for different groups. Second, the measures should not be continued after the objectives for which they were taken have been achieved. The second aspect is intended to prevent reverse discrimination against children without disabilities. The CRC seeks to bring the rights of CWDs to the forefront and spells out what States Parties must do to fulfil these rights. In the context of the right to education, the CRC explicitly states that the education of the child should be directed to (a) the development of the child's personality, talents and mental and physical abilities to their fullest potential; (b) the development of respect for human rights and fundamental freedoms and (c) the preparation of the child for responsible life in a free society'.²⁶ Thus, the education of CWDs should be targeted at achieving these noble goals. More importantly, the breadth of these goals shows that the main concern should be on the best interest of the whole child and his or her life chances, not just the disability.

States Parties also bear the obligation to ensure that a mentally or physically disabled child enjoys a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.²⁷ This approach resonates with the movement of the international community towards the equalization of opportunities for persons with disabilities. Children with disabilities cannot enjoy full and decent lives nor live self-reliant lives if their right to education is not respected, protected, promoted and fulfilled. In similar parlance, active participation in the community remains an un-realizable dream for children with

²⁵ See Committee on the Rights of the Child, General Comment No 1, 'The aims of education' U.N. Doc. CRC/GC/2001/1 (2001) and U Kilkelly 'Disability and children: The Convention on the Rights of the Child (CRC)' in G Quinn & T Degener (eds) *Human rights and Disability: The current use and future potential of United Nations human rights instruments in the context of disability* (2002) 199.

²⁶ Article 29(1) of the CRC.

²⁷ Article 23(1) of the CRC.

disabilities if remedial measures are not taken to benefit them as a historically disadvantaged group. Further, the CRC extends to children with disabilities the right to special care. The special care to which the child is entitled must be 'designed to *ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services and preparation for employment* ...in a manner conducive to the child's achieving the fullest possible social integration and individual development'.²⁸ Clearly, the drafters of the CRC realised that it is difficult for CWDs to have access to and receive education in the absence of measures and policies structured to achieve this goal. Likewise, it is difficult for CWDs to achieve the fullest possible development and social integration without effective access to education, training and preparation for employment. For this reason, the drafters of the CRC sought to link the child's right to special care, in the context of education, to the purpose for which education is attained; namely individual development and social integration.

However, the extension to the child of special care (even in the context of the right to education) should be 'subject to available resources' and be 'appropriate to the child's condition and the circumstances of the parents or others caring for the child'.²⁹ Therefore, the State should, when designing measures to 'ensure that the disabled child has effective access to education and training', make sure that the measures it adopts adequately address both the child's condition and the circumstances of the parents. In other words, the more severe the child's disabilities are and the more incapacitated the child's parents are, the more targeted the measures to be adopted by the State should be. Similarly, where the child's parents live in absolute poverty, the State should respond to the circumstances of the parents by footing the bill for the child's education and other expenses. It is important to note that Zimbabwe ratified the CRC and is therefore bound to implement the provisions of the CRC at the local level.

2.4 The Convention on the Rights of Persons with Disabilities (CRPD)

In terms of the CRPD, States Parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an

²⁸ Article 23(2) and (3) of the CRC.

²⁹ Article 23(2) of the CRC.

equal basis with other children.³⁰ International child rights law recognises their entitlement to education on an equal basis with other children and to be provided with assistance where necessary to achieve this right.³¹ The right, to be enjoyed equally without discrimination on the basis of disability, include the right to education.³² The CRPD embodies the response of the international community to the long history of discrimination against PWDs. It covers many areas in which PWDs have historically been discriminated against. These include access to justice; participation in political and public life; employment; freedom from torture, exploitation and violence; freedom of movement and access to education. Access to education is dealt with in article 24 of the CRPD. Article 24 reads as follows:

The CRPD explicitly recognises the right of PWDs to education. The right to education should be realized without discrimination and on the basis of equal opportunity for all persons.³³ Article 24 seeks to remedy the exclusion and marginalization that CWDs have faced for centuries. It shows that the international community is aware that the prevailing trend is that PWDs tend to have much less access to education than their non-disabled counterparts.³⁴ The exclusion of CWDs from education results in life-long barriers to meaningful employment, health and political participation. For this reason, the main focus of Article 24 is on the elimination of disability-based discrimination in educational settings, as well as the provision of inclusive education at various levels. Further, Article 24 focuses primarily on access of PWDs to the general education system, rather than separate or segregated educational settings.

However, special schools should continue to exist for those individuals still wishing to opt-out of mainstream settings and those who cannot – because of severe learning disabilities – cope with the expected pace of learning in inclusive settings. Article 24 envisages the need for increased accessibility of educational settings and the need to train teachers and staff, including teachers with disabilities, as some of the ways by which equal access to education can be enhanced. For

³⁰ Article 7.

³¹ L Wakefield and N Murungi 'Domesticating international standards of education for children with intellectual disabilities: A case study of Kenya and South Africa' in I Grobbelaar-du Plessis and T van Reenen (eds) *Aspects of disability law in Africa* (2011) 133, 138.

³² See article 24 of the CRPD.

³³ Article 24(1) of the CRPD.

³⁴ Katherine Guernsey, Marco Nicoli and Alberto Ninio 'Convention on the Rights of Persons with Disabilities: Its implementation and relevance for the Bank', The World Bank, (2007) (hereafter World Bank) 13.

countries such as Zimbabwe to meet the obligations created by Article 24, they must increase the accessibility of their educational spaces, develop inclusive curricula and provide adequate learning assistance.³⁵ This is particularly important in light of the Millennium Development Goal of “education for all,” which by definition, cannot be attained if an entire segment of any given population is denied equal access to education.

2.4.1 Inclusive education

State Parties should realise, without discrimination and on the basis of equal opportunity, the right of PWDs to education. The phrase ‘without discrimination and on the basis of equal opportunity’ suggests that States Parties are bound to take affirmative action measures to improve access to education by persons with disabilities. To realise the right to education on the basis of equality and without discrimination, States Parties are bound to ensure the provision of inclusive education at all levels. Inclusive education is a process of addressing and responding to the diversity of all needs of all learners by increasing participation (especially by CWDs) in learning cultures and communities, and reducing exclusion within and from education.³⁶ It is a process which requires schools to accommodate all children regardless of their physical, intellectual, social, emotional, linguistic or other conditions.³⁷ *The nature of inclusion varies and largely depends on the nature of the disability and the school environment.* In some schools, inclusion means the mere physical presence or social inclusion of CWDs children with disabilities in regular classrooms. In other schools, inclusion means active modification of content, instruction, assessment practices and the school environment so that learners can successfully engage in core academic experiences and learning. If policies, contents and teaching approaches are not adapted to the diversity of the learners, CWDs will not have the conditions to learn effectively the skills that will allow them to be successful in life.

2.4.2 General States Parties’ obligations

³⁵ World Bank, 13.

³⁶ UNESCO, 2003.

³⁷ UNESCO, 1994.

Article 4 of the CRPD enumerates general States Parties' obligations. These obligations apply to all the rights, including the right to education, protected in the CRPD. Under the CRPD, 'States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all PWDs without discrimination of any kind on the basis of disability'.³⁸ All the rights recognized in the CRPD have an equality dimension implying that every PWDs must not be discriminated against in the enjoyment of rights protected in the CRPD. In particular, the State should ensure that individuals exercise their full rights and freedoms without discrimination on the basis of disability. To achieve this dignified purpose, States Parties undertake to do certain things. States Parties should 'adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the' CRPD. These measures, which include legislation, should be designed 'to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against PWDs'.³⁹ Given the prevalence of cultural practices which constitute discrimination against PWDs, the passage of legislation modifying these practices is very important in the Zimbabwean context. When designing and implementing policies and programmes, States parties should factor in the protection and promotion of the human rights of PWDs.⁴⁰ States Parties are also bound to refrain from engaging in practices that are inconsistent with the CRPD and to ensure that public authorities and institutions act in line with the CRPD.⁴¹ Discrimination against PWDs is also common in the private sphere. Thus, the CRPD binds States Parties 'to take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise'.⁴² This provision makes it clear that the CRPD applies vertically and horizontally. It outlaws discrimination against CWDs in private homes, private schools and other juristic persons. Thus, it is the duty of States to adopt measures designed to prevent or curb discrimination against CWDs in private schools and other educational institutions.

States Parties are also duty-bound to undertake or promote research and development of universally designed goods, services, equipment and facilities (which should require the minimum possible adaptation and the least cost) to meet the specific needs of PWDs. This

³⁸ Article 4(1).

³⁹ Article 4(1)(a) and (b).

⁴⁰ Article 4(1)(c).

⁴¹ Article 4(1)(d).

⁴² Article 4(1)(e).

research and development should promote the availability and use of universally designed equipment and facilities.⁴³ In terms of the CRPD, "universal design" means the design of products, environments, programmes and services that are usable by all people, to the greatest extent possible, without the need for adaptation or specialized design. "Universal design", however, does not exclude assistive devices for particular groups of PWDs where these are needed.⁴⁴ Clearly, universal design of goods, services, equipment and facilities is important for purposes of facilitating reasonable accommodation of the rights and needs of CWDs in the school environment. This is a pertinent command for countries (such as Zimbabwe) that have buildings, environments, books and facilities that were primarily designed for use by persons without disabilities.

Further, the CRPD recognises that there is need for States Parties 'to undertake or promote the availability and use of new technologies, including information and communications technologies, mobility aids, devices and assistive technologies, suitable for PWDs, giving priority to technologies at an affordable cost'.⁴⁵ States should also ensure that information about these technologies and devices is accessible to PWDs.⁴⁶ Thus the State should provide the required information in the format which the relevant PWDs can understand. It is also imperative for States Parties to promote the training of professionals and staff working with PWDs in areas covered by the rights recognized under the CRPD so as to better provide the assistance and services guaranteed by those rights. In the context of the right to education, the need to train professionals is important to ensure that CWDs, for instance those that are deaf and dumb are taught in the language that they understand. In implementing economic, social and cultural rights, 'each State Party undertakes to take measures to the maximum of its available resources ... with a view to achieving progressively the full realization of these rights'. This obligation is 'without prejudice to those obligations contained in the [CRPD] that are immediately applicable according to international law'.⁴⁷ The CRPD recognises that socio-economic rights impose obligations that are immediate and States Parties should not plead resource scarcity when they fail to fulfil these obligations.

⁴³ Article 4(1)(f).

⁴⁴ Article 2.

⁴⁵ Article 4(g).

⁴⁶ Article 4(h).

⁴⁷ Article 4(2).

In developing and implementing legislation and policies domesticating the CRPD, and in other decision-making processes concerning issues relating to PWDs, States Parties are required to 'closely consult with and actively involve PWDs, including CWDs, through their representative organizations'.⁴⁸ This obligation underlines the importance of inclusion of CWDs, in the making of policies and laws that affect them. Clearly, the inclusion of CWDs in the formulation and implementation of laws and policies enriches the process and ensures that these measures respond to the challenges which CWDs face, even in the context of access to education. The need to include CWDs is an open acknowledgement that CWDs face peculiar challenges which other categories do not face or do not face to the same extent. The obligation to include PWDs also furthers participation of PWDs as one of the general principles underlying all the provisions of the CRPD.⁴⁹ Where the protection afforded to particular rights under the CRPD is limited than that afforded to such rights under national laws or other international instruments to which the State is Party, the State is bound to fulfil these rights as is required by national laws or by such other instruments.⁵⁰ This provision is intended to ensure that States Parties do not deny PWDs certain rights on the basis that the CRPD either does not protect such rights or protects such rights to a limited extent.

2.4.3 Specific States Parties' Obligations

Article 24 of the CRPD outlines the obligations imposed on States Parties by the right of PWDs to education. It provides that States Parties shall ensure that PWDs are not excluded from the general education system on the basis of disability.⁵¹ This provision documents the international community's awareness of the discrimination that CWDs face on the basis of their disability. Children with disabilities should not be denied access to the general education system simply because of their disabilities. States Parties are also bound to provide free and compulsory primary education and secondary education to PWDs. This provision is intended to ensure that parents and the State do not discriminate against CWDs in the name of feeling sorry for them. States Parties are required to ensure that PWDs can access an inclusive, quality and free

⁴⁸ Article 4(3).

⁴⁹ See article 3.

⁵⁰ Article 4(4).

⁵¹ Article 24(2)(a) of the CRPD.

primary education and secondary education on an equal basis with others in the communities in which they live.⁵²

Levelling the playing field would require the State to take positive measures to ensure that CWDs have equal access to educational opportunities which their non-disabled counterparts enjoy. In realizing the right of PWDs to education, States Parties should ensure that reasonable accommodation of the child's requirements is provided.⁵³ Reasonable accommodation of the child's requirements implies that the learning environment be adapted to the needs and rights of such child. Sometimes it may even mean introducing new subjects such as sign language or the hiring of teachers trained in disability issues to cater for the needs of the children concerned. States Parties should also ensure that PWDs receive the support they require, within the general education system, to facilitate their effective education.⁵⁴ Further, States Parties should ensure that effective individualized support measures are provided in environments that maximize academic and social development, consistent with the goal of full inclusion.⁵⁵ These clauses are crafted to ensure that both curricula and educational settings respond to the individual support needs of learners with disabilities. To this end, Article 24(3) of the CRPD require States Parties to facilitate the learning of Braille; alternative script; sign language; alternative modes, means and formats of communication; orientation and mobility skills.⁵⁶

States parties should also ensure the promotion of the linguistic identity of the deaf community. They should ensure that the 'education of persons, and *in particular children*, who are deaf or blind, is delivered in the most appropriate languages and modes and means of communication for the individual, and in environments which maximize academic and social development'.⁵⁷ The duty to meet various support needs of learners with disabilities gets specific as Article 24 unfolds. Thus, States Parties are required to 'take appropriate measures to employ teachers, including teachers with disabilities, who are qualified in sign language and/or Braille, and to train

⁵² Article 24(2)(b).

⁵³ Article 24(2)(c).

⁵⁴ Article 24(2)(d).

⁵⁵ Article 24(2)(e).

⁵⁶ Article 24(3)(a) and (b).

⁵⁷ Article 24(3)(c).

professionals and staff who work at all levels of education'.⁵⁸ The curriculum should incorporate disability awareness and the use of appropriate alternative modes of communication, educational techniques and materials to support PWDs.⁵⁹

The fact that Zimbabwe ratified the CRPD goes a long way in enhancing the prospects for the realization of the rights of CWDs. While the provisions of the CRPD are not automatically binding due to the dualist approach to international law, the CRPD provisions nevertheless have persuasive value in the courts by virtue of Zimbabwe being a state party. For now at least, the ratification of the convention is a first positive step towards the domestication of its provisions.

3.The Zimbabwean legal framework

Starting with the provisions of the new Constitution, this section analyses the legislative protection extended to the right to education in Zimbabwe. Other statutes discussed include the Education Act; the Disabled Persons Act and the Mental Health Act. While there are other statutes (such as the Children's Act) that may have an indirect impact on access to education by CWDs, the three statutes mentioned above are the most pertinent.

3.1 Equality under the Zimbabwean Constitution

The new Constitution provides that every person has the right not to be treated in an unfairly discriminatory manner on such grounds as disability, economic or social status.⁶⁰ Equality entails that 'the State...take[s] reasonable and other measures to promote the achievement of equality and to protect or advance people or classes of people who have been disadvantaged by unfair discrimination'.⁶¹ No wonder the equality clause provides that no affirmative action measure is to be regarded as unfair for the purposes of subsection 3.⁶² It is important that the Constitution permits affirmative action in favour of persons historically disadvantaged by unfair discrimination. Affirmative action means preferential treatment of historically disadvantaged

⁵⁸ Article 24(4).

⁵⁹ Article 24(4).

⁶⁰ Section 56(3) of the Constitution.

⁶¹ Section 56(6). Compare with section 9(2) of the South African Constitution, 1996.

⁶² Section 56(6)(b).

categories of persons. Laws which discriminate based on any of the stated grounds do not violate the prohibition of discrimination to the extent that the laws in question relate to 'the implementation of affirmative action programmes for the protection or advancement of persons or classes of persons who have been previously disadvantaged by unfair discrimination'.⁶³

An affirmative action programme requires 'a member of a disadvantaged group to be preferred for the distribution of some benefit over someone who is not a member of that group'.⁶⁴ Affirmative action should not be seen as an exception to the equality or non-discrimination clause, but rather as part of the right to equality. It is a tool which the State can use to design remedial measures and programmes to achieve, in the long term, a more just and equal society. Thus, section 56 imposes on the State a positive duty to act in order to ensure that everyone fully and equally enjoys all fundamental rights and freedoms. Remedial or restitutionary measures do not constitute derogations from, but are composite parts of the right to equality and non-discrimination.

Preferential treatment targeted at protecting or advancing persons disadvantaged by unfair discrimination is therefore justifiable and constitutionally defensible provided the measures are shown to be consistent with section 56 of the Constitution. In Sachs J's words, 'differential treatment that happens to coincide with [disability] *in the way that poverty and civic marginalisation coincide with [disability]*, should [not] be regarded as presumptively unfair discrimination when it relates to measures taken to overcome such poverty and marginalisation'.⁶⁵ In the context of the right to education, it is therefore fairly legal for the State to take remedial measures to benefit significantly disadvantaged persons such as CWDs because the long-term result of such measures is a more just society. In the event that the measures are challenged as a violation of the equality clause, the State or person responsible for the measure can then defend it by demonstrating that the measure (1) targets persons or categories of persons who have been disadvantaged by unfair discrimination; (2) is designed to

⁶³ Section 23(3)(g) of the Constitution.

⁶⁴ I Currie and J De Waal *The Bill of Rights handbook* Fifth Edition, (2005) 264.

⁶⁵ *City Council of Pretoria v Walker* 1998 2 SA 363 (CC) para 118.

protect and advance such persons or categories of persons and (3) promotes the achievement of equality.⁶⁶

Children with disabilities squarely fall within these criteria and should benefit from preferential treatment in the provision of amenities at schools and other institutions. This is consistent with the notion of substantive equality. Unlike formal equality, which requires uniform treatment of persons according to the same 'neutral' norm, substantive equality requires that persons in unequal circumstances be treated unequally in order to address the imbalance caused by systematic marginalization.⁶⁷ The motivation behind the substantive approach to equality is that 'past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated'.⁶⁸ In fact, the effects, unless corrected, may continue for a substantial time or even indefinitely. As noted by the UN Human Rights Committee, the equal enjoyment of rights and freedoms does not mean identical treatment in every instance. Equality, notes the Committee, may require states to adopt specific affirmative steps to eliminate or dismantle structures and practices perpetuating patterns of disadvantage.⁶⁹ There are, in this country, clearly defined historical patterns of institutionalized disadvantage that have burdened CWDs for decades and undermined their achievement in and outside the classroom. Whilst there is no direct reference to substantive equality in the context of the right of CWDs to education, it is clear that substantive equality mirrors all the other rights in the Fundamental Rights Chapter.

Besides the general right to education to which 'every citizen and permanent resident of Zimbabwe' is entitled⁷⁰ and the specific reference to children's right to education,⁷¹ the Constitution provides that the state must take appropriate measure, within the resources

⁶⁶ See the leading South African case of *Minister of Finance v Van Heerden* (2004) 6 SA 121 (CC) paras 32 and 37.

⁶⁷ See A Moyo 'Defending human rights and the rule of law by the SADC Tribunal: *Campbell* and beyond' (2009) 9 *African Human Rights Law Journal* 590, 604;

⁶⁸ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC), paras 60-61; See also *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) para 41.

⁶⁹ United Nations Human Rights Committee 'CCPR General Comment 18: Non-discrimination' <http://www.unhcr.ch/tbs/doc.nsf/0/3888b0541f8501c9c12563ed004b8d0e?Opendocument> (accessed 10 April 2008) para 8.

⁷⁰ Section 75 of the Constitution.

⁷¹ Section 81 of the Constitution.

available to it, to ensure that PWDs enjoy their full potential. These measures include those intended to provide both special facilities for their education and state-funded education when they need it.⁷² These provisions bind the State to ensure that reading materials are supplied in Braille for children with visual disabilities and to meet all the needs of CWDs in the school environment. Further, the State is required to take appropriate steps to ensure that buildings and amenities to which the public have access are accessible for use by PWDs.⁷³ Schools are therefore required to ensure that classrooms, offices and toilets are built in a way that fosters reasonable accommodation of CWDs. Thus, the constitutional provisions on equality and education largely comply with the demands of the CRC and the CRPD.

3.2 The Disabled Persons Act

The Disabled Persons Act (DPA) deals exclusively with disability matters. The DPA is not framed in the language of human rights and revolve around the duty of the state and private actors to promote the welfare and rehabilitation of PWDs. Further, there is no reference to the word 'child' or 'children' throughout the DPA. Nonetheless, the DPA establishes a National Disability Board (NDB) and confers on it the functions of (i) issuing adjustment orders and (ii) fashioning policies that are accommodative of the rights of PWDs. It must be stated, from the onset, that the NDB has had little or no tangible achievements since it was established.

3.2.1 Adjustment orders

One of the functions of the NDB is to issue adjustment orders in terms of section 7 of the DPA.⁷⁴ Before serving an adjustment order, the NDB should serve notice upon the person concerned. The notice must specify 'the grounds upon which the adjustment order is to be issued and the nature of the action which the Board considers necessary to rectify the situation which has given rise to the proposed order'; stipulate the maximum period that the Board considers reasonable for the implementation of the action it proposes to order; and call upon the person concerned, if he wishes to make representations, to make them to the Board within thirty days from the date

⁷² Section 83(e) and (f); see also section 22.

⁷³ See for instance section 22(4) of the Constitution.

⁷⁴ Section 5(1)(a) of the DPA.

of the service of the notice.⁷⁵ After considering any representations made, the NDB may issue, or refrain from or defer issuing, an adjustment order.⁷⁶

Section 7(2) of the DPA states that 'where the Board considers that any premises, services or amenities are inaccessible to disabled persons by reason of any structural, physical, administrative or other impediment to such access, the Board may ... serve upon the owner of the premises or the provider of the service or amenity concerned an adjustment order'. An adjustment order must set out, among other things, the grounds upon which the Board considers that the premises, service or amenity is inaccessible to disabled persons.⁷⁷ The adjustment order should require the 'owner or provider concerned to undertake at his own expense such action as may be specified in order to secure *reasonable access* by disabled persons to the premises, service or amenity concerned' and stipulate the period within which the action [should] be commenced and completed'.⁷⁸ Should the person upon whom the adjustment order is served elect not to appeal to an Administrative Court (which can confirm, vary or set aside the adjustment order appealed against),⁷⁹ such person should comply with the adjustment order as issued by the NDB. This requirement is enforced on the pain of criminal sanctions as any person who contravenes an adjustment order with which it is his duty to comply shall be guilty of an offence and liable to a fine not exceeding level seven.⁸⁰ The DPA seeks to revolutionise the way public and private service providers perform their functions. Thus, institutions, including schools, with premises, facilities and amenities that are not easily accessible to PWDs are bound to take steps to 'secure *reasonable access* by disabled persons to the premises, service or amenity concerned'.

The concept of 'reasonable access by disabled persons' is consistent with the idea of 'reasonable accommodation' as applied at international law. At international law, 'reasonable accommodation' means necessary and appropriate modification and *adjustments*...to ensure to PWDs the enjoyment or exercise on an equal basis with others of all human rights and

⁷⁵ Section 7(3)(a)-(c) of the DPA.

⁷⁶ Section 7(4) of the DPA.

⁷⁷ Section 7(2)(a)(ii) of the DPA.

⁷⁸ Section 7(2)(b) and (c) of the DPA.

⁷⁹ Section 7(5) and (6) of the DPA.

⁸⁰ Section 7(8) of the DPA.

fundamental freedoms'.⁸¹ Adjustment orders can be utilized to ensure that school buildings and environments can be easily accessed by CWDs. Thus, the issuance of adjustment orders has implications for the enjoyment of access to education by CWDs. This is particularly so in most parts of rural Zimbabwe where entrances to classrooms, toilets and other facilities have staircases and are therefore largely inaccessible to children on crutches and wheelchairs. Furthermore, very few buildings (especially old ones), let alone general school buildings, have ramps with rails to enable persons with visual disabilities to move around with ease. While many new buildings in urban areas have ramps, the recommended gradient of the ramps is rarely adhered to. Many (school) buildings also lack signs to indicate where the disabled person's entrance, elevators or toilets are located. The visually impaired are disadvantaged by buildings with no guiding rails, elevators with no recorded voice, and elevators too small or narrow to accommodate wheelchairs.

Given the plight of CWDs in our education system, one would expect the NDB to issue adjustment orders to almost all schools to ensure reasonable accommodation of learners with disabilities, but this, to our knowledge, has not happened. In the end, children with disabilities confront many physical and environmental barriers to equal access to education in spite of the fact that the law foresees and authorizes the removal of such barriers. The realization of the right of CWDs to education largely depends on whether the NDB exercises its functions effectively. From an access to education perspective, the situation is pathetic because the NDB should not 'serve an adjustment order upon any school or educational or training institution controlled or managed by the State or registered in terms of the Education Act ...*except with the consent of the Minister responsible for the administration of the institution or Act concerned*'.⁸² Therefore, the Minister of Education, Sport and Culture is vested with the authority to decide whether the NDB should issue an adjustment order to schools to ensure that their needs and rights are reasonably accommodated. These procedural formalities potentially undermine CWDs' right to education.

3.2.2 Policy formulation

⁸¹ See article 2 of the CRPD.

⁸² Section 7(7)(b) of the DPA.

The NDB has the statutory mandate to formulate and develop measures and policies designed (i) to achieve equal opportunities for disabled persons by ensuring...that they obtain education..., participate fully in sporting, recreation and cultural activities and are afforded full access to community and social services; (ii) to enable disabled persons to lead independent lives; (iii) to prevent discrimination against disabled persons resulting from or arising out of their disability.⁸³ In the context of education, ensuring equal opportunities for PWDs would require the State to monitor whether private and public schools are accommodative of CWDs. This ties in well with the NDB's power to formulate policies which prevent disability-based discrimination against persons PWDs. Another problem with the Act is that the development of disability-friendly policies is left to the discretion of the NDB. Thus, the rights of CWDs are at the mercy of the NDB which is under no direct binding legal obligation to act as required.

3.3 The Education Act

Under the Education Act, every child has the right to school education.⁸⁴ Although the Education Act promotes education for all, education has not practically been for all CWDs. The Education Act outlaws discrimination based on a closed list prohibited ground of discrimination. This list excludes disability. It is arguable that when the Education Act became law, disability was not considered an important issue in the human rights debate; at least in Zimbabwe. This gap is now addressed by the recently adopted 2013 Constitution.

4. A case study of Mwenezi District

Mwenezi is a predominantly rural area; with small pockets of growth points. It is located in the Southern-most part of Masvingo Province. There are 119 primary and 38 secondary schools in the District but with no special school. Furthermore, there are eight Resource Units in Mwenezi District (some of these Units are not functional due to lack of funding). Until the launch of fast-track land reform, more than half the landmass of the District historically formed part of cattle- and game-ranging farms. These farms invariably had few or no schools built in them. In the aftermath of the land-reform process, newly established communities had to build schools. A

⁸³ Section 5(1)(b)(i), (ii) and (iv) of the DPA.

⁸⁴ Section 4(1) of the Act.

common feature of these schools is that they have few or no qualified teachers – as teachers are hesitant to work in these areas due to water shortages and long distances to busy roads. In this section, we document the number of CWDs at the schools we visited; give a brief analysis of data and discuss in detail the challenges confronting CWDs in Mwenezi and other rural districts. While there may be variations from one district to another, we are of the view that many of the findings we made, especially concerning impediments to access to education in rural areas, potentially apply to the rest of the country.

4.1 Children with disabilities in rural schools

This section tabulates data on CWDs in some of the schools in Mwenezi District as follows.

Name of School	No. of CWDs	Sex	Grades	Disability
Chovuronga Primary School	8	4 Females 4 Males	4 in grade 1; 1 in grade 3; 1 in grade 4; 1 in grade 6; 1 had no stated grade.	2 ill-health; 1 short-sighted; 1 mentally retarded; 1 visually impaired; 1 short right leg; 1 speech difficulties
Masogwe Primary School	11	4 Females; 7 Males	3 in grade 1; 4 in grade 2; 4 in grade 4;	4 mentally retarded; 2 speech problem; 2 hearing impairment; 1 down syndrome; 1 epileptic and cerebral pulse; 1 club foot
Rata Primary School	53	25 females; 28 males	18 ECD; 1 had no stated; 3 resource unit; 8 in grade 1; 6 in grade 2; 3 in grade 3; 5 in grade 4; 2 in grade 5; 3 in grade 6; 4 in grade 7	10 jaws and palate; 4 tongues not rolling; 2 cross-eyed (these were part of the 4 that were in grade7); 9 impaired hearing ;1 hydrocyphulus; 5 ill- health; 4 physical impairments; 6 were hyperactive; 7 learning disabilities; 2 socially deprived; 2 mentally challenged; 1 hypertension
Chikadzi Primary School	75	26 females; 49 males	1 in grade 0; 8 in grade1; 7 in grade 2; 17 in grade 3; 7 in grade 4; 5 in grade 5; 28 in grade 6; 2 in grade 7	50 learning disabilities; 9 deprivation; 5 hearing problems; 2 mentally problem; 2 ill health; 1 hyperactive; 1 speech problem; 1 deaf and dump; 1 deformity on the left

				hand ; 1 down syndrome; 2 hydrocyphalus
Shazhaume Primary School	11	2 females; 9 males	2 ECD; 1 in grade 4; 1 in grade5; 1 in grade 6; 1 in grade7	mentally retarded;
Chengwe Primary School	7	4 females; 3 males	1 in grade1; 2 in grade2; 1 in grade 4; 1 in grade 5; 2 in grade7;	1 skin disease; 1 amputated arm; 1 paralysed; 3 mentally retarded ; 1 one-eyed
Boterere Primary School	3	2 females; 1 male	2 in grade1; 1 in grade4	1 feet without toes; 1 one-eyed; 1 impaired hearing
Mwanezana Primary School	3	2 females; 1 male;	1 in grade4; 1 in grade 5; 1 in grade 6	2 impaired hearing; 1 down syndrome
Munyamani Primary School	7	2 females; 5 males	2 ECD; 1 in grade1; 1 in grade 2 ; 2 in grade3; 1 in grade 5;	1 impaired hearing; 1 short arm; 1 speech difficulties; 1 deformed foot; 1 deformed leg; 2 damaged eyes
Rushumbe Primary School	6	3 females; 3 males	3 in grade 1; 2 in grade 1; 1 in grade 3	3 visual impairment; 3 hearing difficulties
Ruzambu Primary School	6	2 females; 4 males	1 ECD; 2 in grade 1; 1 in grade 2; 1 in grade 6; 1 in grade 7	3 physically handicapped; 1 mentally retarded; 1 visually impaired; 1 speech defects
Msaverima Primary School	17	6 females; 11 males	7 resource unit; 2 in grade 1; 1 in grade 2; 3 in grade 3; 2 in grade 5; 2 in grade 7	4 cerebral pulse and 1of the four hydrocephalus; 5 mentally challenged; 3 visual impairments; 2 physical disabilities and of two one wheelchair bound; 1 impaired hearing ; 1 hydrocephalus
Vinga Primary School	6	3 females; 3 males	2 in grade 1; 1 in grade 3; 1 in grade 5; 2 in grade 6	3 physically handicapped and(all had problems with one leg each); 2 visually impaired; 1 impaired hearing
Machena Primary School	9	6 females; 3 males	2 in grade 1 ; 2 in grade 2; 2 in grade 3; 2 in grade 4; 1 in grade 6	5 mentally retardation; 1 deaf and dumb; 1 grooved leg; 2 eye sight problems and one of them had a burnt face;
Rutenga Primary School	9	6 females; 3 males	1 ECD; 2 in grade 1; 2 in grade 3 ; 1 in grade 4; 1 in grade 5; 2 in grade 7	3 visually impaired; 3 mental defects; 3 physical disabilities;
Negari Primary School	17	7 females ; 10 males;	2 in grade 1 ; 1 in grade 2; 1 in grade 3; 1 in grade4; 2 in grade 5; 2 in grade 6; 8 in grade 7	6 impaired hearing; 7 physically handicapped ; 2 visually impaired; 2 mentally retarded
Bemberero Primary School	1	1 female	1 in grade 0	Physical disability
Matande Primary School	24	15 males; 9 females	2 ECD; 1 in grade 2; 9 in grade 3 ; 3 in grade 4; 1 in grade 5; 5 in grade 6 ; 3 in grade 7	12 impaired hearing; 9 mentally retarded; 2 speech defects; 1 physical disability;

Zvirikure Primary School	27	The sex was not mentioned	4 in grade 0; 5 in grade 2; 5 in grade 3; 1 in grade 4; 4 in grade 5; 7 in grade 6; 1 in grade 7	13 mentally challenged; 3 impaired hearing; 3 ill health; 3 social disability; 2 hyperactive; 2 learning disabilities ; 1 visually impaired
Mavambo primary	16	9 females; 7 males	5 in grade 0 ; 6 in grade 1; 1 in grade 3; 2 in grade 4; 1 in grade 5; 1 had no clearly known grade	3 impaired hearing; 3 visually impaired; 4 polio; 2 dumb; 1 down syndrome; 1 hydrosyphilis ; 1 hyperactive; 1 deferred speech;
Mushonganeburi Secondary School	2	1 female ; 1 male	1 in form 3; 1 in form 1	1 club foot; 1 single eye
Budirirai High	3	2 males; 1 female	Their forms were no stated	1 deaf; 1 mentally retarded; 1 paralysed hand
Gukuku Secondary School	3	3 females	Their forms were not clear from the papers	1 albinism; 1 broken right hand; 1 deformed middle toe

4.2 Analysis of data

There are few CWDs in Zimbabwe's rural schools. Many schools are sparsely located; have big catchment areas and have very few (often less than 10) CWDs. This trend potentially shows that many CWDs do not even reach the classroom. It is highly likely that schools such as Chikadzi (educating 75 CWDs) and Rata (with over 50 CWDs) have many CWDs because these schools have partnered with local communities and traditional leaders. The fact that the catchment areas of these schools are big only tells part of the story as other schools that have even bigger catchment areas are failing to attract CWDs. Furthermore, community leaders surrounding these successful schools indicated that they were certain that a significant number of CWDs were out of school. The situation is worse for children living in the resettlement areas as they have to travel long distances to schools. Those with physical and other related disabilities find it difficult to walk to distant schools in areas where poor road networks collude with poor public transport systems to deny CWDs access to education.

Generally, there are more CWDs in lower grades than in higher grades or secondary schools. Very few CWDs complete their primary education as many of them, especially girls, drop out for

different reasons. Arguably, the education system – usually designed by able-bodied people to serve able-bodied children – is not well-equipped and resourced to retain CWDs once they are enrolled at schools. It was apparent from the respondents interviewed that CWDs withdraw from school. Chief among reasons for withdrawal are the inability of teachers and other learners to respond positively to the rights of CWDs and the existence of school environments that are not adapted to the needs of CWDs. The invisibility of CWDs in secondary schools is also a result of poverty and the failure by parents to pay the required tuition fees and other levies. Almost all parents earn a living from subsistence farming and live below the poverty line.

District-level data collected by the Ministry of Education is primarily concerned with primary school CWDs. This suggests that the focus of the State and even families, at the moment, is on enhancing 'equal' access to primary education. Unfortunately, CWDs need more than primary education for them to learn life skills. At a deeper level, the fact that efforts are concentrated at primary school level may be reflective of a 'national consensus' that CWDs are not able to comprehend issues beyond primary school level. Further, there are more male CWDs in schools, especially at higher levels, than girls. Whilst the numbers are usually even from the Early Childhood Development (ECD) level up to about grade four, the number of girls enrolled in schools dramatically dwindles from grade five to grade seven. This observation suggests that there are other factors which push girls away from school once they have enrolled. This trend could be a result of multiple social, cultural and environmental factors which hinder girls from enjoying equal opportunities in accessing education. Below, we analyse factors that are generally understood to impede access to education by CWDs in rural Zimbabwe.

4.3 Impediments to access to education in Mwenezi District

Lack of resources; long distances to school, poor road networks and transport systems; lack of special schools in the district; social, cultural and attitudinal factors and environmental barriers emerged as some of the leading impediments to access to education in Mwenezi's rural schools. Below, we explain the degree to which each of these factors impedes access to education by CWDs.

4.3.1 Inadequate resources

Inadequate resources are one of the factors that contribute to the marginalisation of CWDs; especially in the context of the right to education. The lack of resources takes various dimensions. Firstly, there is inadequate financial support for PWDs, let alone CWDs at district and school level. One rarely sees anything about PWDs in national budgets or policy documents. This is perhaps not surprising given the inadequate political representation of this category of persons. The only form of assistance offered by the government is the Basic Education Assistance Module (BEAM). The programme targets children who have never been in or have dropped out of school due to economic hardship and children in school but failing to pay levies, tuition and examination fees due to financial hardships. The following criteria are used in the selection of beneficiaries:

- Children who have never been to, or have dropped out of school due to poverty;
- School record of child's previous failure to pay fees and levies due to poverty;
- The source of income and health status of the head of household or breadwinner;
- Whether the potential beneficiary is an orphan and
- Household asset ownership of the guardians of potential beneficiaries.

Whilst the government should be commended for this policy, the problem is that it does not specifically address the educational needs of the most vulnerable groups such as CWDs. For instance, the policy targets children who have never been to, or have dropped out of school due to poverty. This is a noble idea, but the truth of the matter is that many children have never been to, or have dropped out of school due to (stigma associated with) disabilities. There is exclusive focus on financial means than on physical attributes such as psychological and other impairments. As many respondents pointed out, schools are result-based and BEAM cannot concentrate on the needs of CWDs.⁸⁵ There is need for a programme that gives preferential treatment to CWDs at every level of the education system.

Secondly, there is lack of adequate support devices such as hearing aids and other specialised equipment and materials for CWDs. This is a common feature in almost all the Resource Units in Mwenezi District. Most of these devices are expensive and are not locally available. There is

⁸⁵ The same point was emphasised by participants at a Workshop held by the Disability Rights Project of Midlands State University at Mutare on the 12th of July 2012.

need to consider developing cheap and locally available devices. Further, the State should fund all the school projects for CWDs to avoid situations – common in Mwenezi – where parents and local communities put funds together to sustain the available Resource Units. In fact, there were reports that while eight Resource Units existed on paper, lack of funding had long made some of them non-functional.

Thirdly, there is over-reliance on donor support for the purchase of relevant equipment and devices needed by the Resource Units. As pointed out by Mr Shumba at the district offices of the Ministry of Education, reliance on donor support poses a challenge to the sustainability of various projects as donors gradually pull out of the district. In any event, many projects have timelines within which they should be completed and it is often the case that they pull out as per their schedule. The pulling out of donor support and inadequate funding by the State can lead to (a) general shortage of books, science equipment and other essential learning facilities, (b) poor students' performance due to lack of books and other teaching materials, (c) low moral among teachers as a result of poor salaries and other working conditions, and (d) lack of attraction and retention of qualified teachers because of poor amenities in rural areas.⁸⁶ This can lead to lack of commitment towards CWDs as teachers see such learners as an additional burden for which they should be incentivized.⁸⁷ It is against this background that the government and other local organisations should devise mechanisms for ensuring the sustainability of projects targeted at CWDs.

Finally, there are inadequate human resources to cater for the needs of CWDs in all primary and secondary schools. There are inadequate multidisciplinary personnel to cater for all the special needs of CWDs in the schools. To address this anomaly, teachers and parents should be encouraged, if not required, to attend training courses at Centres that are designed to equip relevant persons with coping strategies and to teach communities how to care for CWDs. These measures should go a long way in helping communities understand that inclusion is not an add-

⁸⁶ See also GY Kanyongo 'Zimbabwe's public education reforms: Successes and challenges' (2005) 6(1) *International Education Journal* 65, 72.

⁸⁷ This attitude is prevalent among teachers who did not receive relevant training on how to handle disability in the school environment.

on, but a natural extension of promising research-based education practices that positively affect the teaching and learning of all learners.⁸⁸

4.3.2 Distance to school, poor road networks and transport systems

There is general consensus in Mwenezi District that schools are far much spaced than should be the case. In the communal areas that existed when Zimbabwe attained independence in 1980, primary schools draw pupils from an approximate distance of seven to eight kilometres in every direction. For secondary schools, the distance can be as long as 9-10 kilometres. Many primary and secondary school children living in villages and communities established as a result of the land reform programme have to travel for longer distances since there are few schools in these communities. Long distances to schools collude with poor road networks and transport systems to deny CWDs the right to education. In fact, this is part of the reason why there are fewer Resource Units than there should be in the district as many children live in remote areas that are poorly connected to functioning schools and other centres of activity.

Given that the majority of parents and caregivers live below the poverty-datum line, often in abject poverty, many CWDs remain confined to the family home. The roads that link old growth points, schools and communities are rarely repaired or maintained, let alone those that link remote or new villages and new schools established after fast-track land reform. There is need to maintain existing roads and to construct other roads to link remote areas to existing schools to encourage road transport owners to commute to these places. This is particularly so for most of the areas that became communal areas following the land reform programme. Previously, these areas had numerous game- and cattle-ranching farms with no or few schools close to them.

However, maintaining roads and improving the public transport system will not necessarily guarantee equal access to education for CWDs as these children have to contend with negative attitudes on disability by minibuses operators. Reports elsewhere have indicated that even in urban and peri-urban areas, many CWDs have to be pushed to school because those providing the local minibus services are unwilling to take the time and trouble to load up a child in a

⁸⁸ K Ryan and JM Cooper *Kaleidoscope: Contemporary and classic readings in education*, 12th Edition (2009).

wheelchair.⁸⁹ There are so many cases of public buses refusing to take a child in a wheelchair. This makes transport home a nightmare. Nonetheless, this is not to say that better roads and the public transport system will not make any difference. Coupled with awareness campaigns on disability, better roads and an efficient public transport system will place many more CWDs in school.

4.3.3 Lack of special schools in the District

There are no special schools for CWDs in Mwenezi District. This is a setback for children with multiple or severe disabilities that cannot be easily addressed by teachers in inclusive settings. Teachers without specialised training will no doubt find it difficult to pitch the discussions at the levels which children with severe or multiple disabilities would understand. Many children have to travel to Copota School of the Blind, Morgenster School for the Deaf and many other distant special schools for purposes of accessing basic education. Unfortunately, very few parents can afford to pay the fees required for their children to attend these special schools. These schools are 'expensive' and the majority of parents cannot raise the required fees as the parents are often unemployed and have no regular source of income. The distance from Mwenezi district to the provincial capital, Masvingo, ranges from 110 to 280 kilometres, depending on which part of the district one lives. Thus, it can be difficult for parents to get even bus fare to visit special schools in the provincial capital where many special schools are located.

The only forms of special schools in the district are Resource Units. These are classrooms in ordinary schools dedicated to children (with varying degrees of physical, visual and hearing impairments) who can cope with the demands of ordinary schools. Resource units are manned by specialist teachers and provide integrated educational set-ups for CWDs. The government requires that a resource unit be established at a school if there are seven or more children with the same disability. The problem with this policy is that there can be as many as six children with the same disability or many children with different, but the school is not allowed to establish a Resource Unit. In any event, these Resource Units are poorly funded.

4.3.4 Social, cultural and attitudinal barriers

⁸⁹ See King George VI Children's Centre and School 'Disability in Zimbabwe', Background Paper, available at <http://www.kinggeorge6.org/Home/the-centre/disability-in-zimbabwe> (accessed 28 June 2012).

Negative attitudes, beliefs and stigma against disability are prevalent in Zimbabwe. It is disheartening to note that very few school heads; teachers and children are willing to associate with CWDs. Historically, CWDs were considered burdens to the family and to the community. Children with disabilities were also thought to have been unnaturally conceived and, therefore, were neither fully human, nor part of the community.⁹⁰ Even today, many CWDs are kept at home, isolated and, in extreme cases, tied to trees or rocks as a means of controlling them.⁹¹ Thus, children are often confined to the family home until they are too old and troublesome to be controlled by close kin.⁹² Only then will parents seek 'external' assistance and involve primary schools in the upbringing and education of the child.⁹³ It is often difficult for families living in largely agrarian societies to work the fields while keeping an eye on CWDs. Thus, while it was evident from respondents that more children are now being sent to school at an earlier age than before, it was also apparent that too many CWDs are kept at home until they are too big to handle and then sent to school when it is sometimes too late for effective treatment.⁹⁴

The levels of social stigma fuelled by disability are alarming and serve to disadvantage many children who wish to have an education. Under Shona culture, disability is generally thought to be evidence of a curse from God and/or ancestral spirits that wish to inflict pain on disobedient members of the family. Many respondents agreed that disability is often associated with witchcraft, promiscuity by the mother during pregnancy, punishment by ancestral spirits or by God. Thus, people react with fear, anxiety and hostility when they see CWDs. These beliefs lead to isolation, discrimination and prejudice against CWDs. In many contexts, including access to education, it is the beliefs and attitudes which disable the child, not the disability itself.

⁹⁰ V. Kabzems & R. Chimedza 'Development assistance: Disability and education in Southern Africa' (2002) 17 (2) *Disability and society* 147, 150.

⁹¹ This phenomenon has been confirmed by another research project done in Murambinda by Mr E Mandipa and K Katsande under the auspices of the Disability Rights Project.

⁹² See for instance Oxfam 'Breaking down the stigma around children with disabilities', *The Zimbabwean*, 30 September 2010.

⁹³ In Gokwe, there were reports, during the workshop held on 11 May 2012, of persons with disabilities starting primary school at 16 or 17 years of age.

⁹⁴ This fact was mainly revealed at a meeting with community leaders at Rata Business Centre in Chief Negari's territory.

The problem is largely social and cultural. In the pre-colonial era, children born with disabilities and even twins were taken to a secluded place and left there to die.⁹⁵ Highlighting this problem in an empirical study done for Progressio Zimbabwe, Choruma observed as follows:

*Socially there is still a lot of misunderstanding and lack of knowledge about disabilities. This mainly stems from cultural misgivings about disabilities. Disability is still an issue that is surrounded by myths. In the social setting, people with disabilities are invisible because generally the country's social amenities have not been structured in a way that is inclusive for people with disabilities. As such, people with disabilities are less likely to participate in most social activities. Instead people with disabilities belong to institutions where 'specialised' activities are developed for them. Society's attitude towards people with disabilities reflects a view that people with disabilities are useless liabilities who have no role to play in society.*⁹⁶

Persons with disabilities have always been socially disadvantaged in Zimbabwe and even now many are not accepted into society as they are thought to be incapable of functioning on their own. Disability is equated with inability. These social attitudes often result in CWDs not going to school or not receiving adequate support from parents and the State when in school. For instance, it was apparent from the respondents that many people believe that sending CWDs to school is a 'waste of time' since such children 'are not able to learn'. Apart from fuelling further marginalisation of CWDs, these negative social attitudes can be an 'incentive' for many poor families, reliant on over-stretched budgets, to deny CWDs equal access to education. The child's disability can be a 'strong' cultural reason for the withdrawal of family support for the child's education. More importantly, these attitudes generate a self-fulfilling prophecy as many PWDs are seen to be helpless beneficiaries of charity.

4.3.5 Environmental barriers

⁹⁵ See D Pritchard *Education and the Handicapped* (1963), indicating that this was a worldwide problem.

⁹⁶ T Choruma *The forgotten tribe: Persons with disabilities in Zimbabwe*, Progressio Report (2006) 31.

Many schools are not accommodative to the human rights and educational needs of CWDs. Ordinary schools are often reluctant to enrol CWDs.⁹⁷ Further, the environment in most schools is not as friendly as it should be. Most buildings are inaccessible to children in wheelchairs or on crutches. When CWDs perform at any public function, they have to be lifted on to the stage in their wheelchairs. Children with disabilities are excluded from most inter-school events because of the problems of access, seating or simply an unwillingness to allow them to participate with 'normal' children. Most teachers do not possess the relevant skills and competences to handle learners CWDs and this can be a recipe for further marginalization of CWDs. Some parents, teachers and communities do not appreciate the need to educate CWDs as they consider them incapable of learning.⁹⁸

When CWDs are enrolled in ordinary schools, they are often confronted with an environment that informs them that they are not welcome. Most schools have classrooms, offices and toilets that are stepped and present serious problems to wheelchair users and learners with other physical disabilities. For these children, getting into the classroom or toilet is a nightmare and this induces a feeling that they are burdening other children who help them access these places. To the best of our knowledge, there is no single school in Mwenezi that has tarred roads or pavements. In fact, very few schools have pronounced roads or pathways to even talk about. At many schools, the physical terrain is sloppy or flat and sandy. These circumstances make it difficult for children on wheelchairs or crutches to drive themselves around or move about.

5. Conclusion

Despite the movement towards the greater promotion of the rights of PWDs at the international level, Zimbabwe still does not have a clear disability policy. Whilst the country is striving to mainstream gender equality, there are no indications that the country will mainstream children's rights or disability rights any time soon. Part of the problem may be that the proliferation of disability rights talk comes at a time when the country is facing enormous socio-economic challenges. These challenges push the rights of CWDs to the margins of national economic

⁹⁷ This development has also been confirmed in a series of workshops; including the one held by the Disability Rights Project at Gokwe Business Centre; 11 May 2012.

⁹⁸ See BA Chikwanha 'Preface' in *Breaking down barriers to inclusive education in Zimbabwe* (2011).

planning. In the context of the right to education, it is apparent that a significant number of CWDs do not attend school. Furthermore, the majority of children, especially girls with disabilities, who attend school rarely complete primary education and attain secondary education. At the centre of this trend is a combination of economic, social, cultural, attitudinal and environmental factors which collude to deny CWDs their right to access to education. Thus, behind the denial of the rights of CWDs lie attitudes, cultures and practices which view the life of CWDs as being of less worth, importance and potential than that of able-bodied children. In the end, CWDs continue to be dependent on others and become an economic drain on their communities simply because they were denied the opportunity to attain an education.

This article has demonstrated that the marginalization of CWDs in the context of the right to education is a violation of international and domestic human rights law. The Standard Rules and the CRPD make it clear that States are duty-bound to ensure that buildings, services and resources at educational institutions are tailor-made to accommodate the needs and rights of CWDs. For information to be easily accessible to CWDs, the State also bears the responsibility to provide this information in the format and means which CWDs can understand. These and other noble purposes of international law have been repeatedly violated in Zimbabwe's rural (and even urban) schools. Furthermore, the CRC binds the State to fashion special measures 'designed to ensure that the disabled child has effective access to and receives education, training [and] preparation for employment'. Despite the fact that Zimbabwe is a State Party to the CRPD and the CRC, there are no indications that the country has effectively protected and fulfilled (by taking positive measures) the right of CWDs to education. Even at the local level, the country is violating its own mantra of 'education for all' since CWDs have not had a fair share of attention from government and educational authorities. There is no deliberately framed policy to ensure that CWDs are beneficiaries of affirmative action in the context of educational policies.

Although BEAM has placed some CWDs in school, BEAM is not a disability policy or project. Zimbabwe should rely on section 56 of the Constitution to adopt positive measures to ensure that educational opportunities for CWDs are equalized with those of children without disabilities. To match the standards established at international law, both the Education Act and the Disability Act need complete overhauls. None of these Acts promote legitimate positive discrimination or affirmative action measures. While the Education Act speaks of 'education for all' and every child's right to education, it does not say anything about disability and adds

nothing new for CWDs. Further, the DPA has a number of empowering provisions, but the potential of these provisions is subject to the NDB and the relevant Minister choosing to exercise the discretionary powers conferred on them. The NDB is known for its invisibility and silence and this leaves CWDs with no board to turn to for assistance. It has been observed that disability issues have a low priority within the government of Zimbabwe despite the establishment of the NDB and the appointment of a Presidential Advisor on disability issues.⁹⁹ Thus, the country perhaps needs comprehensive legislation on disability to address the shortcomings evident in the present Acts which were drafted during the heyday of the medical model of disability. There is a greater need to realign the existing legal framework with the new Constitution of 2013 and CRPD. This will invariably foster the prospects for greater protection of the rights of CWDs including the right to education.

Besides the need to have comprehensive disability legislation, there is need for awareness campaigns to challenge prevailing attitudes about disability in Zimbabwe. Such awareness campaigns should not be conducted in a top-down fashion, but should start at the grassroots level. If consistently implemented, these campaigns will go a long way in deconstructing cultural beliefs and social attitudes about disability in Zimbabwe. Finally, there is need to mainstream disability in the same way we have mainstreamed gender in many sectors of society. Mainstreaming disability is another way of politicizing disability rights issues in the same way women's rights issues have been politicized with tangible results.

⁹⁹ Dr R Lang and G Charowa *DFID Scoping Study: Disability issues in Zimbabwe* (2007) 7.

