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Table of contents

Unpacking the symbiotic intersection between national objectives and human rights

Admark Moyo* and Valantine Mutatu**

Abstract

National objectives are fundamental principles of governance and signify the ideals that all state institutions and agencies of government must keep in mind when formulating and implementing laws and policies. They form constitutional instructions to the legislative, executive, administrative and judicial organs of the state at all levels. The national objectives provide overall guidance on the measures that must be adopted to achieve social, economic and political transformation. Since they set out an extensive economic, social and political agenda, the national objectives are intended to promote the realisation of superior ideals such as justice, human dignity, equality and freedom.

1. Introduction

National objectives as provided constitutionally portray Zimbabwe as a 'welfare state' that is committed to taking deliberate legislative, policy and other measures to ensure the achievement of equality in society. The movement towards a more egalitarian society is one of the central goals of national objectives within the framework of our transformative Constitution, the Constitution of the Republic of Zimbabwe (Amendment 20) of 2013. Unlike national objectives which are not justiciably binding, the fundamental rights and freedoms to which every person is entitled are capable of vindication and enforcement in the courts of law. The substantive provisions of the Declaration of Rights[1] (DoRs) protects and encompasses civil and political rights, social and economic rights, and, to a limited extent, group rights. The rights guaranteed in the Constitution generate positive and negative obligations on state and non-state actors. All remaining constitutional rights[2] impose on the state and, to a limited extent; on individuals the duties to respect, protect, promote and fulfil the rights entrenched in the DoRs. The provisions entrenching substantive rights should be applied, interpreted and limited in a manner consistent with other key constitutional provisions which include the application clause, the interpretation clause, the limitation clause and the public emergency clause. Although the legal content of fundamental rights and freedoms is relatively clearly understood, the scope of national objectives has not been the subject of scholarly analysis or debate, thereby leaving a gap that needs clarification for the benefit of the courts, lawyers, the political organs of the state and the general public.

This paper provides an analysis on the relationship between national objectives and human rights through comparison with another national constitution. It examines the content of Directive Principles of State Policy (an equivalent of national objectives) under Indian constitutional jurisprudence in comparison with the legal status of the national objectives under Zimbabwe's Constitution. Reference to the 'national objectives' implies that the set out[3] goals should be placed at the centre of the social, economic and political transformation that

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1 Chapter Four of the Constitution of Zimbabwe (Amendment No 20) 2013.

2 Section 44 of the Constitution.

3 Chapter Two of the Constitution.

is envisaged in the constitutional provisions, including the rights protected in the DORs.

2. National objectives as directive principles of national policy: Republic of India

The justiciability and significance of national objectives is a subject of contestation.[4] These terms are controversial particularly with regard to their potential abuse by judges in the interpretive process as an interpretation that is too wide could lead to abuse to the separation of powers doctrine. Generally, there is an understanding that the constitutionally expressed national objectives are not legally justiciable and that constitutional claims must be based on substantive provisions that protect the right that is alleged to have been breached. However, it is argued that national objectives (together with the founding values and principles) are crucial supportive mechanisms in human rights adjudication.[5] The full realisation and promotion of human rights can be furthered by giving more weight to constitutional national objectives.

In India, the Directive Principles of State Policy (similar to national objectives) have become the axis upon which the judicial enforcement of socio-economic rights revolves. The Indian Supreme Court has noted that "fundamental rights are not an end in themselves but are the means to an end".[6] Similarly, in the Zimbabwean context, the fundamental rights[7] exist to facilitate the realisation of the national objectives protected under Chapter Two of its Constitution. Thus, there exists a symbiotic relationship between national objectives and fundamental rights. The Indian Supreme Court has explained this relationship under similar provisions of the Indian Constitution in the following terms:

> "The importance of Directive Principles in the scheme of our Constitution cannot ever be over-emphasised. Those principles project the high ideal which the Constitution aims to achieve. In fact Directive Principles of State Policy are fundamental in the governance of the country and there is no sphere of public life where delay can defeat justice with more telling effect than the one in which the common man seeks the realisation of his aspirations. But to destroy the guarantees given by Part III [fundamental rights] in order purportedly to achieve the goals of Part IV [directive principles] is plainly to subvert the Constitution by destroying its basic structure. Fundamental rights occupy a unique place in the lives of civilised societies and have been variously described as 'transcendental', 'inalienable' and 'primordial' and … they constitute the ark of the Constitution. The significance of the perception that Parts III and IV together constitute the core of [our] commitment to [a] social revolution and they, together, are the conscience of the Constitution is to be traced to a deep understanding of the scheme of the Indian Constitution. Parts III and IV are like two wheels of a chariot, *one no less important than the other. Snap one and the other will lose its efficacy. They are like a twin formula for achieving the social revolution which is the ideal which the visionary founders of the Constitution set before themselves.* [8]

4 See generally, G.J Jacobsohn Austin 'Constitutional Values and Principles' in M Rosenfeld and A Sajo (Eds) The Oxford Handbook of Comparative Constitutional Law 2012.

5 The functions of the court are not strictly restricted to interpretation of the law but the court can also make law 'by sharing the passion of the Constitution for social justice'. P Singh 'Judicial socialism and promises of liberation: Myth and truth' 1986 28 Journal of the Indian Institute 338.

6 In this context, the DPSP are the 'end' to which the fundamental rights should lead, see *Minerva Mills Ltd v Union of India,* A.I.R. 1980 S.C 1789 at 1806-1807; 253D-H; 256A-B.

7 Chapter Four of the Constitution.

8 Minerva Mills Ltd v Union of India 254H and 255A-D.

In other words, the Indian Constitution is founded on the bedrock of the balance between Parts III and IV. To give absolute primacy to one over the other is to disturb the harmony of the Constitution. The balance between fundamental rights and directive principles is an essential feature of the basic structure of this Constitution.[9]

No doubt, by including the national objectives in the Constitution of Zimbabwe, the intention was the creation of standards by which the success or failure of the state and all its functionaries could be judged.[10] The national objectives are a crucial yardstick by which the state can be held accountable in terms of compliance with its human rights obligations. The Zimbabwean case of *S v Banda*[11] demonstrates how national objectives can be used to buttress the protection of human rights. Charehwa J held that even though the conviction and sentencing of two sexual offenders had been in accordance with the Criminal Law (Codification and Reform) Act [Chapter 9:23], the application of that sentencing regime trivialised "the protective measures for young people prescribed in our law and in the current international framework for safeguarding young persons". The learned judge invoked section 19(2)(c) of the Zimbabwean Constitution (a national objective) to demonstrate that the trial magistrate should have adopted a stricter sentence so as to fully guarantee the protection of the rights of young persons.

The reasoning of the court is commendable as the presiding judge determined the adequacy and desirability of the current domestic laws on sexual offences against young persons in accordance with the national objective which requires the State to adopt reasonable policies and other measures to ensure that children are, *inter alia*, "protected from maltreatment, neglect or any form of abuse".[12] This shows the importance of national objectives and how they can influence the protection and enforcement of fundamental rights and freedoms within a particular country.[13]

3. National objectives as directly enforceable guarantees under Zimbabwean law

Whilst it is essential to recall that national objectives are not strictly enforceable in that claims cannot be based solely on an alleged breach of 'national objectives', the Constitution of Zimbabwe seems to elevate the significance of national objectives, giving them a special status distinguished from comparative documents such as the Indian Constitution. Section 8(1) of the Zimbabwean Constitution provides that:

> "The objectives set out in this Chapter guide the State and all institutions and agencies of government at every level in formulating and implementing laws and policy decisions that will lead to the establishment, enhancement and promotion of a sustainable, just, free and democratic society in which people enjoy

9 Singh ibid at n.5 250B-C; 254H and 255A-D.

10 See HM Seervai Constitutional Law of India 1967 759 who makes similar arguments with respect to the inclusion of DPSP in the Indian Constitution.

11 S v Banda HH-47-16. This criminal review of a case concerns a man aged above 30 years who had impregnated a girl of 15 years. The trial magistrate properly convicted and sentenced the man but on review, Charehwa J faulted the magistrate for not giving due regard to the national objectives in section 19. The learned judge also emphasised the need to look to section 327 (6) of the Constitution which requires the courts to adopt all reasonable interpretations which are consistent with international conventions, treaties and agreements that are binding on Zimbabwe.

12 Section 19 2 (c) of the Constitution.

13 See B De Villiers 'Directive principles of state policy and fundamental rights: The Indian experience' 1992 8 African Journal on Human Rights 29, 37-45, 38-9 and 43-5 for a more detailed discussion on the relationship between DPSP and fundamental human rights.

prosperous, happy and fulfilling lives".

Section 8(1) imposes, on all state institutions and agencies, including the executive and legislative branches, the peremptory duty to be guided by national objectives when formulating and implementing policies. It reiterates the role of national objectives as ideals to be 'kept in mind' when laws and policies are designed and implemented. The aim behind giving effect to national objectives at the level of law and policy-making is to facilitate social and economic transformation and the constitutional text categorically provides that authority. Besides facilitating social and economic progress, national objectives perform a central role in the interpretation of the Zimbabwean Constitution and particularly the rights entrenched in the DORs. Section 8(2) provides that "[r]egard must be had to the objectives set out in this Chapter when interpreting the State's obligations under this Constitution and any other law". This implies that the national objectives should guide the State, including its judicial organs, when performing their functions. Section 8(2) further entrenches national objectives into the interpretive scheme of this Constitution or any other law through including the state's duties to respect, protect and promote all the rights outlined in the DoRs. All laws in Zimbabwe are to be interpreted with due regard to the national objectives stipulated in Chapter Two of its Constitution.

There are overlaps between sections 8(2) and 46(1)(d) of the Zimbabwean Constitution, especially concerning the pivotal role played by national objectives in the interpretation of the instruments enshrined in the Declaration of Rights. Section 46(1)(d) provides that

> "When interpreting this Chapter, a court, tribunal, forum or body must pay due regard to all the provisions of this Constitution, in particular the principles and objectives set out in Chapter 2"

This provision may indicate an intention to establish enforceable standards against which the validity of the conduct of individuals and society as a whole, including the state and its functionaries, should be measured and judged. The national objectives are:

> "... a set of social ideals which are semi-justiciable and designed as targets towards which the country must aim. They define a goal for the Nation without which this country would drift as it appeared to have done in the past'."[14]

The characterisation of national objectives as 'targets' casts them as ideals with legal content and capable of indirect enforcement, especially by helping the courts to accord meaning to fundamental rights. However, despite establishing an undeniably symbiotic relationship between national objectives and the fundamental rights in the Declaration of Rights, it remains that national objectives are not directly enforceable guarantees. However, the Constitution increases the justiciability of national objectives by requiring 'particularly' that the courts and all other tribunals give them 'due regard' when interpreting the rights enshrined in the DoRs. The prescriptive wording in section 46(1)(d) emphasises the weighting which the Constitution attaches to the national objectives. Strong emphasis on 'particularly' reinforces the need to include the national objectives as part of the interpretive guidelines when dealing with alleged infringements of fundamental rights whilst the need to give 'due regard' ultimately animates the status of the national objectives as a 'standard' against which

14 S Kumo and A Aliyu (Eds) Issues in the Nigerian Draft Constitution 1977 29.

all relevant conduct should be judged.

These objectives are a key determinant of whether conduct will pass constitutional muster in that, for example, if the state implements a gender policy which is not fully or substantially reflective of the national objective of achieving gender balance[15] such a policy will not pass the constitutionality test. Under the current Zimbabwean Constitution, the fate of a litigant's case is no longer dependent on whether the court is benevolent enough to consider the national objectives as strengthening the litigant's claim because the Constitution already requires the court to do so. By requiring courts to 'pay due regard to' the national objectives, section 46(1)(d) has indirectly incorporated the whole of Chapter Two into the analytical framework of the interpretation clause. Where there is an enforceable constitutional right that is intended to protect the same interests as those protected by the applicable national objective, it is important for the court to consider the scope of both the right and the objective when interpreting the former.

For instance, gender balance prerogatives[16] should guide the court in interpreting the equality clause,[17] and the scope of culture[18] must be reflected when courts interpret the right to culture[19] This approach is very different from the Indian jurisdiction where the utilisation of Directive Principles owes a large debt to judicial activism rather than the actual constitutional text. One hopes however, that the courts of Zimbabwe will be alive to the meaning, relevance and effect of the national objectives, in light of section 46(1)(d) of the Constitution.

There are some residual limitations with regards to the application of national objectives in the court's interpretive mandate. First, legislation cannot be struck down solely on the basis of non-compliance with national objectives as the latter are not directly applicable to statutory laws and do not set concrete benchmarks for compliance. The exception to this general proposition is that in instances where certain national objectives are coupled with legally enforceable rights protected by the DORs, they can be relied upon to declare the impugned law or conduct unconstitutional.

Secondly, the court may not rely on national objectives as a justification for overstepping its designated role under the separation of powers doctrine. It remains difficult for courts to make policy choices or decisions with budgetary implications based on fundamental rights and freedoms, let alone national objectives. These remarks demonstrate the practical challenges that arise in any attempt to broaden the usefulness of national objectives in interpreting and enforcing fundamental human rights and freedoms.

4. National objectives and systemic interpretation under the Zimbabwean Constitution

Section 46(1)(d) of the Constitution of Zimbabwe creates two related obligatory duties. First, the duty to "pay due regard to all the provisions of the Constitution", and secondly, the duty to pay specific attention to the "principles and objectives" set out in Chapter Two. Section 46(1)(d) makes it clear the need to approach the entire Constitution as the creation of a single unified legal system for the protection of human rights and

15 Section 17 of the Constitution.
16 Section 17 of the Constitution.
17 Section 56 of the Constitution.
18 Section 16 of the Constitution.
19 Section 63 of the Constitution.

fundamental freedoms. National objectives under this Constitution appear to be more compelling, legally speaking, than the directive principles of state policy under the constitutions of other countries. The Constitution 2013 avoids the traditional bifurcated approach in terms of which only the provisions of the DORs are binding and the Directive Principles of State Policy are entirely not. The national objectives entrenched in Chapter Two of the Constitution are 'incorporated' into the interpretive framework of the DORs, thereby ensuring that they influence the scope and content of fundamental human rights and freedoms.

Section 46(1)(d) makes clear the need to approach the entire Constitution as a single unified legal system for the protection of human rights and fundamental freedoms.[20] National objectives under the Zimbabwean Constitution appear to be more compelling, legally speaking, than the directive principles of state policy under Constitutions of other countries. Though context encompasses aspects such as legal history, drafting history, the Constitution restricts context to textual context. Thus, the provisions of the Constitution must be understood in relation to one another — especially when they are associated — and as part of components of more encompassing instruments of which they form part, drawing on the system or logic or scheme of the written text as a whole. The due regard applicable to all the provisions of this Constitution suggests that a court is bound to interpret and apply human rights in a manner that fulfils the broad vision, purpose and object of the Constitution as a whole in a generous and purposive interpretation.

If rights and freedoms are to realise their full potential, they should be treated as parts of a continuum. Reading the Constitution as a single whole enables courts to consider the broad context within which the interpretation of rights must take place. This affirms the claim that rights cannot be enjoyed in a vacuum, but in a particular textual context, which either broadens or limits the enjoyment of rights. In the Zimbabwean case of *Mudzuru and Anor v Minister of Justice*,[21] section 78 of the Constitution, which protects marriage rights for heterosexuals, was interpreted within the context of sections 81 and 44 of the Constitution. Section 81 broadly protects the rights of the child and the principle of the best interests of the child. Section 44 imposes on state and non-state actors the duty to respect, protect, promote and fulfil the rights and freedoms set out in the Declaration of Rights. The court concluded that section 22 of the Marriage Act was inconsistent with the Constitution as it promoted child marriages which the Constitution seeks to suppress. Whilst the Court did not rely on national objectives, there is clear reference to other provisions of the Constitution to reinforce the importance of the entire constitutional framework in ensuring the adequate realisation of human rights guarantees. Where there is an enforceable constitutional right that is intended to protect the same interests as those protected by the applicable national objective, it is important for the court to consider the scope of both the right and the objective when interpreting the former. National objectives form part of the guiding principles of constitutional interpretation and must be accorded due respect when interpreting the provisions of the DORs.

5. Conclusion

The constitutional national objectives provide overall guidance to institutions and agencies of government on the measures that must be adopted to achieve social, economic and political transformation. They provide

20 See also the case of Kesavananda Bharatis v State of Kerala & Anor W.P. (C) 135 of 1970.
21 CCZ 12/2015.

constitutional instructions to the legislative, executive, administrative and judicial organs of the state at every level. This paper has demonstrated there are points of both convergence and divergence regarding the legal status of national objectives and the Directive Principles of State Policy. However, the major difference between the two concepts is that while fundamental rights proper are justiciable and can be enforced in courts of law, the national objectives are neither legally binding nor directly enforceable. Accordingly, national objectives perform a secondary, but nonetheless important role in determining the legal content of rights and the obligations imposed on the state and all institutions and agencies of government at every level.

The national objectives provide guidance to the state and the government at all levels of planning as well as law and policy-making. This is an important development given that the fundamental rights and freedoms protected in the DORs do not necessarily create concrete obligations as to what exactly must be done to respect, protect, promote and fulfil the rights they enumerate. The symbiotic relationship between national objectives and the fundamental rights provided in the DORS is thus critical and the national objectives are crucial supportive mechanisms in the landscape of human rights adjudication. Under this approach, the full realisation and promotion of human rights can be furthered by giving more weight to the national objectives to underscore their role in the full enforcement of rights.

The constitutional protection of the right to administrative justice in Zimbabwe: Prospects and challenge

*Walter T. Chikwana**

Abstract

The Constitution of Zimbabwe, 2013 enacted an expanded Bill of Rights. The right to administrative conduct that is lawful, prompt, efficient, proportionate, impartial and both substantively and procedurally fair is now entrenched in the Constitution. Further, the Constitution requires that an Act of Parliament must be enacted to give effect to the right. Currently, the Administrative Justice Act [Cap. 10:23] operationalises the right to administrative justice. The awkward situation created by this scenario is that the Act pre-existed section 68 (1) of the Constitution which brings the possibility that it may not be fully intra vires the constitutional provision. This article discusses the provisions of the Act whether they are consistent with the constitutional right. Section 68 (1) introduced an element of substantive fairness in administrative decisions and has widened the scope of the courts' review powers. Previously, when reviewing an administrative decision, the court was restricted only to procedural fairness to the exclusion of the merits of the matter. The 'wide' review now provided by the Constitution behoves of the court to consider whether the decision being challenged was both procedurally and substantively fair. The sections of the Act relating to grounds for review (section 3), locus standi (section 5), ouster clauses (section 11), which includes the right to receive reasons and exemption of certain specified organs of state from complying with the Act clearly limit the right to administrative justice as provided in section 68 of the Constitution. These have not yet been constitutionally challenged. This article discusses the sections to demonstrate that they are unconstitutional and, if they are challenged, it is likely that they will not pass constitutional muster. The thrust should therefore be that the Legislature should not wait for court challenges to the provisions but should take steps to align them to the constitutional right to administrative justice.

1. Introduction

The promulgation of section 68 of the Constitution of the Republic of Zimbabwe, Amendment 20, of 2013 which provides for the right to administrative justice heralded a new and exciting era in the development of administrative justice in Zimbabwe. The effect of this provision is that the right to administrative justice, which had been developed by the courts in terms of common law and later legislated through the Administrative Justice Act,[1] is elevated to a constitutional right. Most of the principles of the Zimbabwean administrative law have been developed by the courts in the exercise of their common law review powers. The Act legislated the right to administrative action and decisions that are lawful, reasonable and procedurally fair.[2] Even then, the review powers of the court were grounded on both the common law and the Act but subservient to the authority and whims of the legislature. The subsequent promulgation of section 68 of the Constitution marks the most important and far-reaching development in the jurisprudence of administrative law. This section of the Bill of Rights, amongst other elements, explicitly promises administrative action that is lawful, reasonable and procedurally and substantively fair.[3] Section 68(3) of the Constitution requires that there should be an Act

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1 Administrative Justice Act [Chapter 10:28].
2 See the preamble to the Act.
3 Section 68 (1) of the Constitution. The recognition of such a right has been rare in older constitutional democracies. The

of Parliament to operationalise this right to administrative justice. This article discusses the scope and nature of the Constitutional right to administrative justice. This is done to determine whether the constitutional right is fully given effect by the Administrative Justice Act an Act that predates the current Constitution.

2. International law perspective on administrative justice

Administrative justice is a fundamental requirement of a society that is based on the rule of law.[4] It signifies a commitment to the principle that the government, and its administration, must act within the scope of legal authority.[5] It also signifies the right of private persons to seek legal redress whenever their rights, liberties or interests are negatively affected when the public administration exercises its duties in an unlawful or inappropriate manner.[6] In such cases, meaningful redress should be obtainable through administrative proceedings in a court or tribunal. The court or tribunal should have the power to exercise judicial review to determine the lawfulness or appropriateness of an administrative act, or both, and to adopt suitable measures that can be executed within a reasonable time.[7]

A balance should be struck between the legitimate interests of all parties, with a view to having the administrative act or decision reviewed without delay, and efficient and effective public administration. Guaranteeing judicial review of administrative acts by a competent and independent court or tribunal that adheres to international and regional fair trial standards is fundamental to the protection of human rights and the rule of law.[8] The right to administrative justice must in this context be interpreted by considering international law. Section 46(1) of the Constitution obliges the courts to take into account international law and all treaties and conventions to which Zimbabwe is a party, when interpreting the Bill of Rights. This provision obliges the courts in Zimbabwe to consider international law when interpreting legislation.[9] Therefore, administrative justice in Zimbabwe is governed by several international and regional law instruments, which include but are not limited to, the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966) and the African Charter on Human and People's Rights (1981).

The present human rights regime owes a large part of its existence and development to the Universal Declaration of Human Rights (UDHR).[10] The UDHR makes provision for administrative justice in article 8[11], article 10[12] and article 21(2).[13] It lays a basis for the development of administrative justice in various

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Namibian Constitution was one of the first to contain such a right in Article 18, the South African Constitution provides for the right in section 33 and the Kenyan Constitution in article 47.

4 Folke Bernadotte Academy and Office for Democratic Institutions and Human Rights, OSCE's Office for Democratic Institutions and Human Rights (ODIHR) *Handbook For Administrative Justice* (September 2013) 12.

5 Ibid.

6 Ibid.

7 Ibid.

8 Ibid.

9 Section 34 of the Constitution also provides that the state must ensure that all international conventions, treaties and agreements to which Zimbabwe is a party are incorporated into domestic law.

10 Declaration was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 by General Assembly resolution 217 A (III).

11 "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the constitution or by law."

12 "Everyone is entitled in full equality to a fair and public hearing by an independent and partial tribunal, in the determination of his rights and obligations…"

13 "Everyone has the right of equal access to public service in his country."

jurisdictions, Zimbabwe included. The International Covenant on Civil and Political Rights[14] further addresses administrative justice in article 2 (3)[15] and in article 14 (1).[16] These instruments lay the foundation for the right to hold public officials accountable for administrative misconduct against citizens.

The Charter of Fundamental Rights of the European Union, 2000, is informative in its elaboration of administrative justice. Its article 41 which provides that:

> "*(1) Every person has the right to have his/her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.*
> *(2) This right includes*
> *- the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;*
> *- the right of every person to have access to his or her file, while respecting the legitimate interest of confidentiality and of professional and business secrecy;*
> *- the obligation of the administration to give reasons for its decisions.*
> *(3) Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.*
> *(4) Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.*"

This appears to be the most progressive instrument in as far as administrative justice is concerned. It provides, *inter alia*, that disputes must be dealt with timeously and within a reasonable time. It also entrenches the tenets of natural justice by providing that every person has a right to be heard before any adverse administrative decisions are taken against him or her. The instrument further provides for damages available for affected individuals from responsible institutions. Compensation stemming from maladministration by government institutions is without doubt a welcome step in the path of administrative justice.

The international instruments set the basis and standards for the development of administrative justice at domestic level. Whist the instruments have not gone into detail in terms of the provisions of administrative justice, countries have drawn inspiration from them in the manner they have developed administrative justice in their jurisdictions. The statutes have provided a platform and context from which member countries have extracted best practices. For example, the United Nations Human Rights Committee states that the definition of 'determination of rights and obligations in a suit of law' is based on the nature of the right rather than the status of one of the parties or the forum provided by the domestic legal system for the determination of a

14 (ICCPR), adopted 16 December 1966, entry into force 23 March 1976.

15 "Each State party to the Covenant undertakes:
To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
(c) To ensure that the competent authorities shall enforce such remedies when granted."

16 "1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

particular right.[17]

At regional level, the African Charter on Human and People's Rights[18] also addresses administrative justice to some extent in article 7 (1)[19] and in article 13(3).[20] The African Commission on Human and People's Rights has gone further to set out the principles and guidelines to be followed in determining the rights and obligations of persons as provided for in the African Charter. One of the principles states that, "*Everyone shall be entitled to a fair and public hearing by a legally constituted and competent independent and impartial judicial body.*" [21] The principles further provide for equality between parties and an entitlement to a determination of their rights and obligations without delay.[22] South Africa[23], Kenya,[24] Namibia,[25] Malawi[26] and Zimbabwe, amongst others, have legislated the right to administrative justice in their constitutions, taking their cue and guidance from the international and regional statutes.

3. The right to administrative justice in Zimbabwe

The right to administrative justice in the Zimbabwean context is provided for in section 68 (1) and (2) of the Constitution which states as follows:

(1) *"Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair.*

(1) *Any person whose right, freedom, interest or legitimate expectation has been adversely affected by administrative conduct has the right to be given promptly and in writing the reasons for the conduct*."

The provisions guarantee the right to administrative justice and further elevate and entrench the right from mere common-law rules and ordinary statutory provisions to a constitutional right that is contained in the Bill of Rights. This elevation is based on the concept of supremacy of the Constitution which currently applies in Zimbabwe under section 2 thereof.

The provision of a right to administrative justice as part of the Bill of Rights means that all other laws and administrative conduct that may not be consistent with the right to administrative justice are invalid. Prior to this, the right only existed as a statutory right through the Administrative Justice Act that could easily be amended, done away with, altered or limited.[27] The concept of supremacy of the Constitution also speaks to the manner

17 General Comment No 32, Article 14, Right to Equality before the courts and tribunals and to a fair trial, Human Rights Committee, UN Doc CCPR/C/GC/32 (2007).

18 (African Charter), adopted 17 June 1981, entry into force 21 October 1986.

19 "Every individual shall have the right to have his cause heard. This comprises of:
The right to an appeal to competent national organs against acts of violating his fundamental rights as recognised and guaranteed by Conventions, laws, regulations and customs in force…"

20 "Every individual shall have the right of access to public property and services in strict equality of all persons before the law."

21 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, African Commission on Human and People's Rights (2003) https://www.achpr.org/legalinstruments (accessed on 2 October 2019).

22 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, African Commission on Human and People's Rights (2003) https://www.achpr.org/legalinstruments (accessed on 2 October 2019).

23 See Section 33 of the Constitution of South Africa.

24 See Article 47 of the Constitution of Kenya.

25 See Article 18 of the Constitution of Namibia.

26 See section 43 of the Constitution of Malawi.

27 Section 328(b) (a)- (b) of the new Constitution now requires that an amendment of any part of the bill of rights will only be

in which the constitutional provisions are amended. Constitutional provisions are not amended in the same manner like ordinary legislation. Ordinary legislation is amended by Parliament through a simple majority as provided in section 138 (1)(a) of the Constitution. However, by constitutional design, a constitutional provision which forms part of the Bill of Rights like section 68 can only be amended by a two thirds majority of the membership of each house and a majority of the public vote for it in a national referendum.[28]

The constitutionalisation of the right to administrative justice is also a fulfilment of the founding values and principles of the Constitution.[29] These include, amongst others, transparency, justice, accountability and responsiveness.[30] These are key fundamentals of administrative justice because they are the important good governance. The constitutionalisation of the right must in the same vein be looked at in the context of the obligations imposed on the state to respect, protect, promote and fulfil the rights and freedoms set out in the Bill of Rights.[31] The state and its apparatus are required therefore not only to ensure that the provisions of section 68 are complied with but also to respect them by not violating them.[32] The Bill of Rights which includes section 68, binds the state and all executive, legislative and judicial institutions and agencies of government. It also binds natural and juristic persons to the extent that it is applicable to them.[33] This is the form and nature in which the right to administrative justice must be applied and interpreted in this jurisdiction.

Section 68 introduces substantive fairness in administrative justice in Zimbabwe. Section 68 (1) requires that the administrative conduct must be both substantively and procedurally fair. The inclusion of this element of substantive fairness adds another dimension to administrative justice. The courts are now required to consider not only the process/procedure but also the fairness of the decision itself. Commenting on this development, Feltoe says that:

> "*The old approach where the courts delved only into the manner by which the administrative decisions were taken and avoided dealing with the substantive merits of the decision has thus been largely swept away because now the courts will be obliged to examine the substantive fairness of the administrative action.*"[34]

The significance of this provision is that it now conjoins the two terms, procedural and substantive fairness, with the effect of strengthening administrative justice as a whole where the process and end result reflect fairness.

The term 'substantive fairness' refers to the merits of the matter. When a court looks at a substantive issue, it interrogates the real merits of the case. In other words, the rehearing of a matter to deal with the substantive issues or merits is generally done on appeal rather than on review. There is a clear distinction

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effected on condition that, such an amendment is passed by two thirds majority of Parliament and approved by the majority voters in a natural referendum.

28 Section 328 (5) of the Constitution.

29 See section 3 (1) (a) to (c).

30 See section 3 (2) (g).

31 Section 44 of the Constitution

32 Section 11 of the Constitution also provides that the state must take all practical measures to protect the fundamental rights and freedoms enshrined in Chapter 4 and to promote their full realisation and fulfilment.

33 See section 45 of the Constitution. Application and Interpretation of Chapter 4, the fundamental human rights and freedoms.

34 Feltoe A Guide to Administrative and Local Government Law in Zimbabwe (2014) 26.

between the appeal and review processes. Appeal is about determining the correctness of a decision through the assessment of its substantive merits. Review, on the other hand, is a less exerting procedure in terms of which the court solely assesses the decision-making process to determine whether the outcome was arrived at in an acceptable fashion.[35] The inclusion of substantive fairness in section 68 (1) however is done in the context of judicial review and not appeal.[36] Since the advent of constitutional democracy with its emphasis on fairness and reasonableness, this distinction between appeal and review is dimming as the review process now has a substantive element as well.[37] This wider form of review has encouraged a fundamental shift away from an all-or-nothing approach to judicial review to a more nuanced or variable approach that focuses on a determination of what administrative justice demands in a given case.[38] Corder expressed the same sentiments in the following manner:

> "*Secondly, we need openly to acknowledge that the old approach to distinguishing review from appeal is no longer tenable. It is also not necessary, as our courts have now been expressly authorized to determine the reasonableness of administrative action, which must contain a merits-based substantive element. However, this is not an appeal and nor is it mere procedural review: perhaps it would be better to describe what is required now, in all honesty, as 'substantive' or 'wide' review. We must acknowledge, too, that the merits were inevitably referred to, even in the circumstances of 'procedural' or 'narrow' review, in our own wicked past.*"[39]

Clearly the new constitutional dispensation now refers to a wider form of review which includes both procedural and substantive fairness. Through the inclusion of substantive fairness in section 68(1), the constitutional jurisprudence in Zimbabwe has moved in line and in conformity with the direction which is being followed in the new era of constitutional and administrative law. A person aggrieved by the substantive fairness of an administrative decision may now take it on review.

There are various situations that may arise in administrative law in which citizens may require protection that goes beyond procedural fairness that is, when substantive fairness comes into being. Craig[40] provides some of the situations which may arise where substantive fairness may be called into application. These include instance when:

- "*A general norm or policy choice which an individual has relied on has been replaced by a different policy choice.*
- *A general norm or policy choice had been departed from in the circumstances of a particular case.*
- *An individual representation has been made to a person which he has relied upon but then the public*

35 Kohn and Corder 'Judicial Regulation of Administrative Action in South African Monograph and Constitutional Law' in Murray and Kirkby (eds) Suppl. 108 International Encyclopaedia of Laws (2014) 640

36 See section 68 (3)(a) which provides as follows:
(3) An Act of Parliament must give effect to these rights, and must—
(*a*) provide for the review of administrative conduct by a court or, where appropriate, by an independent and impartial tribunal;

37 Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004 (4) SA 490 (CC) where Ngcobo J noted that:
Although the review functions of the court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.

38 Kohn and Corder 'Judicial Regulation of Administrative Action in South African Monograph and Constitutional Law' in Murray and Kirkby (n 35 above) 641. .

39 Corder H 'Without deference, with respect: A response to Justice O'Regan' (2004) SALJ 443-444

40 Craig Administrative Law 4th ed (1999) 613.

authority seeks to depart from this in light of a shift in general policy.

- *An individual representation has been made to a person which he has relied upon but the public authority then changes its mind and makes a decision in relation to that person which is inconsistent with the original representation.*"[41]

Section 3 (1) of the Act requires an administrative authority to act in a fair manner. At the time the Act was legislated, the section referred to procedural fairness which was also applied in terms of common law. Now that the Constitution distinguishes fairness in two forms; that is "procedural and substantive", the Act should be read to include this distinction in Section 3 (1) (a). Anything short of that may bring to question the constitutionality of section 3 (1) (a).

Section 68(3) of the Constitution provides that an Act of Parliament should operationalise and give effect to the rights provided for in section 68 (1) and (2). The section states:

(3) "*An Act of Parliament must give effect to these rights, and must—*

(a) provide for the review of administrative conduct by a court or, where appropriate, by an independent and impartial tribunal;

(b) impose a duty on the State to give effect to the rights in subsections (1) and (2); and

(c) promote an efficient administration."

The import of that provision presupposes that at the time it was legislated there was no Act of Parliament that provided for administrative justice in Zimbabwe and that an Act of Parliament should now be legislated to give effect to the rights stated. This however is not the case because when section 68 was legislated in 2013 the Administrative Justice Act had been in operation since 2004. In other words, the Act preceded section 68 of the Constitution.[42] Mafusire J in *B (a Juvenile) v Ministry of Primary and Secondary Education*[43] properly captured this scenario when he commented that:

"*Section 68 of the Constitution provides for the right to administrative justice …The section then behoves Parliament to enact legislation to give effect to these rights, even though the Administrative Justice Act [Chapter 10:28] predates the current constitution. In my view, it is one such Act of Parliament that seeks to give effect to the rights and freedoms enshrined in the constitution, the audi rule and its extension, legitimate expectation doctrine.*"

The way the provision is couched clearly shows that the drafters of the Constitution were well aware of the fact that an Act of Parliament was already in existence but that they (the drafters) were concerned that this Act would not give adequate effect to the rights provided for in sections 68(1) and (2) of the Constitution, and had to be amended for that to happen. Therefore, the implication of this provision is that there is no need for Parliament to legislate a completely new Act that complies with section 68. It behoves Parliament to ensure

41 Feltoe (n 34 above) 76.

42 This is however different from the situation in South Africa in which the Promotion of Administrative Justice Act Number 3 of 2000 (PAJA) was promulgated in compliance with the provisions of section 33(3) of the South African Constitution, which has the same contents as Zimbabwe's section 68(3).

43 2014 (2) ZLR 341 (H) at 350A-351A.

that the present Act complies with the Constitution.

The argument makes sense if one compares section 68 (3) with section 33(3) of the Constitution of the Republic of South Africa Act 108 of 1996.[44] At the time section 33 (3) was legislated, the national legislation being envisaged was not yet in place. That is why the provision specifically requires that such national legislation must be promulgated. It was only in 2000 that the Promotion of Administrative Justice Act (PAJA) was promulgated in compliance with the requirements of section 33 (3) of the Constitution of South Africa. The realisation of administrative justice in Zimbabwe as provided in section 68 of the Constitution is therefore done through its operationalisation by the Administrative Justice Act. The discussion that follows examines some of the important provisions of the Act that impact fundamentally on the section 68 right.

4. The Administrative Justice Act

The purpose of the Act is to provide for the right to administrative action and decisions that are lawful, reasonable and procedurally fair; to provide for entitlement to reasons for administrative action or decisions; and to provide for relief by a competent court against administrative action or decisions contrary to the provisions of the Act.[45] The Act is essentially comprised of six important parts or components. The first part is section 2 which defines the kind of decisions to be considered as administrative action.[46] Administrative action is defined as an action or decision that is taken by an administrative authority.[47] An administrative authority refers to any officer or an organ of state, including cabinet ministers and their deputies, or any person exercising administrative power in terms of legislation or any other enabling provision.[48] The second part is section 3 which imposes obligations and duties on administrative authorities.[49] The third part is section 4 which designates the High Court as the primary court to be approached by persons seeking to enforce their right to administrative justice.[50] The fourth part provides guidance to the High Court on the factors that the court may consider for purpose of determining whether an administrative authority has properly discharged its obligations when it reviews administrative actions.[51] The fifth part provides for the right to request for reasons from an administrative authority.[52] The sixth part relates to ousterclauses. These are provisions which allow an administrative authority to depart from obligations imposed by certain provisions of the Act.[53] These are the main provisions of the Act that provide for the right to administrative justice. The provisions will be discussed to assess the extent to which they comply with section 68 of the Constitution.

4.1 Duty of administrative authorities in the Act

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44 It provides:
(3) National legislation must be enacted to give effect to these rights and must-
(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
(c) promote an efficient administration.

45 See Preamble of the Act.

46 Section 2 provides for interpretation and application of the Act.

47 Section 2 (1)

48 Section 2 (1) (a) to (d)

49 Section 3 (1)

50 Section 4 (1)

51 Section 4 (2) (a) to (e).

52 Section 5

53 The constitutionality of the ouster clauses will be discussed later.

Section 3 is one of the most important provisions of the Act as it captures the elements of the right to administrative justice provided in Section 68 (1) – (2) of the Constitution. The section in sub-sections (1) and (2) obliges administrative authorities to act lawfully, reasonably, procedurally fair and to provide reasons. Section 3 (1) provides as follows:

> "3 *Duty of administrative authority*
> *(1) An administrative authority which has the responsibility or power to take any administrative action which may affect the rights, interests or legitimate expectations of any person shall—*
> *(a) act lawfully, reasonably and in a fair manner; and*
> *(b) act within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to take the action by the person concerned; and*
> *(c) where it has taken the action, supply written reasons therefor within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to supply reasons by the person concerned*."

This provision obviously satisfies the rights provided for in section 68(1) of the Constitution. What must however be noted is that Section 3(1) does not mention all the elements of the right stated in Section 68(1). In Section 3(1) (a) it only refers to the following three elements that is 'lawfully', 'reasonably' and in a 'fair manner'. There are however elements which are stated in Section 68(1) that have not been captured in the Act. The following elements are not mentioned in the Act:- prompt, efficient, proportionate, impartial and substantive fairness.[54] As a rule of constitutionality, Section 3(1) of the Act must provide for all the review grounds that are listed under the constitutional right to administrative justice. Whilst some of the elements are dealt with for example in terms of the common law,[55] it is a constitutional imperative that all these elements must be mentioned in Section 3(1). The absence of such brings the constitutionality of this provision into question. Section 3 must therefore be amended in order to give full effect to the Constitutional right to administrative justice as stated in section 68 of the Constitution.

Section 3(2) of the Act is more specific as it provides the mandatory core requirements for procedurally fair administrative conduct.[56] This subsection is meant to give effect and content to the element of the right to procedural fairness. The use of the word 'shall' is pertinent. It implies that the administrator has no discretion in complying with the core requirements of the law. As already discussed above, the implication of section 3(2) should not be limited to procedural fairness only in light of the new constitutional dispensation. Fairness should now be in two forms, that is 'procedural' and 'substantive' fairness. It is important that this new constitutional requirement is reflected in the Act. What is interesting about Section 3 is that it gives guidelines to administrators on what is expected of them, it is proactive. The Act ought to be an instrument of both

54 Substantive fairness will be discussed in greater detail later.

55 The duty to act impartially is an integral part of common law principles of *nemo judex in sua causa* (rule against bias) see Feltoe (n 34 above) 89.

56 It reads:

(2) In order for an administrative action to be taken in a fair manner as required by paragraph (a) of subsection (1), an administrative authority shall give a person referred to in subsection (1)—
(a) adequate notice of the nature and purpose of the proposed action; and
(b) a reasonable opportunity to make adequate representations; and
(c) adequate notice of any right of review or appeal where applicable.

proaction, to prevent objectionable proposed administrative action and reaction, to redress administration gaffes and to promote good administration as well.

4.2 Exceptions from requirements of fair procedure

Section 3(3) of the Act[57] permits an administrative authority to depart from any of the requirements referred to in subsections (1) and (2) where, the enactment under which the decision is made expressly provides for such a departure or where under the circumstances it is reasonable and justifiable to do so. Feltoe argues that the provisions of section 3(3) are unconstitutional in that no administrative authority should be allowed to deviate from the provisions of section 3(1) and (2), that no law should provide for such deviation and that the provisions of section 3(3) are too wide and open to abuse as they simply refer to circumstances that are 'reasonable and justifiable'.[58] The first justification that allows an administrator to deviate from the requirements of section 3(1) and (2) is straightforward that is, where the law under which the decision is made expressly provides for such deviation. The implications of the provision is that the administrator is guided by the law being applied at that time.

The provisions of section 3(1) and (2) are provided for in Section 68(1) and (2) of the Constitution. The concept of constitutional supremacy is such that **any law** (my emphasis) practice, custom or conduct inconsistent with the Constitution is invalid to the extent of the inconsistency. There can be no law or conduct therefore that should vary or allow deviation from the provisions of Section 3(1) and (2) of the Act. Section 3(3)(a) is therefore unconstitutional where it allows the administrative authority to depart from the requirements of section 3(1) and (2) of the Act.

The second justification to depart from procedural fairness is in Section 3(3)(b) when it is, under the circumstances, 'reasonable and justifiable' to do so. This may be problematic on the face of it because it would appear that too much discretion is being given to the administrator when deciding whether it is 'reasonable and justifiable' to deviate from the requirement of fairness. However, this is not the case because the discretion is strictly controlled by the Act itself and the Constitution. Section 3(b)(i)-(iv) provides the factors in which deviations from provisions of 3(1) and (2) are permissible. The administrator is therefore restricted in the exercise of discretion in this context. It is therefore not an open ended discretion. The circumstances which are 'reasonable and justifiable' should also be viewed in the same manner with reference to the provisions of section 86(2)(a)-(f) of the Constitution, which is the limitation clause.[59] These provisions of the Act and the Constitution are couched in similar language. The guidelines to limit rights stated in section 86 have

57 The section reads:
(3) An administrative authority may depart from any of the requirements referred to in subsection (1) or (2) if—
(a) the enactment under which the decision is made expressly provides for any of the matters referred to in those subsections so as to vary or exclude any of their requirements; or
(b) the departure is, under the circumstances, reasonable and justifiable, in which case the administrative authority shall take into account all relevant matters, including—
(i) the objects of the applicable enactment or rule of common law;
(ii) the likely effect of its action;
(iii) the urgency of the matter or the urgency of acting thereon;
(iv) the need to promote efficient administration and good governance;
(v) the need to promote the public interest.

58 Feltoe (n 34 above)36.

59 Section 86 (2) provides for limitations of rights and freedoms.

been repeated both in nature and content in section 3(3) of the Act. In light of the principle of supremacy of the Constitution,[60] section 3(3)(b) of the Act must be consistent with section 86 and the interpretation of that section should also show such consistency. This is the position reflected by the two provisions.

One could therefore contend that the provisions of section 3(3)(b) are similar in nature with those of section 86, hence there is nothing unconstitutional about them. They would, in fact, pass the constitutional test. Section 3(3) of the Act is also similar to section 3 (4) of PAJA.[61] Commenting on this section, De Villiers[62] states that:

> "*The PAJA also recasts the procedures and tests for permissible deviations from procedural fairness. The PAJA allows its provisions to be excluded at the initiative of the administration in four different ways:*
>
> (i) *where the administrator has decided, in particular circumstances and usually owing to urgency, to depart from the specific requirements of s3(2);*
> (ii) *where the Minister has allowed an administrator to vary specific requirements in s3(2) in order to advance administrative efficiency;*
> (iii) *where there is a provision empowering the administrator to follow a procedure which is fair but different from s3(2) of the PAJA, usually because that procedure applied before commencement of the Act and is more suitable to the particular circumstances or is tried and tested; and*
> (iv) *where the Minister has granted an exemption to an administrative action or group or class of administrative actions, typically for executive reasons.*"
>
> These exemptions are permitted if they are either, 'reasonable and justifiable in the circumstances', or 'fair'. PAJA simply restates the 1996 Constitution's standard for limitation of rights.[63]

The law, in dealing with limitations of rights, is enunciated in *Woods v Minister of Justice & Ors*[64] when the court held:

> "*What is reasonably justifiable in a democratic society is an elusive concept. It is one that defies definition by the courts. There is no legal yardstick… that the quality of reasonableness of the provision under attack is to be adjudged on whether it arbitrarily or excessively invades the enjoyment of the guaranteed right according to the standards of a society that has a proper respect for the rights and freedoms of the*

60 Section 2 (1) of the Constitution.
61 PAJA. The section provides:

(4) (a) If it is reasonable and justifiable in the circumstances, an administrator may depart from any of the requirements referred to in subsection (2).
(b) In determining whether a departure as contemplated in paragraph (a) is reasonable and justifiable, an administrator must take into account all relevant factors, including—
(i) the objects of the empowering provision;
(ii) the nature and purpose of, and the need to take, the administrative action;
(iii) the likely effect of the administrative action;
(iv) the urgency of taking the administrative action or the urgency of the matter; and
(v) the need to promote an efficient administration and good governance.

62 Advocate, Legal Resources Centre, South Africa.
63 De Villiers 'Social Grants and the Promotion of Administrative Justice Act' (2002) SAJHR 321at 331.
64 1994 (2) ZLR 195 (S).

individual."

In the *Nyambirai v NSSA* Gubbay CJ, in the consideration of a limitation clause, commented that:[65]

> "*In essence the court will consider three criteria in determining whether or not the limitation is permissible in the sense of not being shown to be arbitrary or excessive. It will ask itself whether:*
>
> *(i) the legislative objective is sufficiently important to justify limiting a fundamental right;*
> *(ii) the measures designed to meet the legislative objective are rationally connected to it, and*
> *(iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective*."

The issue is not the legality or otherwise of the limitation clauses because they are indeed legal. The test really is whether the limitation is 'reasonable and justifiable' in the circumstances of the case. If the limitation fails to pass that test as laid out in the Nyambirai case, then the conduct is unconstitutional hence illegal. It is therefore submitted that section 3 (3) is constitutional.

4.3 Breach of Right to Administrative Justice

A breach of the right to administrative justice comes in three forms. This is when the administrative authority fails to act in terms of the duties and obligations specified in section 3(1) and (2) of the Act. Firstly, when the administrator did not act lawfully, reasonably and in a fair manner.[66] Secondly, when the administrator fails to act promptly in terms of the law or within a reasonable time after being asked to do so. [67]Thirdly, when the administrator fails to supply reasons for a decision taken or fails to supply reasons promptly within the period specified by the law or within a reasonable period after being requested to do so.[68] When any of these three scenarios occurs then there has been a breach of administrative justice. This is also termed as an act of maladministration by the administrative authority. Such acts of maladministration would now entitle the victim to approach the High Court for a remedy. The remedies are provided in section 4 and 5 of the Act.

4.4 Remedies

Section 4 of the Act designates the High Court as the primary and only court to be approached by persons seeking to enforce their right to administrative justice.[69] Limiting the vindication of violated administrative justice rights to the High Court only may be problematic. It flies in the face of the concept of access to justice. This is because not every person has access to the High Court in the country as it is located in four provinces only out of the country's ten provinces.[70] Members of the public outside the four provinces obviously have challenges to access the court. This scenario is a violation of the right to a fair hearing provided in section 69

65 1995 (2) ZLR 2 (S)
66 Section 3 (1) (a)
67 Section 3 (1) (b)
68 Section 3 (1) (c)
69 Section 4 (1) provides that, subject to the Act or any other law, any person who is aggrieved by the failure of an administrative authority to honour its obligations to act lawfully, procedurally fair, reasonably and to supply reasons can apply to the High Court for relief.
70 The High Court is located in Harare, Bulawayo, Masvingo and Mutare.

of the Constitution.[71] There may be need to have an easily accessible court like the magistrates' court deal with certain forms of maladministration.[72]

The section also outlines the remedies that the High Court can grant to an applicant who has been adversely affected by administrative action conducted in a manner that is inconsistent with the rights and duties provided for under the Act. Sections 1 and 2(a) to (e) list a number of such remedies which include; confirming or setting aside the decision, referring the matter back to the administrative authority for consideration or reconsideration, directing the administrative authority to take action within the relevant period specified by law or by High Court and directing administrative authority to supply reasons for its decision within the period prescribed by the law or fixed by the court. Section 5(a) to (p) lists a number of factors that the High Court may consider for purposes of determining whether an administrative authority has properly discharged its obligations in terms of the law.

4.4.1 Locus standi in terms of the Act

The Administrative Justice Act provides *locus standi* only to persons that have sufficient personal interest in the matter concerned.[73] *Locus standi* refers to the eligibility of persons to approach and present a matter for adjudication before the court.[74] In terms of Section 4(1) of the Act, only persons who are aggrieved by the failure of an administrative authority to comply with the rights and duties under the Act may apply to the High Court for relief. There must be a personal interest that must be affected for *locus standi* to arise; for instance when the administrative action affects personal liberty, property or a legitimate expectation of a benefit.[75] Thus, *locus standi* under the Act is limited to persons that can demonstrate sufficient personal interest in the matter. This provision therefore has the effect of limiting public interest litigation.

The old Constitution[76] did not provide as much sympathy to public participation as is now provided by the new Constitution.[77] The Constitutional Court, relying on the provisions of the old Constitution regarding direct approach to the court by the public,[78] took a narrow approach on the issue of *locus standi* to the public.[79] The courts were generally fearful of an overly wide application of the *audi alteram partem* principle to the public. However, section 68, read together with section 9 of the Constitution on good governance, and section 85,[80]

71 Section 69 (3) provides that every person has a right of access b the courts, or to some other tribunal or forum established by law for the resolution of any dispute.

72 The magistrates' courts are located in every district in the country. The courts are more accessible and closer to the people.

73 See Feltoe (n 34 above) 49.

74 Currie and De Waal The Bill of Rights Handbook 6th Ed (2013) 73

75 See Stevenson v Minister of Local Government and National Housing SC38/02 at page 4.

76 Constitution of Zimbabwe 1980, Schedule to the Zimbabwe Constitution Order 1979 (S.I. 1979/1600 of the United Kingdom.

77 Constitution of Zimbabwe Amendment (No.20) Act 2013.

78 Direct approach to the court was provided for in section 24 of the Lancaster House Constitution.

79 See the cases of United Parties v Minister of Justice, Legal and Parliamentary Affairs &Ors 1997 (2) ZLR 254 (S), Nyamandhlovu Farmers Association v Min of Lands and Another 2003 (1) ZLR 185 (H), and Law Society v Minister of Justice 2006 (2) ZLR 19 (S).

80 It provides:

85 Enforcement of fundamental human rights and freedoms

(1) Any of the following persons, namely—

(a) any person acting in their own interests;

(b) any person acting on behalf of another person who cannot act for themselves;

(c) any person acting as a member, or in the interests, of a group or class of persons;

liberalises the question of the *locus standi* of the public.

The provisions of section 85(1) are specific in widening the concept of *locus standi* in general by allowing the public access to the Constitutional Court or any other competent court to vindicate violated constitutional rights. The initial deviation from the restrictive approach to *locus standi* was laid out by Chidyausiku CJ in *Mawarire v President of the Republic of Zimbabwe and Others*;[81] as follows:

> "*The objections by the second and fourth respondents to the applicant's right to approach this court for relief are based on a restrictive approach to locus standi in the pre-2009 period and a failure to appreciate that the 2009 Amendment No. 19 has thrown wide open the right to seek relief in terms of s 24(1) to any and every citizen who is affected by a failure by public officer to uphold the law.*"

However, the Act does not have provisions that provide for public participation before a decision that affects the public is taken. This is the position that has been propagated by the courts within this jurisdiction and beyond,[82] that the rules of natural justice have no application to the public at large. This attitude is not only archaic but is also not in sync with the developing jurisprudence on administrative justice in Africa and beyond. There is need to widen the concept of *locus standi* in the Act so that it complies with the new constitutional dispensation. The Act should have a provision that would extend the requirements of fairness to the public, by prescribing administrative procedures to follow before a decision adverse to the public is taken. The benefits of such a provision are enunciated by Mass[83] in the following manner:

> "*On the one hand, it is a helpful tool for the administration because it provides new information and exposes possible weaknesses in a planned administrative action. On the other hand, it alerts the public to the intention of the administration, allowing for early control and possibly, protest. Public participation can, at the same time, increase the general acceptance of the administrative action and it might be argued that by providing for a 'surrogate political process', it increases the democratic legitimacy of the administrative action and helps to compensate for the fact that most administrative actions are not taken by democratically elected representatives.*"

In South Africa, in accordance with section 33 of its Constitution, PAJA sets out, in its section 4, the circumstances for procedural fairness to the public. It places a duty on the administrator to hold a public inquiry or to undertake a notice and comment procedure. Provisions of similar nature[84] may be added to the Act so that the public's right to administrative justice is assured.

(d) any person acting in the public interest;
(e) any association acting in the interests of its members;

is entitled to approach a court, alleging that a fundamental right or freedom enshrined in this Chapter has been, is being or is likely to be infringed, and the court may grant appropriate relief, including a declaration of rights and an award of compensation.

81 CCZ 1/13.

82 Botha JA expressed the attitude of the courts as follows in Pretoria City Council v Modimola 1966 (3) SA 250 (A):
Where a public authority is authorized to take a decision prejudicially affecting the property or liberty of members of the whole community….no principle of natural justice is violated by a decision taken under the statute without affording an opportunity to every individual member of the community be heard before a decision is taken.

83 Mass 'Section 4 of the PAJA and procedural fairness in Administrative Action Affecting the Public : A Comparative Perspective' in Lange C &Wessels J (Eds) Right to Know : South Africa's Promotion of Administrative Justice and Access to Information Acts (Siber Ink South Africa) 63
See also Currie The Promotion of Administrative Justice Act: A Commentary 2nd ed (Siber Ink South Africa,2007) [5.1].

84 Similar to those of section 4 of PAJA.

However, in view of the current situation where the Act does not provide for fairness to the public, the public may seek protection against the maladministration administrators through section 85(1) of the Constitution by making a direct application to the court. The general approach by the courts is that where the Act adequately provides for the law that addresses such situations, access to the Constitutional Court relying of section 85 (1) is refused. This position is properly captured by Malaba DCJ in *Zinyemba v The Minister of Lands and Rural Resettlement and Another*[85] as follows:

> "*Where there is an Administrative Justice Act which gives full effect to all the substantive and procedural requirements for effective protection of the fundamental rights guaranteed under s 68, the Act must surely govern the process for the determination of the question whether a specific administrative conduct is in accordance with the standards of administrative justice. There cannot be an allegation in terms of s 85(1) of the Constitution of administrative conduct violating the fundamental right to administrative justice enshrined in s 68 of the Constitution when there is an Act of Parliament which validly gives full effect to the requirements for the protection of the fundamental right against the provision of which the legality of the administrative conduct must be tested.*"[86]

Currie and De Waal[87] commented on the same aspect by stating as follows in reference to the PAJA of South Africa:

> Since the commencement of the PAJA judicial review of administrative action generally has a legislative basis. In other words, it is based on the rights, duties and remedies provided for in the Act itself. The rights to just administrative action in the Constitution now play an indirect rather than direct role in judicial review.

Therefore, in Zimbabwe section 85(1) of the Constitution may only be relied on in situations not adequately provided for by the Act. It has already been concluded that there is no provision in the Act that provides for fairness to the public at the moment. This is a gap that can now be covered by the Constitution. The public may approach the Constitutional Court directly in terms of section 85(1) of the Constitution. This position is confirmed in the *Zinyemba* case that if the complaint is that the provisions of the Act do not give effect to the fundamental rights guaranteed under section 68(1) of the Constitution, then one may approach the court directly in terms of section 85(1).[88]

4.5 Constitutionality of the ouster clauses

The Administrative Justice Act contains a number of ouster clauses. An ouster clause is defined as a clause which seeks to exclude the jurisdiction of the courts.[89] It is a clause or provision included in a piece of legislation by a legislative body to exclude judicial review of acts and decisions of the executive by stripping the courts of their supervisory judicial function. The approach has been that administrative officials are only permitted to act in terms of legislation and any ouster clause does not remove the jurisdiction of the courts to review action not taken in terms of legislation.[90]

85 2016 (1) ZLR 23 (CC) at 26E-F.
86 This is also in line with the doctrine of avoidance and subsidiarity.
87 Currie and De Waal (n 77 above)646.
88 26D-E.
89 Legal Dictionary https://legal-dictionary.thefreedictionary.com/ouster+clause
90 Natal Newspapers (Pty) v State President of the Republic of South Africa 1986 (4) SA 830 (A).

4.5.1 Exclusion of certain decisions of members of cabinet from review under the Act

In terms of section 11(1), individuals affected by decisions of public officials listed under section 1 of part 1 of the schedule to AJA have no right to demand and receive written reasons for such decisions. The decisions listed under section 1 of part 1 of the schedule to AJA are those decisions made by the President and members of the cabinet when exercising their executive powers or functions. Executive powers and functions of the President and cabinet are provided for under section 110 of the new Constitution. Such powers and functions include the authority to receive and accredit foreign diplomatic officials as well as developing and implementing national policy.

Of particular interest is the effect that section 11(1) of the Act has on the powers of the court to review decisions made by the President or members of the cabinet when performing their executive functions in terms of the Constitution's section 110 (3)(d) power to implement national policy. Essentially, by virtue of section 11 (1), ministers and their deputies are exempted from the duty to act procedurally fair and the duty to provide written reasons when they make decisions that are part of the process of implementing national policy irrespective of whether or not such decisions are of prejudicial effect to the aggrieved person or public. In other words, the Act allows them to proceed in such a manner with impunity and without being accountable. The constitutional validity of section 11(1) of AJA may therefore be challenged on the basis that it undermines the constitutional right to administrative justice, particularly the right to receive written reasons and the right to procedural fairness for persons that are adversely affected by the decisions of the President and the cabinet in implementing national policy. This provision is also in conflict with other constitutional imperatives like the founding values and principles.[91]

Even though some may argue that decisions made by cabinet members can still be reviewed under the general principle of legality, administrative law review is more comprehensive than review under the broad principle of legality. While commenting on judicial review in South Africa, J de Ville noted that review of executive action under the general principle of legality (sometimes referred to as the principle of the rule of law) is confined to inquiry into whether the functionary acted with *mala fide*, misconstrued the nature of his or her powers and whether such functionary acted rationally.[92] This view is true of how review under the broad principle of legality is applied in Zimbabwe. In Zimbabwe, review under the principle of legality consists of a test of rationality of the decision, which is essentially examining whether the decision is provided for by law, consistent with the purpose of the law and is logically capable of achieving the objective of the law as well as reviewing the logic of the relationship between the decision and the purpose for which that decision has been taken.[93] As such, the principle of legality includes giving reasons but does not necessarily include the constitutional duty to act procedurally fair unless where the specific enabling legislation requires a certain process to be followed when making the decision.

Contemporary public administration is bedevilled with such challenges as corruption and general abuse of power and these challenges are attributed to secretive decision making tendencies by state officials.[94] Government decision making processes in Zimbabwe are not free from this undesirable reality. As such, the duty to provide a fair hearing and general procedural fairness is a fundamental aspect of administrative justice

91 Section 3 provides for founding values and principles which include good governance and rule of law.
92 De Ville Judicial Review of Administrative Action in South Africa Revised 1st Ed (2005)60
93 See Zambezi Proteins (Pty) Ltd v Minister of Environment and Tourism 1997 (1) ZLR 563 (S) at page 565H-567G. Also See definition of rationality in C Hoexter Administrative Law in South Africa 2nd ed (2012) 340
94 Feltoe (n 34 above)31

which seeks to ensure that the public participates in decision making processes so as to reduce such social ills like corruption in the public administration system. The effect of section 11(1) of the Act is that, even though the constitutional right to administrative justice requires public officials to act procedurally fair, section 11(1) exempts such public officials from that duty as long as they can argue that the impugned decisions were made by cabinet Ministers in the course of policy implementation. This is undesirable in view of the new Constitutional dispensation.

To avoid a scenario where individuals end up without recourse to violation of their administrative right to procedural fairness, section 11(1) of the Act must be struck off and be replaced with a provision that exempts only those decisions that are made by the cabinet and the President as part of exercising executive power that is directly derived from the Constitution. Exercise of executive authority as part of implementing legislation or any other national policy must be subjected to the duty to act procedurally fair and to supply written reasons. As it is, section 11(1) is too broad and may result in the right to procedural fairness concerning executive action being unenforceable.

4.5.2 Ouster of the right to receive written reasons

In terms of section 11(2) of the Act, persons that are adversely affected by decisions that are made as part of disciplinary proceedings in terms of the Defence Act [Chapter 11:02], the Police Act [Chapter 11:10] and the Prisons Act [Chapter 7:11] are not entitled to the right to receive written reasons. The cumulative effect of sections 11 (2) is that as a general rule, members of the military, the police and prison services who are negatively affected by decisions taken in disciplinary proceedings against them cannot invoke their constitutional right to be given written reasons unless they can prove to the court that there is no apparent public interest that is served by withholding the written reasons.[95]

Section 11 (2) is clearly unconstitutional because it violates the constitutional right of the affected persons to be given written reasons in relation to the decisions made against them. Section 68 (2) of the Constitution gives any person whose right, freedom, interest or legitimate expectation has been adversely affected by administrative conduct, the right to promptly receive written reasons. Disciplinary decisions taken in terms of legislation are clearly a form of administrative conduct as defined by AJA through section 2 (1). Just like every other individual in Zimbabwe, members of the police, the military and the prison services are therefore equally entitled to this section 68 (2) constitutional right in situations where their rights or interests are negatively affected by disciplinary decisions made against them. The Defence Act, Prisons Act and the Police Act do not provide for a right to receive written reasons in case of disciplinary proceedings that negatively affect one's interests and rights. To exclude the members of the military, the police and prison services constitutes unfair discrimination and directly contravenes their constitutional right to be given written reasons as provided under section 68(2) of the Constitution. By virtue of excluding the members of the uniformed forces, from the right to be given written reasons, section 11 (2) is also inconsistent with section 56(1) of the Constitution which provides for the constitutional right to equality before the law and equal protection and benefit of the law.

4.5.3 The right to receive reasons: reverse onus

Furthermore, section 11(3) of the Act allows the affected persons to receive written reasons if they can

95 See section 11(3) of the Administrative Justice Act which authorizes affected persons to apply to the High Court compelling the administrative authority to supply written reasons on the basis that there is no apparent public interest that is served by withholding such reasons from the applicant.

demonstrate to the court that there is no apparent public interest that is served by withholding the reasons. The section provides that, persons adversely affected by the decisions made as part of disciplinary proceedings may approach the High Court for an order to compel the decision maker to supply written reasons, if such persons (the applicant) can demonstrate to the court that there is no apparent public interest that is served by withholding those reasons. Effectively, this places the burden of proof on the affected person to show that the administrator has no good reason for withholding the reasons. This amounts to a limitation of a right.

By virtue of providing for the right to receive written reasons under the Bill of Rights, the Constitution requires that, any limitation of that right must comply with the requirements of the limitation clause in section 86(2) (a)-(f) of the Constitution. In terms of section 86(2) of the Constitution, limitation of any of the fundamental rights provided for under the Bill of Rights can only be allowed if it is in terms of a law of general application and to the extent that such a limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom. The cumulative effect of section 86(2) is that, the person who wishes to limit a fundamental right must first and foremost demonstrate that such a limitation is consistent with the requirements of section 86(2). As such, if an administrative authority wishes to withhold written reasons, he or she bears the constitutional duty to demonstrate to the court that the action or limitation is consistent with section 86(2) of the Constitution. Thus, it is the administrative authority (and not the affected person) who must bear the onus to prove to the court that there is an apparent public interest that will be jeopardised if the reasons are disclosed to the person who is constitutionally entitled to receive those reasons. Thus, section 11(3) is inconsistent with the Constitution's section 86(2) limitation clause and is therefore unconstitutional.

4.5.4 Minister's power to oust the High Court's jurisdiction to review a decision

In terms of section 11 (5) of the Act, where an adverse decision has been made as part of disciplinary proceedings in terms of the Defence Act, Police Act or Prisons Act, the High Court shall not make an order compelling the disclosure of written reasons if the responsible Minister provides the court with a certificate to the effect that disclosure of the reasons is contrary to the public interest as defined by AJA. Section 8 (3) (a)-(e) of AJA provides for a list of factors that constitute public interest and these factors include such vaguely defined factors like proper functioning of government. The constitutionality of this ouster clause is questionable given that it limits the jurisdiction of the court to make decisions that promote administrative justice.

The new Constitution embraces the doctrine of separation of powers as one of the nation's founding values.[96] In terms of this Constitution, there is separation of powers between the executive and the judiciary wherein in terms of section 110 (3) (c), the executive is responsible for implementing national policy and legislation while in terms of sections 165 (c) the judiciary is mandated with the power to enforce the law, safeguard fundamental rights and ensure that government policies are implemented in conformity with the Constitution and the law. Therefore constitutionally, it is the duty of the court to determine the legitimacy and validity of the reasons outlined in the certificate by the Minister for refusing to disclose the requested reasons. The Constitution precludes the Minister from performing that duty but instead requires such a minister to submit his or her justifications to the court for consideration. Contrary to this constitutional arrangement, section 11(5) allows the Minister to exclude the jurisdiction of the court to review an action by merely providing the court with a certificate in which he or she determines that the reasons are legitimately and validly withheld for purposes of protecting a public interest. Section 11(5) therefore allows the Minister to usurp the constitutional authority of

96 Section 3(2) (e) of the Constitution of Zimbabwe Amendment (No.20) Act of 2013

the judiciary and is therefore inconsistent with the principle of separation of powers and the rule of law.

Furthermore, section 11(5) of the Act is unconstitutional because it imposes a far less rigorous standard of limiting the fundamental right of the affected person to receive prompt written reasons. In terms of this provision, depositing such a ministerial certificate indicating that disclosure of reasons will disrupt a public interest, is sufficient to bar the court from hearing the application for relief by the affected person whose right to written reasons has been violated. Limitation of any of the fundamental rights under the Bill of Rights must comply with the comprehensive and strict requirements of section 86 (limitation clause) of the Constitution. Section 86 requires the person wishing to limit a fundamental right to do much more than just depositing a certificate or an affidavit claiming that limitation of the concerned right is done for purposes of protecting a public interest. Section 86(2) requires the Minister wishing to limit the fundamental right of the affected person to receive written reasons, to prove such factors like reasonability and proportionality of the limitation. Thus the requirements set by section 11 (5) to limit the fundamental right to receive written reasons are vague and far less comprehensive than the constitutionally required standard and as such, section 11(5) is unconstitutional on the basis of its inconsistency with the limitation clause under section 86(2)(a)-(f) of the Constitution.

4.5.5 Exemption of organs of the state from complying with the Act

Section 11 (6) of the Act, provides that where he or she deems it necessary or desirable in the public interest, the Minister of Justice may, by way of a notice in a statutory instrument, amend by adding or deleting any item in Part 1 or Part 2 of the schedule to AJA. Part 1 and 2 of that schedule lists decisions and organs of state that are exempted from the duty to comply with all or some of the obligations imposed upon administrative authorities by AJA. The effect of section 11(6) is such that the Minister of Justice may by statutory instrument exempt other administrative authorities (in addition to those already exempted) from the duty to act lawfully, procedurally fair, efficiently, reasonably and to provide written reasons.[1] Thus through section 11(6), individuals may all of a sudden find themselves legally precluded from invoking the whole of or some of the elements of their constitutional right to administrative justice. As such, both section 11(6) and the resultant actions of the Minister may be unconstitutional because of their potential to frustrate the object of the constitutional right to administrative justice which is to protect the rights of an individual against being violated through abuse of power by administrative authorities.

5. Conclusion

The promulgation of section 68 of the Constitution which provides for the right to administrative justice is one of the most fundamental developments of administrative justice in this jurisdiction. This article has shown that this has placed administrative justice at a much higher position than it was before. It sets constitutional standards that must be followed by the law and administrative authorities. It ensures that the country now measures up to the administrative justice standards set in international law and other jurisdictions. Zimbabwe is therefore not lagging behind in this respect.

The article has also shown the importance of an Act of Parliament that would operationalise the rights stated in section 68 (1) and (2). A finding was made that the legislation being envisaged is the Administrative Justice Act which however was already in existence by the time section 68 was legislated. The importance however for the Act of Parliament to be *intra vires* the provisions of section 68 cannot be overemphasised. The Act

97 See Feltoe (n 34 above) (37)

presents a good opportunity and prospects for the operationalisation of the rights stated in section 68. At the same time it has also been shown that firstly, it has provisions that are in violation of the section 68 rights and secondly there are various provisions that will require to be added into the Act to make it compliant with the constitutional provisions.

It is therefore recommended that there be a process of realigning the Act to the Constitution attending to the following issues amongst others: adding provisions that cater for substantive fairness; fairness to the public and including more courts or tribunals like magistrates' courts that may deal with administrative justice instead of having the High Court only. There is also need for certain provisions to be removed from the Act like the exemption and ouster clauses as these are in violation not only of section 68 but various other provisions of the Constitution. The bigger picture however is that Zimbabwe has moved in the right direction in developing administrative justice.

Apportionment of matrimonial property upon divorce in Zimbabwe and its Impact on the welfare of children

Basutu. S Makwaiba*

Abstract

This paper analyses the legal regime that governs the sharing of matrimonial property and the consequences of such disposal on children. The aim is to expose its weaknesses in so far as it fails to protect the welfare of children. The author interrogates the Zimbabwean Matrimonial Causes Act (Chapter 5.13) and argues that it does not protect the welfare of children by ensuring that children have adequate housing in the distribution of matrimonial property upon divorce. The paper argues that the Act is silent about the provision of children in the distribution of matrimonial property upon divorce, does not contain a provision directing the Courts to have first consideration to the welfare of children in the re-allocation formula. The author further argues that the Act does not have any provision which directs the Court to ensure that satisfactory arrangements for the welfare of children have been made before a divorce is finalised and that it only provides for consideration of children at infancy. The paper also critiques the discriminatory language in the Act and its failure to take into account the role of the custodial parent upon Divorce. Noting the broad consideration that is granted to the Courts in terms of the Act, the paper will argue that very few judgments considered the welfare of children before the coming into effect of the Constitution. The impact of the Zimbabwean Constitution on divorce laws is analysed. The author critiques the paramountcy principle in the Constitution and further argue that there is an urgent need to enact statutory laws that seek to operationalize the provisions in the Constitution on the protection of children. The author critiques the re-allocation formula set by the Courts in the distribution of matrimonial property in neglecting the rights of the children. The paper will analyse the existing legal regime governing the distribution of matrimonial property in light of jurisdictions of Zambia, Kenya and Australia. The paper notes urgent need for reforms in this area of law and attempts to proffer recommendations in the legislation that governs the disposal of matrimonial property upon divorce.

1. Introduction

The formula for the re-allocation of matrimonial property in Zimbabwe is contained in Section 7 of the Matrimonial Causes Act.[2] Matrimonial property means the matrimonial home or homes, household goods and effects in the matrimonial home, any other immovable or movable owned by both or either spouse and any property acquired during the subsistence of marriage.[3] During marriage, spouses normally live together and they are likely to accumulate possessions, property and other financial assets which are termed matrimonial property. Each party can contribute to the accumulation of the assets of the spouses. Divorce is the legal dissolution of a marriage by a Court.[4] Upon divorce, it is important that the divorcing couples share their matrimonial property. The *"tangle must be untangled"*.[5] It is necessary for the parties to know the future of

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1 Section 7 of Matrimonial Causes Act (Chapter 5.13).

3 Matrimonial Property Act, 2013, (No 49 of 2013) Kenya Gazette supplement No 183 at Clause 6.

4 The Black's Law Dictionary, Eighth Edition.

5 M. Hayes and C. Williams: - Family Law, Principles, Policy and Practice (1995) at 447.

the matrimonial home. Zimbabwe adopted a Constitution in 2013[6] which represents a major milestone in the development and protection of human rights in Zimbabwe. By virtue of Section 2 of the Constitution, Zimbabwe is a Constitutional supremacy.[7] As a result the Constitutional provisions should be the yardsticks that measure the adequacy and appropriateness of the existent marriage and divorce laws.

The purpose of this paper is to critique and display the failing of the legal regime governing the sharing of matrimonial property in Zimbabwe by examining its adequacy or otherwise in addressing the distribution of such property in particular the matrimonial home after divorce in so far as it affects children. The question sought to be answered is that, does it fully protect the welfare of children by ensuring that they have adequate housing in the distribution of matrimonial property upon divorce? This article comprises an in-depth comparative examination of Zimbabwean family law against that obtaining under the jurisdictions of Zambia, Kenya, U.K and Australia. The paper will clearly show that the law regarding the distribution of matrimonial property upon divorce as it relates to the protection of the welfare of children is years behind similar legislation of the above mentioned jurisdictions. The article will propose ways in which the current situation may be improved.

It is important to note that when looking at the impacts of the distribution of property on children, it is inevitable not to look at the consequences on the divorced custodial parent. This is because on divorce, the parties to a marriage assume the same roles and responsibilities that the marriage assigned to them. The divorced custodial parent has responsibilities in ensuring that the children's needs for food, shelter, clothing, health and education are met.[8]

2. The legal regime governing the division of matrimonial property in Zimbabwe and the consequences of such division on children

The division of assets consequent to a divorce is governed by Section 7 of the Matrimonial Causes Act (hereinafter referred to as the Act).[9] Section 7 (4) of the Act enjoins the appropriate Court to consider all the circumstances of the case in the exercise of its discretion in the division, apportionment or distribution of assets by stating various guidelines. While this article agrees that these are important factors, it finds the views expressed by Gillepsie in *Shenje v Shenje*[10] to be crucial in dealing with factors listed in section 7(4). The Judge noted that the factors in the subsection "deserve fresh comment."[11]

2.1 Distribution of matrimonial property and the wide discretionary powers of the courts

MALABA JA in the case of *Gonye v Gonye*[12] remarked that the terms used are the "assets of the spouses" and not "matrimonial property". It is important to bear in mind the concept used because the adoption of the concept "matrimonial property" often leads to the erroneous view that assets acquired by one spouse before marriage or when the parties are on separation should be excluded from the division, apportionment or distribution exercise. The concept "the assets of the spouses" is clearly intended to have assets owned by the spouses individually (his or hers) or jointly (theirs) at the time of the dissolution of the marriage by the Court considered when an order is made with regard to the division, apportionment or distribution of such assets.

6 The Constitution of Zimbabwe Amendment (No.20) Act, 2013.
7 Constitution of Zimbabwe (n5 above). See Section 2.
8 See remarks by Tsanga J in the case of Katsamba v Katsamba 2014 (1) ZLR at p 87.
9 Zimbabwean Matrimonial Causes Act (Chapter 5.13).
10 Shenje v Shenje 2001 (2) ZLR at p 160.
11 Shenje v Shenje (n6 above) at p 163 G-H.
12 Gonye v Gonye SC 15/09.

A number of judgements point to the fact that the Matrimonial Causes Act, [Chapter 5.13], has given wide discretionary powers to the Courts. Korsah A.J.A in the case of *Ncube v Ncube* [13] whilst referring to the facts which the Court should take into account in the division of matrimonial assets remarked that the determination of the strict property rights of each spouse is invariably a theoretical exercise for which the Courts are imbued with a wide discretion.

Sandura JA, with Chidyausiku CJ and Ziyambi JA agreeing in the case of *Hatendi v Hatendi*[14] held that the division of matrimonial assets and divorce in terms of Section 7 (1) of the Matrimonial Causes Act is a theoretical exercise in which the Courts are given a wide discretion. That discretion cannot be interfered with on Appeal unless the trial Court exercised the discretion erroneously. Malaba JA in the case of *Gonye* v *Gonye* [15] noted that a court has an extremely wide discretion to exercise regarding the granting of an order for the division of the assets of the spouses in divorce proceedings. Thus, the rights claimed by the spouses under s 7(1) of the Act are dependent upon the exercise by the court of broad discretion.

It can be argued that although the Act gives wide powers to the Courts, very few judgements considered the welfare of children and custodial parents before the coming into effect of the Constitution. The approach to the question of distribution of assets upon divorce which is set out in the celebrated case of *Takafuma v Takafuma*[16] is heavily criticised in this paper. This formula has been adopted by the Courts in a number of Judgements. Mc Nally JA held that in dividing up the assets the Court must not simply lump all the property together and then divide it up in a fair way as possible. The correct approach is to sort out the property into three lots, which may be termed "his", "hers" and "theirs". Then the Court should concentrate on the lot marked "theirs". It must apportion this lot using the criteria set out in Section 7(1) of the Matrimonial Causes Act, [Chapter 5.13]. It must then go through the same process in relation to the wife. That is the first stage. Having completed this exercise, the Court must finally look at the overall result and again, applying the criteria set out in Section 7 (3) of the Act, consider whether the objective has been achieved of placing the parties in the position they would have been had the marriage continued, in so far as this is reasonably practicable and just having regard to the conduct of the spouses.

The approach was also discussed by Korsah JA in the case of *Ncube v Ncube*.[17] The Judge dealt with a similar situation. He adopted the approach of starting from a position of 50-50 ownership and only moving away from that position if the justice and equity of the case required it. Of particular importance is page 11 of the judgement where the Judge remarked that, "as a registered joint owner, she is entitled to half a share of the value of that property".

The approach in both cases is heavily criticised when looking at the welfare of children in the division of matrimonial property. The Courts centred more on the rights of the spouses and neglected the welfare of the child. Children do not appear in the re-allocation formula set out by the cases. The children should not be visited by hardships where it can be avoided because they are certainly not part to the divorce but their rights are eroded by the divorce.[18]The Courts should have factored in the needs of the child in coming up with the re-allocation formula. It should be emphasised that this paper is of the argument that the welfare of any child is

13 Ncube v Ncube 1993 (1) ZLR (39) (S) at p 40 H-41 A.
14 Hatendi v Hatendi 2001 (2) ZLR (S) at p 530.
15 Hatendi v Hatendi (n 14 above) at p 232.
16 Takafuma v Takafuma 1994 (2) ZLR 103.
17 Takafuma v Takafuma (n 16 above) p 11.
18 Mwayera J, as he then was, in the case of Duncan v Duncan HH 232-17.

to be regarded as the first consideration, and the Courts should ensure that the children are adequately housed.

2.2 The matrimonial home on divorce

Whether a particular abode constitutes the matrimonial home is a factor to be determined by where the parties set up home, and ordinarily reside. It does not have any direct relationship to the property owned by either or both of the parties.[19] The future of the family home on divorce is an important matter, not just because of its financial value but because it provides accommodation for the family.[20] Thorpe LJ said that, "it is one of the paramount considerations in applying the Section 25 criteria, to endeavour to stretch what is available to cover the need of each for a home particularly where there are young children involved."[21]

3. The Zimbabwean divorce law framework as it relates to children upon the division of matrimonial property vis-a-vis Zambian, Kenyan and international standards: A comparative analysis

3.1 First consideration to the welfare of children

Section 10 of the Matrimonial Causes Act, [Chapter 5.13] provides for an enquiry as to custody and maintenance of children. Section 10 provides that,

> *'(1) where there are any children of the marriage, the appropriate Court, before granting any decree of divorce, judicial separation or nullity of marriage, may require evidence to be produced by either party for the purpose of determining whether or not proper provision has been made for the custody and maintenance of such children.'*

Thus, in cases of custody and maintenance, the Act is clear that the Court may make a determination on whether or not proper provision has been made for the custody and maintenance of children. However, the paper is of the argument that there exists a gap in the Act as it is silent about the proper provision of children in the distribution of matrimonial property upon divorce. The Act does not contain a provision directing the Courts to have first consideration to the welfare of children in the re-allocation formula. It does not emphasise the welfare of the children as priority and primary consideration in the distribution of the matrimonial property. In contrast, the English Act makes the re-distribution formula subservient to the welfare of minor children by directing the Court to have first consideration to the interests of minor children.[22] Section 25 of the English Matrimonial Causes Act, 1973, was amended to read,

> '*it shall be the duty of the Court in deciding whether to exercise its powers under section 23, 24 or 24 A above and, if so, in what manner, to have regard to all circumstances of the case, first consideration being given to the welfare while a minor or any child of the family who has not attained the age of eighteen.*'[23]

In the case of *Miller v Miller*[24], the House of Lords commenting on this provision remarked that,

> '*Although the 1973 Act as amended in 1984 contains no express objective for the Court, it does contain some pointers towards the correct approach. First the Court is directed to give first priority to the welfare of children while a minor or any child of the family who has not attained the age of 18. This is*

19 Makarau J, as she then was, in the case of Maponga v Maponga and others 2004 (1) ZLR at p 63 (H).
20 K. Standley: - Family Law (2004) at p 287.
21 M v B Ancillary Proceedings: Lump sum (1988) 1 FLR at p 53.
22 W. Ncube – Family Law in Zimbabwe (1989) at p 175.
23 English Matrimonial and family proceedings Act (1984).
24 Miller v Miller 2006 (House of Lords).

a clear recognition of the reality that, although the couple may seek to go their separate ways, they are still jointly responsible for the welfare of their children.'

It must be emphasised that the provision for first consideration to the welfare of children also arises in the context of the exercise of the Court's powers to make orders in relation to spouses and is not solely related to the making of orders relating to children. In the case of *C v C*[25], the Court of Appeal upheld substantial awards to a wife notwithstanding the fact that the marriage had lasted for only 9 months. Ward LJ remarked that, "the statutory obligation to give first consideration to the welfare of the parties' four year old child was a material factor in the decision".

As can be evidenced, the invariable practice in English law is to try to maintain a stable home for the children after their parent's' divorce. Research indicates that this is more successful in doing than in securing comparable income for them in the future.[26] This stance by the English jurisdiction is not at variance with the reasoning of this paper. The law should seek to emphasise as a priority the necessity to make such financial provision as would safeguard the welfare of children. The welfare of children remains the first or primary consideration. The courts should consider all the circumstances, always bearing in mind the important consideration of the welfare of children, and then attempt to attain a financial result which is just between the spouses. The consequences of not doing so are increased risks of poverty for the children.

The Constitution has come up with a highly protective tone towards children by providing that in all matters relating to children, the best interests of children concerned are "paramount".[27] Where the child's welfare is "paramount", it overrides all other considerations and determines the course to be followed. Where the child's welfare comes "first", it means that the Court must give it greater weight than other considerations but it will not necessarily prevail over the matters which the Court must bear in mind.[28]

In the seminal decision of *J v C*[29] Lord Mac Dermott defined paramount as overriding. He stated,

'*A process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices, and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the child's welfare. That is…the paramount consideration because it rules upon or determines the course to be followed.*'

The paramountcy principle originated as a covert method of putting mothers on an equal footing with fathers in custody disputes, through the subordination of both father's and mother's interest of the child.[30] The paper agrees that in deciding the questions about the upbringing of a child, the Court is directed to regard the welfare of the child as "paramount consideration". But in considering financial relief the Court is not required to go that far. It only needs to give "first" consideration to the welfare of the child in question.

It is the argument of this paper that the paramountcy principle is inapplicable in the distribution of matrimonial property following divorce because there are also rights of the spouses to be considered. It is the protection of children's welfare which needs to be strengthened and supported and not the paramountcy of children's rights. The paramountcy principle must be abandoned and replaced with a framework which recognizes that the child is merely one participant in a process in which the interests of all participants count.

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25 C v C (1997) 2 FLR at p 26.
26 S. Arthur, J. Lewis and M. Ma Clean- Settling up: Making financial arrangements after divorce (2002).
27 Section 19 (1) and 81 (2) of the Constitution of Zimbabwe (n 5 above).
28 Sutter v Sutter (1987) 2 ALL ER p 336.
29 J v C (1969) 1 ALL ER 788 p 821.
30 C. Smart "Power and the politics of custody".

3.2 Satisfactory arrangements for the children before a divorce is finalised

The Matrimonial Causes Act, [Chapter 5.13], does not have any provision which directs the Court to ensure that arrangements for the welfare of children have been made and are satisfactory or the best that can be devised under the circumstances before a divorce is finalised. It is submitted that on this shortcoming, there are lessons that can be learnt from Zambia. The Zambian Matrimonial Causes Act [31] provides that a decree nisi of dissolution of a marriage or nullity of a voidable marriage shall not become absolute unless the Court by order has declared that it is satisfied that,

> '*Proper arrangements in all the circumstances have been made for the welfare, and where appropriate, education or advancement for those children*.'

Section 71 of the said Act further provides that the decree shall not be made absolute except where it is impracticable for the party or parties appearing before the Court to make such arrangements. Section 71 (2) is couched as follows,

> '*The Court shall not make an order declaring that it is satisfied…unless it has obtained a satisfactory undertaking from either or both of the parties to bring the question of the arrangements for the children named in the order before the Court within a specified time*.'

Failure to abide by this provision leads to a void order. Similarly, Section 41 of the English Matrimonial Causes Act, as amended[32] provides that,

> '*The Court shall not make absolute a decree of divorce or nullity of marriage, grant a decree of Judicial separation, unless the Court by order, has declared that it is satisfied that b (i) arrangements for the welfare of every named child have been made and are satisfactory or the best that can be devised under the circumstances*.'

The above provisions are consistent with the sentiments of this article. It is the argument of this paper that upon the distribution of matrimonial property following divorce, the Court must direct their attention in the first instance to the provision of a home for children. It can achieve this for instance by ordering the transfer of the house to the parent with whom the child is to live, or the division of proceeds of sale permitting her to purchase accommodation, or settling it on terms that it be not sold during the children's dependency. Although there are Judgements where the courts have given a party who has custody to stay in the house until the child turns 18, this remains uncertain and can only be a standard practice when there is a specific provision in the Act directing the Courts to ensure that the arrangements for the welfare of the child are adequate before a divorce is finalised.[33]

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31 Section 42 b (i) of the Zambia Matrimonial Causes Act, No 20 of 2007, See also Section 71.

32 English Matrimonial and family proceedings Act (n 23 above).

33 See the case of *Mazorodze v Mazorodze HH-245-11 (unreported)* where Mawadze J (as he then was) applied the clean break principle. With respect, this is a problematic application of the law and if the problem is not rectified, the dangers of such Judgements will continue looming. Ordering the sale of the matrimonial home upon divorce where there are children to be cared for can be described as socially disastrous. It prejudices the children of a home. With respect, it is idle to talk about rented accommodation. See also the case of Nyatwa v Nene 1990 (1) ZLR p.97 where Ebrahim J (as he then was) had occasion to remark on the place of the clean break concept in our divorce law in the context of the provisions of the Matrimonial Causes Act. He explained that, "the Matrimonial Causes Act does not specifically embrace and provide for the clean break principle. On the contrary, it is on this basis that this Court has made orders for custodial parents to remain in occupation of the matrimonial residence after divorce and until the youngest child attains majority". The inconsistencies in the application of the orders can only be cured by a specific provision directing the courts to have first consideration to the welfare of children in the re-allocation formula.

3.3 Protection of the matrimonial property in particular the matrimonial home upon divorce

While it may be argued that the Zimbabwean Constitution has provisions covering the protection of children and spouses, the argument of this article is that the protection of the matrimonial home is not adequately canvassed. There is an urgent need to enact statutory laws like in the Kenyan case, that seek to operationalize what is in the Constitution with clear-cut guidelines on how the Court is required to proceed in the protection of the matrimonial home. This will ensure that children have adequate shelter when the spouses separate. Section 26 (d)[34] of the Constitution provides that the state must ensure that, "in the event of dissolution of a marriage, whether through death or divorce, provision is made for the necessary protection of any children and spouses". It should be noted that at the time of writing, the Constitution was still relatively new and some of its provisions were still to be tested and interpreted by the Courts. What exactly does this protection entail[35]? It is also important to note that the Matrimonial Causes Act, [Chapter 5.13], also does not direct the Courts to ensure that such arrangements are made before a divorce is finalised.

This paper makes comparison on this stance with Kenya and England. Section 68[36] of the Kenyan Constitution requires Parliament to enact legislation on "to regulate the recognition and protection of matrimonial property and in particular the matrimonial home during and on the termination of marriage". Such a law will no doubt direct a Court, when or after granting a decree of divorce or separation order a division of any assets acquired between them which protects the matrimonial home hence the welfare of children.

The Kenyan Parliament indeed rose to the occasion and enacted the Matrimonial Property Act.[37] The Act provides for the rights and responsibilities of spouses in relation to the matrimonial property. It statutorily defines matrimonial and separate property and protects the right of each spouse to marital property.[38] Separate property is the property of only one spouse, while matrimonial property is "(a) the matrimonial home or homes, (b) house hold goods and effects in the matrimonial home or homes and (c) any other immovable and movable property, jointly acquired during the subsistence of the marriage."[39]

In view of the arguments raised above, Tsanga J also shared the same sentiments in the case of *Madzara v Stanbic*.[40] The Judge remarked that,

> '*That the protection of the matrimonial home is legally desirable does not need much argument because of its important role in any family context. This is indicative of a lacuna in the law which needs to be addressed legislatively in terms of spelling out the exact parameters of the protection of the matrimonial home*.'

This paper advocates that the Parliament define the term "protection" to include the protection of matrimonial property in particular the matrimonial home on the end of the spouse's marriage so as to protect the welfare of children. . As Thorpe LJ put it in *Cordle v Cordle*,[41] "nothing is more awful than homelessness".

In England, the Matrimonial homes Act[42] was passed whose main thrust was to protect the matrimonial home

34 Constitution of Zimbabwe (n 6 above).
35 S. Chirawu-Principles of the law of succession in Zimbabwe at p 7.
36 The Laws of Kenya -Chapter 5.Part 68 (C) (iii) of the Constitution of Kenya (2010).
37 Kenya Matrimonial Property Act (2013).
38 Part 4.13 of the Kenya Matrimonial Property Act (n 37 above).
39 Part 3.6 (1) of the Kenya Matrimonial Property Act (n 38 above).
40 Madzara v Stanbic HH 546-15.
41 Cordle v Cordle 2002 (1) FLR 97, Paragraph 33.
42 English Matrimonial Homes Act (1967).

by providing for interests of a married spouse to the matrimonial home regardless of the fact that it is not registered in their own name. Banks in England have also subsequently adopted an ethical code of conduct regarding the sale of the matrimonial home. In Zimbabwe, the case of *Madzara v Stanbic Bank*[43] point to the fact that legislative intervention is needed to address the rights of the spouses and children with regard to the matrimonial home during and at the dissolution of the marriage. Tsanga J dealt with a case where the spouse sought an order that she should be able to veto an encumbrance of the matrimonial home and that they have a right to be consulted before sale. She remarked that,

> '*What constitutes a matrimonial home if a spouse is to be prevented from encumbering such a home, whether by sale, mortgage or pledge for a debt, needs to be legislatively articulated. What constitutes an encumbrance itself needs to be spelt out. Furthermore the conditions under which a party may be allowed to encumber the property, whether by consent or Court order would need to be fully spelt out, given that a spouse may have no objections to the matrimonial home being used as security where they envisage that likely benefits will flow from a given a loan. The rights of the untitled party also need to be addressed where the property is not jointly owned as in this case*.'

The Judge further remarked that these are not "issues that can be addressed through the enthusiastic pen of an overly activist Judge". These issues require informed dialogue and the legislator's engagement with relevant stakeholders on what would be realistic. Sight should also not be lost of the significance of participation for efficacy of laws by those whom they will have a bearing. She also explained that there is a need by the local banks to adopt best practices and a code of ethics on how they engage with parties in relation to the matrimonial property given the tremendous impact that the sale inevitably has on the family.

The position in Kenya, England and the remarks in the above cited case in relation to the protection of the matrimonial home upon divorce are consistent with the arguments made in this research. The matrimonial home upon divorce should be protected as it is the most urgent need for the individuals concerned. This research calls for the law to intervene with normative guidelines on the protection of the matrimonial property, in particular the matrimonial home upon divorce. Protection of the matrimonial home will ensure that children are adequately housed when the parent's' divorce.

3.4 Consideration of the welfare of children "only" at infancy

The Court is only required to give "paramount" consideration to the welfare of a child who has not attained the age of eighteen years.[44] Sections 19 (1) and 81 (2) of the Constitution providing for best interests of the child are criticized for not catering for interests of children who at the date of hearing have attained the age of 18 years or directing the Courts to consider "special circumstances"[45] in cases of majority. The provisions do not require the Court to take into account of the fact that children in practice do often stay in their homes until a later age whether because they are undergoing education or training or because they prefer to do so, particularly during the early stages of their career.[46] In reality, especially in the Zimbabwean context, children remain dependant on their parents beyond the age of majority. This can be as a result of unemployment, undergoing education or even being disabled. As such the provisions have the potential to prejudice the welfare of children

43 Madzara v Stanbic Bank (n 39 above).

44 See Section 81 (1) of the Constitution (n 6 above) which defines a child read with Section 19 (1) and 81 (2).

45 See Chapter 4 of the Dissertation by- B.S Makwaiba Welfare of Children and Disposal of the Matrimonial Property upon Divorce: A legal analysis (2018: Midlands State University) Published- which discusses the Zambian Matrimonial Causes Act (n 30 above) in depth.

46 S. M. Cretney, J. M. Masson and R. Bailey: - Principles of Family Law (2002) at p 319.

who have attained the age of eighteen years when distributing matrimonial property following divorce.

This reasoning in this paper is in line with the remarks that were passed in the case of *Richardson v Richardson*.[47] The Court held that as a general proposition, it can be stated that the obligation to support lasts until a child is between 18 and 21 years of age. However, it can last longer than that if there are special circumstances such as the presence of physical or mental handicap in the child or the child is in full time attendance at an educational institution. This article calls for widening of the definition of a "child". The definition should be qualified by "dependency" not "majority".[48] This stance will ensure that the welfare of children is fully protected in the apportionment of matrimonial property upon divorce.

It must also be emphasised that the Matrimonial Causes Act, [Chapter 5.13] does not provide for special circumstances that can prevail even when the child has reached the age of majority. As a result, the welfare of children who have attained majority is not adequately protected in the division of matrimonial property upon divorce. The article makes comparisons on this aspect with Zambia. The Zambian Matrimonial Causes Act[49] in Section 41 provides that,

> '*The Court may in a particular case, if it is of opinion that there are special circumstances which justify its so doing order that this section shall apply in relation of a child of the marriage who has attained the age of twenty one years at the date of the decree nisi*.'

The said Act further states that this section applies to the following children of the family,

> '*Under the age of twenty five and is receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not the child is also in gainful employment*.'[50]

What is clear from the Zambian Matrimonial Causes Act, 2007 is that the Court may give such directions if it is of the opinion that there are special circumstances which make it desirable in the interest of the child that this section shall apply.[51] This research calls for the legislators to cure the lacuna in the Zimbabwean Matrimonial Causes Act, [Chapter 5.13] by providing for special circumstances where the welfare of a major child can be desirably considered in the division of matrimonial property. The enactment of the statutory law like in the Zambian case will give an interpretation and clear guidelines of the provisions of the Constitution.

3.5 Discrimination

An appropriate Court may make an order with regard to..., "any child of the marriage".[52] It is the argument of this paper that this categorization is discriminatory in view of the Constitution which outlaws discrimination of being born in or out of wedlock. Mawadze J in the case of *Mazorodze v Mazorodze*[53] remarked that, "the defendant's position is informed by her concern for the welfare of three children in her custody including the (illegitimate child).The paper analyses this provision referring to the wording of the English Matrimonial

47 Richardson v Richardson 1994 (No 2) FLR p105.
48 See Section 71 (5) (ii) of the Zambian Matrimonial Causes Act (n 31 above) which provides for consideration of special circumstances.
49 Zambian Matrimonial Causes Act (n 30 above).
50 Zambian Matrimonial Causes Act (n 30 above).
51 See Section 71 (b) of the Zambian Matrimonial Causes Act (n 30 above).
52 Matrimonial Causes Act (n 1 above).
53 Mazorodze v Mazorodze (n 33 above).

Causes Act which applies to "children of the family".[54] 'Child of the family' includes not just the parents' own child but a non-marital child of one or both parties and any child treated by the parties as a child of the family.[55]

Furthermore, the Zambian Matrimonial Causes Act[56] provides that for the purposes of the application of this Act in relation to a marriage (a) a child adopted since the marriage by the husband and wife or by either of them with the consent of the other (b) a child of the husband and wife born before the marriage, whether legitimated by the marriage or not (C) a child of either the husband wife including a child born outside wedlock to either one of them and a child adopted by either of them, if at the relevant time the child was ordinarily a member of the house hold of the husband and wife and accepted by both as a member of the family, shall be deemed to be a child of the family, and a child of the husband and wife.

This article calls for the amendment of the Matrimonial Causes Act, [Chapter 5.18] to extend from "child of the marriage" to "child of the family" so that it conforms to the Constitution and fully protects the welfare of children. This will ensure adequate protection of children in the division of matrimonial property upon divorce.

3.6 Role of the custodial parent

Tsanga J in the case of *Katsamba v Katsamba*[57] remarked that "on divorce, more often than not, the parties to a marriage are left in the very same personal situation in terms of the roles and responsibilities that the marriage assigned to them". Thus, where a wife, as in this case, has performed the child rearing and caring role, relying largely on financial support from her husband, the reality of continuing such obligations post separation, without adequate support, can be particularly detrimental for the physical and mental wellbeing of the spouse and children. The responsibilities that a divorced custodial parent can expect to face in relation to the children primarily include ensuring that their needs for shelter, food, clothing, education and health care are met. In addition to time and emotional devotion that these responsibilities require, the bottom line is that they need an assured source of income. She further stated that,

> '*Whilst an immediate partnership approach in the division of the matrimonial home especially as pressed for by plaintiff, with each spouse getting 50 per cent, may appear just and equitable as between the spouses, the very nature of obligations and responsibilities that the custodial parent is likely to face may in fact place her at a greater disadvantage as compared to the husband*.'

Mwayera J in the case of *Duncan v Duncan*[58] also remarked that "the parties have agreed she be the custodial parent and it naturally follows that children and mother require shelter. The Judge further stated that,

> '*The drive to push the plaintiff (custodial parent) and children to rented accommodation given the defendant has no need for immediate shelter is unjustified in the circumstances. The plaintiff and the children are accustomed to the Avondale home and have need for shelter*.'

What is clear from the above remarks is that failure to recognise the role of the custodial parent after divorce also prejudices the welfare of children. This research contrasts the Zimbabwe Matrimonial Causes Act,

54 English Matrimonial Causes Act (Chapter 18).
55 English Matrimonial Causes Act (Chapter 18).
56 Section 5 (1) of the Zambian Matrimonial Causes Act (n 31 above).
57 Katsamba v Katsamba 2014 (1) ZLR p 87.
58 Duncan v Duncan HH 232-17.

[Chapter 5.13] with Australian position on this aspect. The factors considered under the Australian Family Law Act [59] in the division of matrimonial property relevant in this discussion is (c) whether either party has the care or control of a child of a marriage who has not attained the age of 18 years (d) commitment to support a child (i) the need to protect a party who wishes to continue that party's role as a parent. Once these factors are considered, the Court may give the person with the lower earning capacity an additional loading of the matrimonial property. This is especially the case if that person has a high cost of living, such as can come from the care of children. This will often mean that a person in that situation will receive more than 50 per cent of the parties' property.[60] This research is of the argument that the legislature should insert a provision in the Zimbabwean Matrimonial Causes Act, [Chapter 5.13] which directs the Courts to take into account whether either party has the care or control of a child as a factor for consideration.

4. Conclusion

The chief aim of the paper was to highlight the problems encountered by children and custodial parents in the disposal of matrimonial property following divorce. This was done firstly by evaluating the Zimbabwe Matrimonial Causes Act, [Chapter 5.13] clearly pointing out how it has contributed to the problems faced by children in the distribution of matrimonial property upon divorce. The article further analysed how the Courts have dealt with the sharing of the matrimonial home following divorce in so far as the welfare of children is concerned. After noting challenges faced by children in the division of the matrimonial home, the paper calls for introduction of a principle giving priority to the needs of children. The major lesson learnt from an analysis of other jurisdictions in the regional and international domain is that the Zimbabwe Matrimonial Causes Act, [Chapter 5.13] needs an urgent amendment. It should be amended through the insertion of provisions directing the courts to ensure that proper arrangements for the welfare of children have been made and are satisfactory before a divorce is finalised, to provide for "special circumstances" for major children who have attained majority so that their welfare can also be taken into account in the division of matrimonial property and to insert a provision which recognizes the role of the custodial parent. The discriminatory language in the Act should be done away with. The standpoint of the article was and is still that there is a need for the legislature to enact laws spelling out the exact parameters on the protection of the matrimonial home during and upon divorce.

59 Family Law Act, 1975, See Section 75 (2).

60 G. Sheehan and J. Hughes-Division of matrimonial property in Australia (2001).

Banning single-use plastics in Zimbabwe: A panacea to plastic waste pollution?

Tafadzwa Dhlakama*

Abstract

The 2018 World Environment Day was celebrated under the theme 'Beat Plastic Pollution.' The theme calls upon governments and communities to unite in reducing the number of plastics in our environment. Single-use plastics in Zimbabwe contribute significantly to pollution which has since reached alarming levels. This article reignites the discussion on calls for a total ban on single-use plastics in Zimbabwe 10 years after legislative attempts aimed at regulating plastic use were crafted. A focus will be placed on the Plastic Bottles and Plastic Packaging Regulations which seek to address the single-use plastic challenge in Zimbabwe.

1. Introduction

Single-use plastics[1] have emerged as a global environmental challenge. In Zimbabwe the environmental challenge they pose is exacerbated by the country's unique socio-economic and political environment. In particular, 18 per cent of all the waste that is disposed into landfills is classified as plastic waste,[2] the majority of which is single-use plastics. Single-use plastics cause serious environmental hazards such as pollution, which is a barrier towards the realization of the right to a clean, safe and healthy environment as enshrined in the Constitution.[3] Zimbabwe's legislative framework regulating single-use plastics is evident in the Constitution, the Environmental Management Act,[4] the Plastic Bottles and Plastic Packaging Regulations[5] and Zimbabwe's Integrated Solid Waste Management Plan.[6] Whilst numerous socio-economic reasons have been provided for the continuous use of single-use plastics, these reasons need to be holistically understood within the constitutional environmental rights context. The existing legal framework that prohibits the manufacturing and distribution of single-use plastics that are less than 30 micrometres have significantly failed to curtail plastic pollution in Zimbabwe. Also, complementary educational awareness and financial instruments have not resulted in bringing about the desired human behavioural change regardless of the 10 years since the regulations have been in place. This paper analyses the existing single-use plastics policy position in Zimbabwe with a view of understanding whether a complete ban of the single-use plastic bags would be a panacea to Zimbabwe's plastic pollution woes. The paper will explore various arguments for and against banning single-use plastics use in Zimbabwe whilst seeking to balance socio-economic considerations and the constitutional environmental right.[7]

2. Contextual Background

A plethora of literature exists that identifies the serious levels of harm that emanates from single-use plastics waste largely because of its chemical composition.[8] Single-use plastics are estimated to take up to 1000 years

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1 Plastic carrier bags are defined in the Plastic Bottles and Plastic Packaging Regulations as packaging manufactured with or without handles or with or without gussets that are used for the carriage of goods by a person. Other types of single-use plastics include bottles, straws, containers, cups and cutlery.

2 Government of Zimbabwe Zimbabwe's Integrated Solid Waste Management Plan (2015).

3 Constitution of Zimbabwe Act No 20 of 2013.

4 Environmental Management Act [Chapter 20:27].

5 Plastic Bottles and Plastic Packaging Regulations Statutory Instrument 98 of 2010.

6 Zimbabwe's Integrated Solid Waste Management Plan (n2 above).

7 Constitution of Zimbabwe (n3 above).

8 Most plastics are made up of polypropylene which is a material that is manufactured from petroleum and natural gas which is non-renewable fossil fuel material.

for them to degrade.[9] This is a significant amount of time which could adversely prevent future generations from inheriting a clean environment. Single-use plastics indiscriminately affect humans, flora and the fauna together with land and marine living organisms. Plastic pollution is noted as contributing to the death of marine species,[10] the spread of diseases,[11] hindering reproduction and resulting in livestock and wildlife fatalities,[12] landscape pollution[13] and air pollution through the production and disposal of plastic.[14] The Environmental Management Agency (EMA) attributed the 2005 floods in Harare to drainage systems blockages partially as a result of single-use plastics which consequently exposed people to serious health hazards.[15] The negative implications of single-use plastics are thus visible for all.

It has been noted that single-use plastics are easily accessible, convenient, affordable and easy to dispose of when compared to other alternative biodegradable products with almost equal utility in the eco-friendly category such as paper bags.[16] In 2012, the World Bank reported that the world's largest cities were generating over 1.3 billion tonnes of solid waste annually and within this figure, plastic material amounted to nearly a third.[17] The United Nations Environmental Programme (UNEP) recently indicated that 500 billion plastic carrier bags are used each year, which amounts to approximately 50% of consumer plastics and such figures are set to double in the next 10-15 years.[18] In 2015 alone, approximately 50% of all plastic waste that was generated globally was plastic packaging.[19] It is estimated that due to rapid urban sprawl and constant population growth, the amount of plastic waste generation will skyrocket to an estimated 2.2 billion tonnes by 2025.[20] Zimbabwe is not unique to this global plight as single-use plastic manufacture, distribution and use are significantly high due to the momentary convenience to consumers and manufacturers. It is in this light that most nations have either chosen to ban or regularise single-use plastics, with Zimbabwe choosing the later whose rationale is now seriously being questioned.[21]

3. Zimbabwe's Legal and Policy Framework on plastics

3.1 Constitutional Environmental Right Context

The enactment of the 2013 Constitution in Zimbabwe elevated the environmental right[22] to the same level as

9 R Geyer, JR Jambeck and KL Law 'Production, Use, And Fate of All Plastics Ever Made' (2017) Vol 3 Science Advances 3.

10 JR Jambeck et al 'Plastic Waste Inputs from Land into the Ocean' (2015) Vol 347 Science 770.

11 J Clapp and L Swanston 'Doing away with plastic shopping bags: International patterns of norm emergence and policy implementation' (2009) Vol 18 Environmental Politics 315.

12 Environmental Management Agency 'Plastics and the Environment' available at <https://www.ema.co.zw/agency/downloads/file/THIN%20PLASTICS%20PROHIBITION.pdf>.

13 Environmental Management Agency (n12 above).

14 R Verma, KS Vinoda, M Papireddy and ANS Gowda 'Toxic Pollutants from Plastic Waste: A Review' (2016) Procedia Environmental Sciences Vol 35 701.

15 Environmental Management Agency 'An Environmental Newsletter' (2011) Vol 1 Environmental Management Agency 3.

16 SEM Selke 'Plastics in Packaging' in AL Anthony (eds) Plastics and the Environment (2003) Wiley-Interscience 137-183.

17 World Bank 'Solid Waste Management' available at <https://www.worldbank.org/en/topic/urbandevelopment/brief/solid-waste-management>.

18 C Giacovelli 'Single-Use Plastics: A Roadmap for Sustainability' (2018) United Nations Environment Programme 6.

19 Jambeck (n10 above) 770.

20 World Bank: Waste Generation available at <https://siteresources.worldbank.org/INTURBANDEVELOPMENT/Resources/336387-1334852610766/Chap3.pdf>.

21 R Mangizvo and J Steven 'Regulating or Banning Plastic bags in Zimbabwe: A contentious debate' (2012) Vol 9 Ossrea Bulletin 24. The authors called for the regulation of plastic bags thickness as opposed to a complete ban. They also argued for the introduction of levies as opposed to an outright ban which they considered to be too drastic and the last resort after exploring the available options.

22 Environmental rights are typically classed by various names such as third-generation, green, group rights or collective rights.

other civil, political and socio-economic rights in the country.[23] The environmental right embraces the need for the country to pursue development in a manner that does not result in an environment that is harmful to anyone's health or well-being. Section 73 specifically provides that:

> (1) Every person has the right—
> (a) to an environment that is not harmful to their health or well-being; and
> (b) to have the environment protected for the benefit of present and future generations,
> through reasonable legislative and other measures that—
> (i) prevent pollution and ecological degradation;
> (ii) promote conservation; and
> (iii) secure ecologically sustainable development and use of natural resources while promoting economic and social development.
> (2) The State must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realisation of the rights set out in this section.

Several observations can be made from the reading of this environmental right provision. The right to a clean environment is substantive and of equal importance more so when an activity that is to be undertaken in the environment threatens one's health[24] or well-being.[25] Single-use plastics as has been previously identified contribute to factors that are harmful not only to human health and well-being as provided for under section 73 but is also harmful to the flora, fauna, land and marine animals.[26] The continuous use and regulation of these single-use plastics should thus be analysed taking into consideration the circumstances, reasons and implications on their use.

The constitutional environmental right also recognises the inevitability of environmental pollution in any industrialised society. Production and provision of goods and services certainly results in the emission of environmental pollutants.[27] However, the pollutants emitted should be within the environment's own carrying capacity. The key principle that should guide industrial operations in the environment is sustainability, which balances economic, social and environmental factors.[28] Sustainable development recognises the clear linkage that exists between human rights and the environment with humans at the centre of this concern.[29] It is important to note that all actions undertaken in the environmental, social and economic context are done for humankind's benefit and as such continuous action that would undermine the future enjoyment of such products will be futile to this goal.

Another key concept that the Zimbabwean Constitution seeks to safeguard is the future generation's

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23 Constitution of Zimbabwe (n3 above) Section 73.

24 Human health, in this case, may denote a healthy, pollution-free environment that does will not affect the mental and physical integrity of people. See LJ Kotzé 'The Judiciary, the Environmental Right and the Quest for Sustainability in South Africa: A Critical Reflection' (2007) Vol 16 *Reciel 299.*

25 Well-being' relates to instances where a person's environmental interests or intrinsic value or aesthetic value is affected. See J Glazewski Environmental Law in South Africa (2005) 77.

26 Jambeck (n10 above) 770.

27 Kotzé (n 24 above) 300.

28 United Nations General Assembly Report of the World Commission on Environment and Development: Our Common Future (1987) 43.

29 United Nations Human Rights Office of the High Commissioner and United Nations Environment Programme 'Human Rights and the Environment Rio +20: Joint Report' (2012) OHCHR and UNEP 5

environmental needs as embedded in the inter-generational principle. The inter-generational principle has now become an environmental right norm that is of equal importance as the sustainable development principle.[30] The inter-generational principle recognises that all activities that are undertaken today have a bearing on the next generation and as such current actions should not hamper the needs of future generations to inherit a clean environment, which are equally important.[31] This principle was simplified in *Augar Investments v Minister of Water and Climate*[32] to which Justice Chigumba yearned that all

> citizens of Zimbabwe will vigorously pursue and enforce their rights as provided in terms of the Environmental Management Act, lest we are judged and found wanting, by future generations, for failing to play our part in preserving and protecting the environment.

The application of this environmental norm in the context of single-use plastics should be considered in light of the fact that a 1000 years are needed for plastics to degrade. Considering that 18% of all solid waste generated in Zimbabwe is plastic, it is critical to reflect on the extent to which future generations will inherit a clean environment that is not harmful to their health or wellbeing. Sadly, it is, in most circumstances, the poor and marginalized who suffer the brunt from the proliferation of waste dumps that are regrettably andcolonially situated near high-density areas' vicinity.[33]

In this light, the Constitution places an obligation on the government to take 'reasonable legislative and other measures' towards the realisation of the environmental right. Explicitly, a duty is placed on the state to prevent pollution and ecological degradation, to promote conservation and to secure ecologically sustainable development and use of natural resources. This mandate on the state is in line with the Rio Declaration Principle on the prevention of pollution. [34] Relatively, legislative and other measures in the context of preventing single-use plastic pollution are evident in the form of the Environmental Management Act,[35] Plastic Packaging Regulations[36] and the Integrated Solid Waste Management Plan.[37] However as clearly articulated in the South African case of *Government of the Republic of South Africa* v *Grootboom*[38] that the mere enactment and establishment of policy mechanisms on its own does not suffice as compliance with the constitutional dictates, mere legislation may not be enough.[39] The effectiveness and ability of such mechanisms to address the need for which they were enacted is critical and may call for constant reflection and amendments.

3.2 Environmental Management Act

In Zimbabwe, there is no specific legislation regulating the manufacturing, distribution and disposal of single-use plastics. The main legislation that has a bearing on single-use plastics is the Environmental Management Act.[40] The Environmental Management Act aims to provide for the sustainable management of natural

30 United Nations General Assembly (n29 above) Chapter 2.
31 P Henderson 'Some thoughts on distinctive principles of South African Environmental Law' (2001) South African Journal of Environmental Law and Policy 139.
32 Augar Investments v Minister of Water and Climate HH 278-15.
33 RD Bullard 'Environmental Justice: It's More Than Waste Facility Siting' (1996) Social Science Quarterly, vol. 77, no. 3, 493–499.
34 The Rio Declaration on Environment and Development available at <http://www.unesco.org/education/pdf/RIO_E.PDF>.
35 Environmental Management Act (n5 above).
36 Statutory Instruments 98 of 2010.
37 Government of Zimbabwe (n3 above).
38 Government of South Africa v Grootboom 2001 (1) SA 46 (CC).
39 Ibid, para 42.
40 Environmental Management Act (n4 above).

resources, the protection of the environment and the prevention of pollution and environmental degradation amongst other goals.[41] The environmental legislation also gives effect to the constitutional environmental right by reiterating that every person has a right to a clean environment[42] that can be attained through prohibiting the discharge of litter[43] and waste[44] into the environment. Though the term litter is not defined in the legislation, waste is defined as

> domestic, commercial or industrial material, whether in a liquid, solid, gaseous or radioactive form, which is discharged, emitted or deposited into the environment in such volume, composition or manner as to cause pollution.[45]

The definition of waste is wide enough to encompass single-use plastics that are discarded into the environment after having fulfilled their use at undesignated sites. The Environmental Management Act was crafted to regulate waste products such as single-use plastics in a bid to prevent littering of the environment.

Regardless of the absence of specific legislation regulating single-use plastics used in Zimbabwe, the Environmental Management Act is the environmental framework legislation in Zimbabwe. The principles set out in the legislation guide the 'interpretation, administration and implementation of any other law concerning the protection or management of the environment'.[46] Some of the important principles that the legislation refers to and that are important in as far as single-use plastics are concerned include the preventative principle,[47] the protection of sensitive ecosystems,[48] the precautionary principle,[49] the polluter pays principle[50] and the principle of sustainable development.[51] These key environmental principles or norms can be used to evaluate the application and implementation of any other legislation or policy that has environmental implications. In this light, actions by companies and workers involved in the manufacture of single-use plastic actions will also be interpreted in the context of these principles with none being more superior to the other. Failure to pass the threshold required by such norms can be grounds upon which such conflicting action or policy position can be overridden to the extent of its inconsistency. Importantly, the plastic packaging and plastic bottles regulations discussed below have to be weighed taking these norms into account.

The Environmental Management Act also establishes key entities that potentially play an important complementary role in environmental management. One key establishment is the Standards and Enforcement Committee.[52] The Committee, though never constituted and currently non-existent, should be composed of key government ministries, academia, non-governmental organisations, industry or employers organisations and labour or trade unions.[53] The existence of the Committee, in as far as single-use plastics are concerned

41 Ibid, preamble.
42 Ibid, Section 4.
43 Ibid, Section 83.
44 Ibid, Section 70.
45 Ibid, Definition of terms section.
46 Ibid, Section 4 (2) (c).
47 Ibid, Section 4 (2) (f).
48 Ibid, Section 4 (2) (i).
49 Ibid, Section 4 (2) (d).
50 Ibid, Section 4 (2) (g).
51 Ibid, Section 4 (2) (e).
52 Ibid, Section 55.
53 Ibid, Fourth Schedule.

would enable the provision of recommendations to the Minister of Environment, Climate, Tourism and Hospitality Industry (the Minister) in consultation with EMA on the level of compliance with single-use plastics standards, handling and destruction of single-use plastics and even the implications of banning the use of single-use plastics on the environment, job and even enforcement mechanisms. The non-appointment of this Committee is a missed opportunity that the visionary environmental legislation had identified to complement EMA's efforts. There is still however an opportunity for the Minister to constitute this key advisory body to which many Zimbabweans would want to serve for the fulfilment of the Environmental Management Act's objectives.

The Environmental Management Act on the other hand delegates law-making powers to the Minister for the development of regulations that can ensure the effective implementation of the legislation. The Environmental Management Act is fleshed up with modalities that can result in the legislation goals being fulfilled. For example, section 140 of the Environmental Management Act authorises the Minister to draw up regulations aimed at curbing any 'imminent and foreseen environmental challenges.'[54] This is an important mandate that is entrusted by the Parliament to an administrative officer. The Minister has formulated regulations discussed below in the form of the Environmental Management (Plastic Packaging and Plastic Bottles) Regulations of 2010.[55]

3.3 Environmental Management (Plastic Packaging and Plastic Bottles) Regulations, 2010

The Environmental Management (Plastic Packaging and Plastic Bottles) Regulations were enacted in 2010 following the proliferation of plastic packaging waste on the environment.[56] These regulations specifically address the scourge of plastic packaging in general and single-use plastics in particular. The Plastic Packaging and Plastic Bottles Regulations make it a criminal offence through prohibiting:

> The manufacturer for use within Zimbabwe, commercial distribution or importation of plastic packaging whether biodegradable or not, with a wall thickness of not less than 30 micrometres[57]

Though these regulations do not affect bread packaging,[58] the regulations go into detail even to the extent of identifying the standard that should be used to measure the bags' thickness. The specific requirement stresses that:

> (a) Plastic packaging, offered for the trade of commercial distribution as carrier packaging, shall be made from plastic film consisting of polypropylene.
>
> (b) When the film of the plastic carrier packaging is measured in accordance with section *three* (1), no individual thickness measurement shall be less than 30 micrometres.[59]

On paper, the regulations are commendable and the Minister should be applauded for having been awake to the harm that single-use plastics have on the environment before growing global voices such as those echoed during the 2018 World Environment Day. The rationale for single-use plastics thickness though grounded on a scientific basis leading to their inclusion in the regulations raises numerous questions. The direct correlation

54 Environmental Management Act (n4 above).
55 Statutory Instruments 98 of 2010.
56 Ibid.
57 Ibid, Section 3(1).
58 Bread packaging can have a thinner thickness to those of plastic carrier bags with a thickness of 25 micrometres.
59 Statutory Instrument (n5 above) Schedule, section 1.

between thicker plastics, low susceptibility to damage and the resultant reduction in plastics consumption has not materialised. According to the 2016 World Economic Forum report, only 14 per cent out of 86 per cent of all total packaging waste that was disposed of was recycled regardless of the existence of plastics thickness regulations.[60] It is therefore evident that the basis for advocating for thicker plastic regulations does not bring about the desired result.

It is also important to highlight that modern solid waste management trends demand sustainability to be promoted through the implementation of the waste management hierarchy.[61] At the core of the waste management hierarchy is prevention, followed by recycling, full collection and treatment of the waste before finally disposing of the waste.[62] According to Sevitz, thin plastic bags are non-reusable and are ill-suited to recycling due to their low commercial return.[63] The promotion of 30 micrometres as the minimum threshold is thus a means of advancing recycling once the plastic is disposed of. The current regulations on single-use plastic do not adequately fall within the ambit of prevention, rather they encourage recycling by seeking to extend single-use plastics shelve life.

One of the major challenges these regulations have faced is changing the behaviour of industry and public in as far as single-use plastic manufacturing and use is concerned. Whilst consumer behaviour momentarily changed following the gazetting of the plastic packaging and plastic bottles regulations, this culture has not been nurtured.[64] Local manufacturing industries have abided by these regulations and major distributors (retail outlets) started retailing single-use plastics thicker than 30 microns at a cost.[65] This action in principle ideally was a wise move that sought to change human behaviour by discouraging single-use plastic consumption. However, consumer behaviour is never static. It is noted by Chitotombe,[66] Mangizvo and Steven[67] that consumers identify more with soft-action. Consequently, a total ban of single-use plastic was considered too drastic. The regulations on 'banning' single-use plastics had momentary success. Now that the populace has internalised the soft action as part of everyday life, there is a need for a different approach.[68]

Furthermore, though the regulations on single-use plastics have been implemented in conjunction with other mechanisms, it has not brought the intended results. Market-based or economic instruments,[69] information based instruments,[70] self-regulatory instruments,[71] and or criminal mechanisms have not deterred nor significantly changed consumer behaviour. To the contrary, consumers have acclimatised to the tax levy put in place and in so doing resorted back to the use of single-use plastics.[72] In such circumstances, one is left to ponder what

60 World Economic Forum 'The New Plastics Economy. Rethinking the future of plastics, January' (2016) available at <www3.weforum.org/docs/WEF_The_New_Plastics_Economy.pdf>.
61 This is emphasized on the second page of the Integrated Solid Waste Management Plan.
62 Giacovelli (n18 above) 6.
63 J Sevitz, AC Brent and AB Fourie 'An Environmental Comparison of Plastic and Paper Consumer Carrier Bags in South Africa: Implications for The Local Manufacturing Industry' (2003) Vol 14 Journal of Industrial Engineering 67.
64 JW Chitotombe 'The plastic bag 'ban' controversy in Zimbabwe: An analysis of policy issues and local responses (2014) Vol 3 International Journal of Development and Sustainability 1000.
65 Ibid, 1011.
66 Ibid, 1005.
67 Mangizvo and Steven (n21 above) 25.
68 E Witbooi 'Plastic Bag Regulation in South Africa: Just a Load of Rubbish?' (2003) 10 *SAJELP* 67.
69 These are mechanisms aimed at promoting good environmental behaviour through price alterations that reflect the cost of production and or consumption. It involves putting a levy on suppliers, retailers and even consumers of the product.
70 These are measures taken to enhance awareness on environmental issues. It involves the cost of plastic carrier bags is itemised on an invoice or till receipt issued to the customer. Furthermore, the plastic carrier bags usually have a recycle sign and sometimes written 'Government-certified standard'.
71 Business entities are the ones that impose own regulatory structures without governments or community interventions.
72 Chitotombe (n64 above) 1008.

other alternatives the Minister can implement in as far as single-use plastics given the ineffectiveness of complementary enforcement mechanisms.[73]

The introduction of the tax levy currently pegged at $0.20 on single-use plastics has not been a deterrent on the part of consumers and manufacturers. Most parties also feel short-changed and question if the charges are financially or environmental founded.[74] In the alternative, lack of transparency and communication to the consumers with regards to money that is collected from single-use plastics has aided in cultivating the culture of irresponsibility. It is worthy to note that one of the environmental norms in Zimbabwe is the polluter pays principle. The principle denotes that any actor who causes or contributes to environmental harm should bear the cost of remedying such harm.[75] This principle is evident in the regulations themselves in as far as the manufacturers of single-use plastics are charged an annual registration fee of US$ 40, a quarterly fee of $100 and a $5 000 fine or a one-year jail sentence for failure to comply. On the other hand, consumers are 'charged' $0.20 for every single-use plastic carrier bag that they are provided by retailers. Whilst these amounts are not truly reflective of the environmental rehabilitation fees needed, they are significant and can contribute something towards the environmental fund.[76] Accountability in as far as the use of these funds or tabulating the true cost of safely disposing of single-use plastic carrier bag vis-à-vis collected funds may change people's mindset from the current one that perceives this as a finance generating levy.[77]

In other circles, the inability to adequately use funds or apportion the true cost of environmental rehabilitation has been used a basis to put in place restrictions on single-use plastics production and use as opposed to a complete ban. However, such an argument will not suffice taking into account the fact that the polluter pays principle does not override other environmental norms such as the preventative principle and sustainable development. The World Bank has also stated that the unregulated use of single-use plastics is contrary to sustainable development as well as other fundamental principles of environmental law.[78] In the *Gabčíkovo – Nagymaros Project* case,[79] Vice-President Weeramantry in a separate opinion noted that sustainable development is one of the centre-pivotal considerations that states should take into account when formulating policies which have a bearing on the environment.[80] In light of the court's reasoning, it is clear that the concept of sustainable development may perhaps favour a complete ban on single-use plastics whilst and conversely, the principle can serve as a justification for mere regulation and not a ban.

The other challenge that can be attributed to the ineffectiveness of the plastic packaging regulations is the socio-economic conditions prevailing in the nation that have upscaled the informal sector. Zimbabwe's' informal sector is more than 60% of the economy according to the International Monetary Fund (IMF) thereby becoming the largest in Africa and the second in the world.[81] The high number of people in the informal sector

73 Whilst banning of certain products should be the last resort, in the environmental context it has worked and produced the desired results in Zimbabwe such as Diesel 50 and Styrofoam.

74 Chitotombe (n64 above) 1004.

75 Rio Declaration on Environment and Development (n35 above).

76 Ideally, the funds collected should be earmarked for waste management and other environmental Initiatives including awareness and education campaigns.

77 Environmental Management Act (n6 above) Section 52.

78 GS Eskeland and E Jimenez 'Policy instruments for pollution control in Developing Countries' (1992) Vol 7 World Bank Research Observer 145.

79 Gabčíkovo -Nagymaros Project (Hungary-Slovakia) ICJ (25 September 1997) (1997) ICJ Reports, Judgment, I.C.J. Reports 1997,

80 Ibid, page 85.

81 'Shadow Economies Around the World: What Did We Learn Over the Last 20 Years?' available at <http://www.imf.org/en/Publications/WP/Issues/2018/01/25/Shadow-Economies-Around-the-World-What-Did-We-Learn-Over-the-Last-20-Years-45583>.

presents a challenge in as far as environmental management is concerned given that all goods and products sold in this sector are transported by the consumer in some form of single-use plastic packaging, which in most cases, does not meet standards.

Plastic thickness is measured 'using the method described in SAZ-ISO4893,'[82] a scientific mechanism which cannot be precisely undertaken with the naked eye except by estimation through comparison. Enforcement officials hence have to deal with the huge numbers of non-compliant single-use plastics which are manufactured locally or imported illegally into the country from neighbouring countries given the brisk business and demand for their use in the informal sector.[83] In an economy that is largely informalized, monitoring the implementation of the regulations in terms of single-use plastic quality would have been easier as those not complying would be fined.

One cannot also turn a blind eye to the often raised arguments against the banning of single-use plastics. It is argued that the banning of single-use plastics would have some monetary and economic implication on workers and investments made in industrial manufacturing. These implications are not however in perpetuity as proponents seem to suggest. A new legal position can give room to retrain, reskill and upgrade machinery.[84] Furthermore, the constant reference to economic factors at the expense of social and environmental factors is not what the sustainability principle entails. In a South African case of *BP Southern Africa v MEC Agriculture,*[85] it was highlighted that pure economic principles should no longer be the determinant factor as to whether the development of policy is acceptable.[86] This case is informative on the need to strike a balance between socio-economic development and environmental protection. The ban of single-use plastics would, in this regard, be justifiable as alternative products in the form of recyclable eco-bags or paper bags can fulfil the same role of single-use plastics, thus simultaneously creating employment opportunities.[87]

3.4 Zimbabwe's Integrated Solid Waste Management Plan

The Ministry of Environment, Water and Climate in 2015 developed Zimbabwe's Integrated Solid Waste Management Plan.[88] The plan envisages a safe, secure and sustainable solid waste management system that will transform Zimbabwe into a clean, healthy and environmentally friendly country.[89] The Ministry should be commended for developing this key and important policy document that acts as a blueprint upon which solid waste management challenges can be addressed in Zimbabwe.

The Integrated Solid Waste Management Plan acknowledges the increasing challenge posed by single-use plastic waste in general and the corresponding need to minimise waste generation.[90] According to 2011 baseline information, plastic waste is the second most generated form of waste generated in Zimbabwe averaging 18% (303 040 tonnes).[91] This is a significant amount of waste considering its non-biodegradability. The Plan further notes that if Zimbabwe's economic performance had reached 100 per cent by 2016 following business as

82 Statutory Instrument (n55 above) Test methods, Section 3.
83 Chitotombe (n64 above) 1004.
84 An example relates to the ban on Styrofoam products with recyclable or biodegradable one. See S Mhofu 'Zimbabwe Temporarily Lifts Ban on Foam Food Containers' Voice of America News, 18 July 2017 available at <https://www.voanews.com/a/zimbabweenvironment-styrofoam-eps containers/3949063.html>.
85 BP Southern Africa (Pty) Limited v MEC for Agriculture, Conservation, Environment and Land Affairs 2004 (5) SA 124 (W).
86 Ibid, para 144.
87 Mangizvo and Steven (n21 above) 24.
88 Government of Zimbabwe (n2 above).
89 Ibid.
90 Ibid, Goal 1.
91 Ibid, page 3.

usual approach, the amount of waste generated would have doubled.[92] This Plan however did not envisage the growth and waste generation emanating from the informal sector. One can postulate that the projections have been realised in terms of waste generation hence the Presidents call for a national clean-up campaign.[93]

Notably, some legal, policy and institutional framework solutions are identified as key in addressing the waste challenges in Zimbabwe. The Solid Waste Management Plan identified key targets that had to be undertaken by 2020, which include the review and enforcement of statutory instruments on solid waste management by the EMA before the end of 2018, but this timeline was not met.[94] Furthermore, the statutory instrument with implications on single-use plastics was not specifically mentioned as in need of review yet plastic waste was identified in the same strategy as the second-largest form of waste generated in Zimbabwe. Ideally, the plastic packaging regulations should have been included within the list of other statutory instruments in need of review, given the prevailing and current trends in environmental management that are always evolving.

1. Conclusion

Single-use plastics play an important economic and social role in the lives of consumers, workers and investors. However, the effects of single-use plastics are however much greater on human health, the environment, the flora and fauna. It is in this light that a balancing act should be done such that the constitutional environmental right which is the foundation of life is not subservient to economic and social considerations. Prohibiting single-use plastics is a mechanism upon which sustainable environmental, economic and social strategies can be implemented for the benefit of all actors. Furthermore, current soft-action coupled with economic and enforcement challenges have failed to change human behaviour. Plastic packaging regulations should be included in the list of regulations in need of review within the review framework of the integrated solid waste management plan.

92 Ibid, page 23

93 ED declares National Clean-Up Day The Herald 19 December 2018.

94 Ibid, page 64. These regulations were never revised as per plan and will most likely not be revised during the lifetime of the plan.

Specialized superior courts judicial selection: Perspectives from Mozambique, South Africa and Zimbabwe

Gift Manyatera*

Abstract

Emerging democracies in Africa are grappling with the aftermath of the so called 'third wave' of democratization.[1] *Post-colonial governments in countries such as Mozambique, South Africa and Zimbabwe have to ensure democratic consolidation by establishing institutions that promote the rule of law and the protection of fundamental rights of citizens. One such institution is the judiciary. It necessarily follows that the mechanisms of appointing superior court judges are critical in so far as the democratic consolidation imperatives are concerned. These mechanisms of judicial selection are important as they impact on the independence of judges from unnecessary external pressures in fulfilling their adjudicative functions. Specialized superior courts have not been given the same prominence as the ordinary superior courts in judicial selection debates. This article highlights the importance of specialized superior courts judicial selection mechanisms in three Southern African countries comparatively. It further provides useful lessons for all three jurisdictions in enhancing the independence and effectiveness of specialized superior courts.*

1. Introduction

The effectiveness of legal institutions in Africa is of paramount importance to legal scholars, academics, politicians and policy makers[2] and one such key legal institution is the judiciary. Recent studies have suggested that countries which wish to grow economically should be concerned with the rule of law and the effectiveness of their legal institutions.[3] An effective and independent judiciary[4] assures a better human rights record and entrenchment of democratic tenets in a state.[5] Most theories of judicial independence place a great deal of emphasis on judicial selection systems as a key element of judicial independence and current 'constitutional developments in Africa necessarily continue to be influenced by Western constitutional models.'[6]

Emerging democracies in Africa are increasingly grappling with the expectations intrinsic in a democratic dispensation. The judiciary as a pivotal institution in the separation of powers paradigm is under the spotlight as it has to satisfy the expectations of societies which had been oppressed for a long time. These expectations are unavoidable as the end of colonial rule brought with it the promise and prospects for good governance and emerging new states which subscribed to democratic virtues. The role of the judiciary in strengthening

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1 See generally Huntingdon, ''The third wave: Democratization in the late twentieth century'' 1991, Norma, OK, University of Oklahoma Press.

2 Joireman, S F "Inherited legal systems and effective rule of law: Africa and the colonial legacy"2001 Journal of Modern African Studies,39, 4 , 571.

3 Ibid.

4 According to Fombad C M in, "Challenges to constitutionalism and constitutional rights in Africa and the enabling role of political parties: Lessons and perspectives from Southern Africa" 2007 The American Journal of Comparative Law Vol 55. No.1 p10 'an independent judiciary can be defined as one that is free to render justice on all issues of substantial legal and constitutional importance, fairly, impartially, in accordance with the law, without threat, fear of reprisal, intimidation or any other undue influence or consideration'.

5 Joreman, S F 2001 Journal of Modern African Studies, 571.

6 Fombad, C M "A preliminary assessment of the prospects for judicial independence in post-1990 African constitutions" 2007 2 Public Law, 236.

democracy and the appointment of independent-minded judges is therefore critical in post colonial African countries.[7] Judicial independence therefore seeks to ensure the freedom of judges to administer justice impartially without any fear or favour.[8]

This paper focuses on a functional assessment of the specialized superior courts judicial selection/appointment criteria in three Southern African countries, that is Mozambique, South Africa and Zimbabwe. The functional analysis will enable this comparative assessment to bring out the distinctive features of each system of judicial selection at the specialized superior court level.[9] Further, legal systems in Africa have a lot to learn from each other and this comparative assessment enables each comparator legal system to draw important lessons which can inform a law revision agenda in the selection of specialized superior court judges.

2. Analysis of the positions in all three countries

The Mozambican Constitution establishes an Administrative Court which is the highest court in the hierarchy of administrative, customs and fiscal courts, and which is a superior court of record.[10] Prior to 2009, the Administrative Court did not follow a career system as there existed only a single Administrative Court for the whole country. The President of the Administrative Court is nominated by the President of the Republic after consultation with the JAC (Superior Council of the Administrative Judiciary). However, this nomination requires parliamentary ratification in the same manner as the appointment of the President of the Constitutional Council, the President and Vice President of the Supreme Court. The rest of the Administrative Court judges are appointed by the President on the 'recommendation' of the JAC.[11] Effectively, the President of the Republic has an unfettered discretion in the appointment of the President of the Administrative Court. However, this discretion is limited in respect of the Administrative Court judges as the President makes these appointments on the basis of a recommendatory list prepared by the JAC. Critically, the JAC does not conduct any interviews for prospective judges. Paradoxically, the same JAC advertises vacancies in the Provincial Administrative Courts followed by interviews of shortlisted candidates.[12] These inconsistencies in judicial selection procedures necessarily bring political patronage into the selection of Administrative Court judges. Perceptions abound that political gerrymandering plays a key role in Administrative Court judicial appointments.

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7 www.sabar.co.zw/law-journals/2010/december volume 023 no 3 p43 accessed on 10 April 2012. Having highlighted the importance of an independent judiciary, the critical aspect is to investigate the reasons why there have been controversies against several post-independence judicial appointments in Zimbabwe, South Africa and Mozambique. An investigation of this key element of judicial independence in Zimbabwe, South Africa and Mozambique is imperative considering the implications of the different judicial selection mechanisms on the rule of law and democracy. Identifying the qualities of a good judge is not only an 'illusory task but a daunting one' for policymakers and those responsible for making judicial appointments. It is therefore imperative that the judicial selection mechanisms are tailored to be able to come up with candidates who will enhance the effectiveness and independence of the judiciary.

8 Akkas, S A "Appointment of judges: A key issue of judicial independence" 2004 Bond Law Review, Vol 16, No 2 200. Chief Justice Mohamed in an address to the International Commission of Jurists in Cape Town on 21 July 1998 remarked, 'Society is ……entitled to demand from judges fidelity to those qualities in the judicial temper which legitimize the exercise of judicial power. Many and subtle are the qualities which define that temper. Conspicuous among them are scholarship, experience, dignity, rationality, courage, forensic skill, capacity for articulation, diligence, intellectual integrity and energy. More difficult to articulate but arguably even more crucial to that temper, is that quality called wisdom, enriched as it must be by a substantial measure of humility and by and instinctive moral ability to distinguish right from wrong and sometimes the more agonizing ability to weigh two rights or two wrongs against each tother which comes from the consciousness of our own imperfection.'

9 In this article, any references to the Judicial Appointment Commission unless the context clearly indicates otherwise should be taken to refer to the Judicial Council in Mozambique and the Judicial Service Commissions in South Africa and Zimbabwe.

10 Article 228(1) of the Mozambican Constitution. There are nine Provincial Administrative Courts in Mozambique.

11 Article 229(3).

12 Ibid.

In relation to the criteria for Administrative Court judicial appointments, the Constitution provides as follows;

"*At the time of their appointment, judges of the Administrative Court shall be of at least thirty-five years of age and shall meet all other requirements established by law.*"[13]

It is apparent that the Constitution does not provide clarity in respect of the criteria for the appointment of Administrative Court judges, delegating these matters to subsidiary legislation. It is also worth noting that as of 2013, there was no subsidiary legislation which governed the appointment of Administrative Court judges.[14] This lack of legislative clarity is hardly surprising considering the traditional dominance of the executive over Administrative Court judicial appointments. The most significant gap is the failure to specify the minimum professional experience threshold which is critical in limiting executive discretion in the judicial selection process. A key stakeholder observed that;

"*The executive has traditionally dominated the Administrative Court judicial appointments. The gaps in the enabling legislative framework have resulted in the current situation where there is no clear objective criteria for appointment to the Administrative Court. In fact, this is one of the main reasons the Administrative Court is a target of the constitution revision exercise which started in 2013 and is yet to be completed.*"[15]

Judging from past JAC practices, two qualification requirements are key in the selection of Administrative Court judges, namely, a qualification in law and a good public service record.[16] Critically, experience as a judge is not necessary for appointment to the Administrative Court. Due to the establishment of the provincial administrative courts in 2010, the administrative judiciary now follows a career path for judges.[17] Consequent to this fundamental change in the structure of the administrative judiciary, it is probable that the pre-2010 executive domination of Administrative Court judicial appointments will weaken as more judges from the career judiciary get elevated to the apex court.

The South African legislative framework on the other hand establishes four specialized superior courts namely, the Labour Court, the Electoral Court, the Competition Appeal Court and the Land Claims Court. It is also critical to note that the South African subsidiary legislation establishing the specialized superior courts also entrenches the judicial selection process for each court. A significant distinction in the South African context relates to the appointment criteria for the specialized superior courts which goes beyond the general appointment criteria for the ordinary superior courts. It is perhaps this additional criteria in terms of expertise in a particular field of law which explains the decrease in the number of applicants to the specialized superior courts in South Africa generally. For example, in the April 2013 JAC interviews, only one candidate was interviewed for the Competition Appeal Court and two candidates for the Electoral Court.[18] The April 2014 JAC interviews also had only one candidate for the Electoral Court.[19]

The appointment of Labour Court judges in South Africa is governed by the Constitution and the Labour Relations Act.[20] While the Constitution lays down the general judicial appointment criteria for all judges,

13 Article 229(4) of the Mozambican Constitution.
14 Ibid.
15 Interview with Professor of administrative and constitutional law at Eduardo Mondlane Law Faculty, Maputo.
16 Ibid.
17 Ibid.
18 See Democratic Governance and Rights Unit report available at http://www.dgru.uct.ac.za/dgru/reports/researchreports accessed on 12/07/14.
19 Ibid.
20 Act 66 of 1995.

the Labour Relations Act goes much further in listing the specific requirements peculiar to this court. The President of the Republic appoints judges of the Labour Court acting on the 'advice' of the National Economic Development and Labour Council (NEDLAC), and the JAC, and after consultation with the Minister of Justice and the Judge President of the Labour Court.[21] Furthermore, the President also appoints the Judge President of the Labour Court acting on the 'advice' of NEDLAC and the JAC, and after consultation with the Minister of Justice.[22] With respect to the Deputy Judge President of the Labour Court, the President of the Republic must also consult the Judge President of the Labour Court.[23] To be eligible for appointment as a judge of the Labour Court, a person must be either, a judge of the High Court or a legal practitioner with knowledge, experience, and expertise in labour law.[24] The requirements for appointment as a Judge President and Deputy Judge President are a notch higher than the rest of the Labour Court judges. To be appointed as such, a person must be a judge of the Supreme Court in addition to having vast expertise in labour law.[25]

It is clear that expertise in labour law is an important attribute which prospective Labour Court judges must possess. However, the legislative text is silent on what level of expertise is required for appointment purposes. Judging from past JAC practices, it would appear that vast experience specializing in labour law on an objective basis would suffice for the purposes of appointment. Critically, the involvement of many stakeholders is crucial in the process of selecting a meritorious bench, but it is apparent that the appointment of Labour Court judges in South Africa is strangely, a bureaucratic affair. Significantly, the executive's role is undoubtedly limited in the appointment of Labour Court judges. However, it is not clear from the legislative text how differences of opinion between the JAC and the NEDLAC are resolved in practice, especially taking into account the fact that the JAC conducts public interviews for Labour Court judges as contemplated by section 166(e) of the South African Constitution.

The Labour Relations Act also creates the Labour Appeal Court in addition to the Labour Court. The Labour Appeal Court is a superior court that has authority equal to that which the Supreme Court of Appeal has in relation to matters under its jurisdiction.[26] The Judge President and the Deputy Judge President of the Labour Court become the *ex officio* Judge President and Deputy Judge President of the Labour Appeal Court respectively.[27] The other judges of the Labour Appeal Court are appointed in the same manner as the Labour Court judges.[28] Effectively, this means Labour Appeal Court judges are seconded from the sitting Labour Court judges subject to them not having participated in the proceedings in the court *a quo*.[29]

The appointment process and criteria for judges of the Electoral Court is of the utmost importance considering the important role that this court plays in settling electoral disputes which in turn have an impact on a country's democratic consolidation, including peace and stability. It is hardly surprising therefore that South Africa vests the adjudication of electoral disputes to a superior court of record. The South African legislative framework establishes a separate Electoral Court which has a status similar to that of the Supreme Court of Appeal.[30] The South African Electoral Court is composed of three judges of the Supreme Court, and two other members who

21 See section 153 of the Labour Relations Act 66/1995.
22 Ibid. Section 153(1)(a).
23 Ibid. Section 153(1)(b).
24 Ibid. Section 153(6).
25 Ibid. Section 153(2)(a-b).
26 Section 167.
27 Section 168.
28 Section 169(1).
29 Section 168(3).
30 See section 18 of the South African Electoral Commission Act 51 of 1996.

are South African citizens.[31] These judges are appointed by the President 'upon the recommendation' of the JAC.[32]

Considering the legal-political significance of this court, it is hardly surprising that Supreme Court judges are a majority in the Electoral Court. While the legislative text is not clear on the qualifications for the two members who only have to be South African citizens, the trend has generally been to appoint serving judges as members of the Electoral Court. Significantly, the South African JAC plays an important role in the appointment of Electoral Court judges, with appointments to this court subject to the JAC's judicial appointment process. Moreover, the President's role in making these appointments is limited to the JAC's recommendations. Despite this limitation, the major threat to the independence of the Electoral Court emanates from the President's power to fix the terms of office, conditions of service, remuneration, and benefits of members of the Electoral Court. Vesting such powers in the hands of the executive creates a strong possibility of undesirable indirect influences especially taking into account the fact that the very same judges have an important say in political matters in which the executive has an interest.[33]

In contrast to Mozambique and Zimbabwe, South Africa establishes the Competition Appeal Court, and the Land Claims Court as superior courts of record with jurisdiction over matters relating to their respective spheres of expertise. The judges of the Competition Appeal Court are appointed by the President acting on the 'advice' of the JAC.[34] The President of the Republic also designates one of the judges to be the Judge President of the court.[35] The key criteria for appointment to this court, is that a prospective candidate must have been a judge of the High Court at the time of appointment.[36] This means that effectively, candidates outside the judiciary are automatically ineligible for appointment to the Competition Appeal Court.[37]

An important distinction is evident in relation to the appointment of Land Claims Court judges. The President of the Republic appoints the President of the Land Claims Court acting on the 'advice' of the JAC.[38] The additional judges of this court are appointed by the President of the Republic after 'consultation' with the President of the Court, and the JAC. Effectively, this means the President of the Republic is not bound by the opinion of the latter.[39] To be eligible for appointment to the Land Claims Court, a person must be a South African citizen who is 'fit and proper' to be a judge.[40] Additionally, the person must be a judge of the High Court, or be a practising legal practitioner and/or law lecturer of at least ten years cumulative experience, with expertise in land matters.[41] It appears the most critical criteria for appointment to the Land Claims Court relates to a candidate's ability to demonstrate expertise in land matters as well as being a 'fit and proper' person to hold judicial office. Moreover, appointments to this court are not limited to members of the judiciary and this promotes a diversified bench with members from different legal professional backgrounds. An equally important point to note is the citizenship qualification criteria. The fact that the citizenship criteria is applicable to the Constitutional Court and the Land Claims Court only is indicative of the socio-political significance of

31 Ibid. Section 19.
32 Ibid.
33 Section 19(2) of the South African Electoral Commission Act 51 of 1996.
34 Section 36(2) of the Competition Act of 30 November 1998.
35 Section 36(3) of the Electoral Act [Chapter 2:01].
36 Section 36(2) of the Competition Act of 30 November 1998.
37 Ibid. Section 36(1)(a).
38 Section 22(3) of the Restitution of Land Rights Act, 22 of 1994.
39 Ibid. Section 22(4).
40 Ibid. Section 23(a-b).
41 Ibid. Section 23(c).

this court.

A residual point of concern relates to the executive's undesirable control over the appointment of the majority of the Land Claims Court judges. The only check on executive discretion is imposed in the appointment of the President of the Court.[42] The dominance of the executive over Land Claims Court judicial appointments is put beyond doubt by the *ad hoc* consultation procedures provided for in the legislative text, which are different from the formal JAC process.[43] Significantly, the land question is a key issue in most of Africa's emerging democracies which are still grappling with untying the shackles of colonialism. Overall, the fact that the South African executive retains control over the appointment of the majority of the Land Claims Court judges is hardly surprising especially taking into account the important political role of this court in redressing past historical imbalances.

Moving on to the Zimbabwean position, the Zimbabwean constitutional and legislative framework establishes the Administrative Court, the Labour Court and the Fiscal Appeals Court as specialized superior courts of record.[44] However, it is important to note that in terms of the Electoral Act,[45] the Electoral Court is not established as a stand-alone court. Jurisdiction over electoral disputes other than the presidential elections is vested in the High Court which sits as the Electoral Court.

The judicial appointment criteria for the Administrative Court, and the Labour Court is discussed concurrently below due to the similarity of the appointment criteria. The Labour Court and Administrative Court judges are appointed in the same manner as the High Court judges in terms of the process leading to the appointment, as well as the qualification criteria.[46] The key constitutional provision in the appointment of these judges provides as follows;

"To be appointed as a judge of the High Court, the Labour Court or the Administrative Court a person must be a fit and proper person to hold office as a judge."[47]

The above constitutional provision is complimented by the general appointment criteria that a candidate be at least forty years old plus seven years experience either as a judge or legal practitioner in a Roman-Dutch or English law jurisdiction.[48] Furthermore, both the Administrative Court Act and the Labour Act sets out three similar qualification criteria for prospective judges. To be eligible for appointment, a candidate must be a former judge of the Supreme Court or High Court, or is qualified to be a High Court judge, and/or has been a magistrate for not less than seven years.[49] While the provisions of the 2013 Constitution are supreme to any other law, the qualification criteria set out in the Administrative Court Act and the Labour Act needs to be aligned with the 2013 Constitution. These amendments can perhaps go a step further in detailing the attributes expected of a prospective judges in terms of expertise in administrative and labour law.

Similarly to the Administrative and Labour courts, the Fiscal Appeals Court Act sets out two qualification criteria. Firstly, a candidate is qualified for appointment if he/she is a former judge of the Supreme Court or the High Court, and secondly, if the candidate is qualified to be appointed as a judge of the Supreme Court or

42 Section 5 of Government Regulation 423/2003.
43 Ibid. Section 6.
44 Section 162(d-e) of the Zimbabwean Constitution. See also section 3 of the Fiscal Appeals Court Act [Chapter 23:05].
45 Section 36 of the Electoral Act [Chapter 2:01].
46 Section 179(1) of the Zimbabwean Constitution.
47 Ibid. Section 179(2).
48 Ibid. Section 179(1)(a-b).
49 Section 85 of the Labour Act [Chapter 28:01]. See also section 5 of the Administrative Court Act [Chapter 7:01].

High Court.[50]

A number of observations can be made in respect of the judicial appointment criteria for the specialized superior courts in Zimbabwe. Significantly, the subsidiary legislation establishing all three specialized courts entrenches more or less similar qualification criteria. Perhaps the most critical lacuna in the legislative texts is the omission to specify the requisite skill and expertise antecedent to judicial appointment for each specialized court. While it can be assumed that during the interviewing process, questions relating to a candidate's experience in a specialized area of the law are likely to arise, it is important that the law clearly give guidance as to the qualities expected of each specialized superior court judge. This point is pertinent considering the recent past experiences where Labour Court judges appointed had no previous experience in labour matters.[51] Consequently, it came as no surprise when the Chief Justice bemoaned the poor quality of service delivery in the Labour Court when officially opening the 2014 legal year.[52]

3. Evaluation of similarities and differences in all three countries

Important observations can be made in-respect of the judicial selection processes for specialized superior court judges in Mozambique, South Africa and Zimbabwe. It is apparent that South Africa establishes more specialized superior courts compared to the Mozambican and Zimbabwean positions. Unlike the Mozambican and Zimbabwean positions, the South African legislative framework entrenches specific eligibility criteria for the each of the specialized courts which goes beyond the general judicial selection criteria. While considerations relating to a candidate's experience are likely to arise in any specialized court judicial appointment, the South African legislative framework gives guidance on the specific judicial selection criteria for each specialized court. This legislative clarity perhaps explains the earlier noted difference between the South African and Zimbabwean criteria for appointment to the Labour Courts.

4. Conclusion

Debates surrounding judicial appointment criteria in all three countries are as critical as the ones centering on the judicial selection process itself. In fact, the criteria for judicial appointment is a logical corollary of the judicial appointment process, which in turn is an important element of the independence of the judiciary. The preceding discussions have highlighted the main features of the judicial appointment criteria for the ordinary and specialized superior courts in all three countries. Particularly significant in this endeavor was the attempt at de-constructing the textual meaning of the entrenched constitutional and legislative judicial appointment criteria. This article further demonstrates that, the criteria for judicial appointment is not an end in itself. It is a means to an end. First, judicial appointment criteria provide guidelines on the caliber of appointed superior court judges. Second, they act as a safeguard against unfettered executive discretion. Critically, executive discretion is limited by directing executive preferences to candidates who meet the stipulated minimum professional threshold.

While all three countries in varying degrees institutionalize the judicial appointment criteria for the specialized superior courts, the imperative for clear judicial appointment criteria remains a common concern. Considering

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50 Section 3 of the Fiscal Appeals Court Act [Chapter 23:05].

51 See 'Zimbabwe: Four Labour Court Presidents Sworn In' available at http://allafrica.com/stories/201307180483.html accessed on 18/07/14.

52 The speech by the Chief Justice is available at http://www.jsc.org.zw/ accessed on 6/08/14.

the serious threats posed to the independence of JAC's by over-bearing executives generally, it is critical that the judicial appointment criteria be entrenched in the law with much clarity as far as practicable. Legislative clarity guards against unwarranted external influences at the same time instilling public confidence in the judicial selection process.

Fidei commissary substitutions in Wills: An analysis of Zaranyika versus The Master of the High Court and Others HH 526-19

Basutu S Makwaiba*

Abstract

The article analyses the decision in Zaranyika v The Master of the High Court and 3 others. The article assesses critically the decision in relation to the concept of fidei commissary substitutions in wills. It singles out and makes an in-depth examination of fidei commissary substitutions as there is no Zimbabwean case that has been decided on this aspect. The article critiques other issues arising from the judgment in so far as they relate to fidei commissary substitutions. These include the conditions on re-marriage, protection of the matrimonial home upon death, registered immovable property and real rights, freedom of testation and fidei commissary substitutions, constitutional guarantee of freedom of testation and freedom of testation and the Wills Act. Overally, the article will make an interrogation on whether or not fidei commissary substitutions impact freedom of testation.

1. Introduction

A *fideicommissum* is a legal institution in terms of which a person (the *fideicommittens*) transfers a benefit to a particular beneficiary (the fiduciary or *fiduciarius*) subject to a provision that, after a certain time has elapsed or a certain condition has been fulfilled, the benefit must go over to a further beneficiary (the fideicommissary or *fideicommissarius*).[1] In its simplest form, a *fideicommissum* is a *fideicommissary* substitution which occurs where a testator leaves his estate or part of it to an heir and directs that the bequeathed property is to devolve to a second heir after a certain period or on the happening of an event.[2] A fideicommissary substitution thus makes provision for successive beneficiaries. Divested property, subject to acceptance by the beneficiary, no longer belongs to the testator.[3] The aim of the paper is to analyse the legal institution of *fideicommissum* focusing on the decision in *Zaranyika v The Master of the High Court and 3 others*.[4]

The article also provides a critique on related issues arising in the judgment including conditions on remarriage, protection of the matrimonial home upon death, registered immovable property and real rights, property rights as provided and protected by the Constitution of Zimbabwe[5]. Overall, the analyses the concept of *fidei commissary* substitutions and freedom of testation. Freedom of testation is the right of an individual to dispose his or her property on death as he or she pleases.[6] The contents of a will are left to the discretion of individual testator.[7]

2. *Zaranyika versus The Master of The High Court and Simplisius Julius Chihambakwe N.O and The Kabelo Family Trust and Maud Zaranyika HH 526-19*

Zaranyika versus The Master of the High Court and 3 others (supra) was decided by Chirawu-Mugomba

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1 C.G Van de Merwe, J.E Duplessis:-Introduction to the Law of South Africa (2004) 183.
2 Elizabeth Ann Bragge and Douglasdale Dairy (Pty) (Ltd) 2014, 17307 (Republic of South Africa) 6.
3 Estate Late Wakapila v Matongo 2008 (2) ZLR (H) 43.
4 Zaranyika v The Master of the High Court and 3 Others HC 3577/18, HH 526/19.
5 Constitution of Zimbabwe Amendment (No.20) hereinafter referred to as the 'Constitution'.
6 Corbelt, Hofmeyr and Kahn: - The Law of Succession in South Africa (2001) 39.
7 De Waal and Schoeman Malan:-Law of Succession (2015) 3.

J in 2019. In this case Patience Zaranyika, a daughter to the late Abraham Zaranyika (the testator) was the applicant in the main matter. In the counter application, the applicant was Maud Zaranyika who was married to the testator under the Marriage Act (Chapter 5.11).The bone of contention centred on the last will of the testator.[8] Patience was aggrieved by the approval by the Master of the final liquidation and distribution account in the estate of late Abraham.[9] On the other hand, Maud was aggrieved by conditions in the will relating to a conditional bequest of an immovable property situate in Milton Park, Harare. The condition was that upon her death or remarriage, the property should go to the Abraham Zaranyika Trust.[10]

The background of the matter was as follows,

> *'The late Abraham Zaranyika died on the 4th of February 2001. In his will, the testator made some conditional bequests. The executor was appointed in terms of clause 2 of the will. In clause 5 of the will, the testator bequeathed to his wife Maud the following:-a house situate at no. 21 Van Praagh Avenue, Milton Park (the Property), all his businesses (i.e. the general dealer, bottle store, butchery, grinding mill) and a homestead situate in Murewa. Also bequeathed was an immovable property situate in Seke Township, all vehicles, all cattle and chicken, all household property and 20% of the shareholding in a company called Day and Nite TV sales and repairs (Pvt) Ltd. The testator made this bequest conditional as follows:-*
>
> > *"**Subject to the condition that on her death or remarriage after me*** (emphasis added)*, the property herein bequeathed to her shall devolve upon and be held by a trust to be established under the name ABRAHAM ZARANYIKA TRUST (hereinafter referred to as "the Trust". The trustees shall be the executor/administrator, my wife, my two sons and my two daughters. The Trust shall hold the property and/or invest any income therefrom for the benefit of my children and or/ their children per stirpes in accordance with the shareholding set out herein. Remarriage shall include customary marriage and / or living with a man as husband and wife."*
>
> *To his nine children who include Patience, the testator bequeathed 10% share to some and 5% share to others of Day and Nite TV sales and repairs (Pvt) Ltd (the Company). He bequeathed to his other unknown children who proved that they were sired by him a further 5% shareholding. **The testator further directed that no property bequeathed shall be sold except clothes and wearing apparel subject also to certain conditions*** (emphasis added). *In clause 9, the testator bequeathed Stand 2829 of Seke Township to the testamentary trust as well as the residue of his estate of whatsoever nature, kind or whatever situate. **In a further clause he directed that no benefit was to form or constitute a portion of communal or joint estate of such beneficiary and should they marry in community of property or under customary law any benefit accruing should be excluded from the community of property. Further that should any beneficiary divorce; their share shall be excluded from the matrimonial property*** (emphasis added). *The testator then included the standard reservatory clause.*
>
> *During the winding up period, the property was sold to the Trust for the sum of USD 350 000 in 2012. After a period of sixteen years, the Master approved the estate account on the 23rd of March 2017. The approved account omitted the Seke property, the Company, motor vehicles and did not mention that the*

8 Zaranyika v The Master of the High Court (n 4 above).
9 Zaranyika v The Master of the High Court (n 4 above).
10 Zaranyika v The Master of the High Court (n 4 above).

Milton Park property had been disposed of.'[11]

Patience sought the following relief**:-**

1. *'That Estate late Abraham Zaranyika first and final distribution account which was approved by the Master on 23 March 2017 to be set aside.*

2. *The executor be ordered to draw up a proper first and final liquidation and distribution account to include and account for all estate assets listed in the last will and testament. She sought that the first and final liquidation and distribution account were to comply with the testator's special condition that all immovable property bequeathed to Maud Zaranyika shall devolve upon and be held by a trust to be established under the Abraham Zaranyika Trust.*

3. *That the agreement of sale entered into by and between the executor and the Trust prior to the winding up of Estate Late Abraham Zaranyika be declared null and void.'*[12]

In the counter application, Maud sought an Order as follows:-

1. 'That stand 2970 Salisbury Township of Salisbury Township Lands be declared the matrimonial home for the purposes of the administration and winding up of estate late Abraham Zaranyika.
2. The proviso and conditions to Clause 5 of the Last Will and Testament of the late Abraham Zaranyika be declared invalid in as far as it relates to the matrimonial property, being Stand 2970 Salisbury Township of Salisbury township Lands.
3. The matrimonial house, being Stand 2970 Salisbury Township of Salisbury Township lands be awarded to the surviving spouse MAUD ZARANYIKA who inherited full rights of ownership thereof and was entitled to deal with it as she deemed fit.'[13]

The key legal issues revolve around the concept of *fidei commissary* substitutions in wills and the right to freedom of testation. Maud argued that the conditions in relation to the remarriage and the bequeathing of the property to the Kabelo family Trust in the event of her death was contrary to the Wills Act,[14] as it infringed on her rights to inherit the matrimonial home as the surviving spouse. She thus sought unconditional ownership to the property. Maud also submitted that the conditions were inconsistent with the provisions of the Constitution and she further argued that they were not in line with public policy considerations.

The Court reiterated that freedom of testation remains the cornerstone of testate succession. Justice Chirawu-Mugomba cited the case of *Robertson v Robertson's Executors,*[15] where Innes ACJ stated that,

> '*Now the golden rule for the interpretation of testaments is to ascertain the wishes of the testator from the language used. And when these wishes are ascertained the Court is bound to give effect to them, unless we are prevented by some rule or law from doing so.*'

The Judge stated as follows,

> '*The right to freedom finds resonance in Section 71 (2) of the Constitution in which the right of every*

11 CHIRAWU-MUGOMBA J in Zaranyika v The Master of the High Court and 3 others (n 4 above).
12 Zaranyika v The Master of the High Court (n 4 above). See page 4 of the Judgment.
13 Zaranyika v The Master of the High Court (n 4 above). See page 15 of the Judgment.
14 Wills Act (Chapter 6.06), See Section 5 (3) (a).
15 Robertson v Robertson's Executors 1914 AD 503 at 507.

person to acquire, hold, occupy, use, transfer, hypothecate, lease or dispose of all forms of property is recognised…'

Pertaining to conditions in wills, the Court stated that based on freedom of testation, a testator remains at liberty to impose conditions in a will, on inheritance or a legacy. This article notes that the decision in *Zaranyika v The Master of the High Court (Supra)* is the first to deal with *fidei commissary* substitutions in the Zimbabwean jurisdiction. For this paper, it is therefore important to fully interrogate the concept *fidei commissary* substitutions in wills and further analyse how the concept was dealt with by the Court. The article also seek to answer the question of what relevance the judgment is to the Zimbabwean law of succession. The paper will later do a critique on other issues arising from the judgment in so far as they relate to *fidei commissary* substitutions.

3. Fidei Commissary Substitutions in Wills

A *fidei* commissary substitution occurs when a testator leaves property to someone else (a fiduciary), on the condition that when the fiduciary dies the property will be handed over to another person (the *fidei* commissary).[16] The parties in a *fidei* commissary are therefore the testator, the fiduciary and the *fidei* commissary.[17] The first heir is known as *fiduciarius* and the eventual owner is known as the *fideicommissarius* or fidei commissary. *Fideicommissum* are dependent on the happening of an event, future date or on a resolutive condition. In a conditional *fideicommissum* the *fideicommissary* property vests in the *fideicommissary* substitution upon fulfilment of the condition, provided that the *fideicommissary* is still alive.[18] Prior to fulfilment of the condition, the *fideicommissary* has a contingent right to the property.[19]

Under common law, the fideicommissum was created in order to circumvent the strict regime of the *ius civile*.[20] Under the law of *ius civile*, certain classes of people e.g. infants and non-Romans, were prohibited from becoming beneficiaries of a legal testament.[21] A testator could nevertheless entrust his property to an intermediary person who was allowed to be an heir by law.[22] The testator would then instruct the intermediary third party to transfer the entrusted property to the intended beneficiary, who was not allowed to be an heir by law.[23] This informal testamentary trust was known as the *fideicommissum*, a legal device by which property was "entrusted" to one person (the *haeres* fiduciaries) for the benefit of another (the *fideicommissarius*).[24] The *fideicommissum* was eventually recognised and adopted by Roman law.[25]

The Roman theory traces the origins of the English *use* to the *fideicommissum* by pointing to the similarities between both institutions.[26] Both the *use* and the *fideicommissum* share a "common fiduciary nature: property is entrusted to one person for the benefit of another."[27] The Roman theory suggests that ecclesiastics introduced the *fideicommissum* into England as the *use* in order to circumvent the restrictions on the transfer of property

16 S. Chirawu:-Principles of the law of succession in Zimbabwe (2015) 140.
17 Chirawu (n 16 above).
18 Lee and Honore:-Family Things and Succession 449.
19 Chirawu (n 16 above) 449.
20 Loring and Rounds:-A Trustee's handbook (2017). See footnote 19 where the author states that, 'The ius civile was the law of the Roman Empire applicable to Roman citizens. Barry Nicholas: - An Introduction to Roman law 57-59 (1962).'
21 J. Inst. 2.23.1.
22 J. Inst. 2.23.1.
23 J. Inst. 2.23.1.
24 D. Johnston:-The Roman law of Trusts 1 (1988).
25 Barry Nicholas:-An Introduction to Roman law (1962) 27-28.
26 W. Blackstone, Commentaries 328. See footnote 25 in Loring and Rounds (n 20 above) where the authors state that the theory suggests that the Roman fideicommissum was the direct ancestor of the English use.
27 D. Johnston (n 24 above).

imposed by the Mortmain Statute.[28]

In the South African case[29] of *Kemp v Estate Kemp*[30], it was held that the general presumptions where a testamentary disposition is expressed in the form of a *fidei commissum,* is that the testator intended to postpone any vesting in the *fidei commissary* heirs until the happening of a specified condition. Pending that, the *dominium* is in fiduciary and a mere *spes* (hope) in the remainderman. Yet, this presumption must yield to the clearly expressed intention of the testator to the contrary. Everything depends upon the intention of the testator. The rights in a *fidei commissary* substitution were clearly captured in another South African case of *Douglas Dairy (Pty) Ltd and 4 others and Bragge and another*[31]as follows,

> *'In British South Africa Company v Bulawayo Municipality 1919 AD 84 at 95, this Court laid down the key principles pertaining to fiduciary and fideicommissary interests. Innes CJ said as follows: 'a direction to an heir to hand over inheritance to another upon the happening of a condition is sufficient to constitute a fideicommissum, if and when the condition happens the final beneficiary acquires a real right in the inheritance…'*

In *Brits v Hopkinson*[32] Wessels JA stated as follows:-

> *'Before the Court can construe a testamentary disposition to be a fideicommissum it must be satisfied beyond a reasonable doubt that the testator intended to burden the bequest with a fideicommissum. To impose a fideicommissum for the benefit of succeeding generations, the words employed must not be vague and indefinite, but must be sufficiently clear to show an intention on the part of the testators that the heirs are not free to deal with the property either during their lifetime or after their death, but that they must allow the property to go to their heirs. (Van Heerden v Van Heerden's Executors, 1909, T.S at p.291).'*

As the institution of a *fideicommissum* constitutes a burden on the bequeathed property, it is imperative that an express provision in a will purporting to create or institute a fideicommissum, must clearly evince the intention of the testator to that effect.[33] On the death of the testator, the *fiduciary* becomes owner of the property subject to the resolutive condition.[34] In the institution of a *fideicommissum*, on the demise of the testator, the *fiduciary* becomes owner of the *fideicommissum* property, subject to the resolutive condition, provided that his or her rights have vested.[35] The vesting of his or her right to ownership of the property is reffered to as the vesting of right to *dominium,* which generally vests upon the testator's death.[36] The vesting of a *dominium* in *fideicommissum* was dealt with in the South African case of *Jewish Colonial Trust Ltd* v *Estate Nathan*[37] as follows:

> '*When it is said that a right is vested in a person, what is usually meant is that such person is the owner*

28 A. Avini, Comment, The Origins of the Modern English Trust Revisited, 70. Mortmain Statutes place direct restrictions on charitable organisation's power to acquire and retain real property and also place restrictions on a donor's ability to give real or personal property to charitable organisations. They first appeared in England in the thirteenth century and the aim was to regulate the possession of land by charitable organisations.

29 South African case law has persuasive value in Zimbabwean jurisprudence.

30 Kemp v Estate Kemp, 1915 AD 491 at 500.

31 Douglas Dairy (Pty) Ltd and 4 Others and Bragge and another 731/2017 (2018 ZASCA 68 (25 May 2018).

32 Brits v Hopkinson 1923 AD 492 at 495.

33 Estate Late Wakapila v Matongo (n 3 above) Page 6.

34 Estate Late Wakapila v Matongo (n 3 above) Page 7.

35 Flavells Exor v Est. Stephan 1912 CPD 404.

36 Central South Africa Railways v Geldenhys MR, GM Co Ltd 1907 TH 278.

37 Jewish Colonial Trust Ltd v Estate Nathan 1940 AD 163 at 175.

of that right-that he has all the right of ownership in such right-including the right of enjoyment.'

As the owner of the property the *fiduciary* is entitled to the beneficial use and enjoyment of the property including its fruits.[38]In *Crookes No and Another v Watson and Others*[39] Van Den Heever J.A reiterated that:

> *'A fiduciary, as I understand his position is full owner enjoying all the fruits, save that he is subject to restraint of alienation and is obliged, when the time arrives or the condition is fulfilled to yield up the gift over.'*

The *fiduciary* is also entitled to occupy the property[40] as well as to administer the burdened property.[41] However, the fiduciary's ownership is subject to several limitations.[42] First, the *fiduciary* is subject to a limitation in the use and enjoyment of the assets.[43] The fiduciary must use the assets in such a way that they can still be transferred *salva reisubstantia* (maintaining their essential quality) to the fideicommissary.[44] Secondly, the *fiduciary* does not in general have the powers to alienate the fideicommissary assets.[45]

In the case of *Estate Kemp and Others* v *Mc Donalds' Trustee*[46]Innes CJ observed that:

> '*In modern practice "fiduciary" is the most frequently used to denote an heir or legatee who holds the bequeathed property as owner and for his own benefit subject to its passing to fidei-commissaries upon happening of a certain condition*.'

Upon delivery of the burdened property or on its registration with the Registrar of Deeds, the *fiduciary* becomes owner of the right to *dominium*.[47] This ownership, however being ownership of a burdened property is not full ownership largely because the *fiduciary* is obliged, when the time arrives or when *fideicommissary* condition is fulfilled to effect the transfer of the property to the *fideicommissaries*.[48]Once the fideicommissary right or interest vests, at the fulfilment of the condition, the fideicommissary acquires personal vested rights in relation to the prohibitions, limitations, obligations and duties imposed by the fideicommissum on the fiduciary in relation to the *fideicommissary* property.[49]

4. Fidei Commissary Substitutions as Applied in the Zaranyika Decision

The Court in *Zaranyika v the Master of High Court* reiterated that a testator remains at liberty to impose conditions in a will based on freedom of testation. Justice Chirawu-Mugomba stated that, 'with conditions… the preponderance of authorities suggest that the condition imposed must be lawful, possible to fulfil and not *contra bonos mores*. If a Court sets aside a condition, it is treated as *pro non scripto* (of no force or effect). The bequest will still be effected minus the condition.' The Court further stated that:

> *'…fidei commissum falls into the class of resolutive conditions. In its simplest sense, a fidei commissum is a disposition by which one person transfers property to a beneficiary subject to a provision that if*

38 See Voet Commentarius36 1 49-50 and Crookes v Watson 1956 (1) SA 227 (A) 300.
39 Crookes v Watson 1956 (1) SA 277 (A) 299.
40 Steyn:-The Law of Wills in South Africa 2nd Ed 374.
41 Mackenzie v Est. Mackenzie (1906) 23 SC 453.
42 Elizabeth Anne Bragge and Douglasdale Dairy (Pty) Ltd) (n 2 above).
43 Elizabeth Anne Bragge and Douglasdale Dairy (Pty) (Ltd) (n 2 above).
44 Elizabeth Anne Bragge and Douglasdale Dairy (Pty) (Ltd) (n 2 above).
45 Elizabeth Anne Bragge and Douglasdale Dairy (Pty) (Ltd) (n 2 above).
46 Estate Kemp v Mc Donalds' Trustee 1915 AD 491 at 499.
47 Estate Kemp v Mc Donalds' Trustee (n 46 above).
48 Crookes v Watson 1956 (1) SA 277 (A) 299.
49 Elizabeth Ann Bragge and Douglas Dairy (Pty) Ltd 2014/17307.

certain condition is fulfilled, the property is to go over to a further beneficiary. The relationship is therefore three way with the testator being the first party, the fiduciary the second party and the fidei commissary being the third party…

The fiduciary is entitled to possession of the property subject to the fidei commissum. The fiduciary, whether real or a juristic person is entitled to control and administer the property in question and is entitled to demand from the executor the transfer of the property subject to the relevant condition once the liquidation and distribution account has been finalised. A fiduciary is also entitled to the use and enjoyment of the property.'

In clause 5 of the will, Abraham Zaranyika (testator) made a conditional bequest that upon Maud's (widow) death or remarriage, the property should go to Abraham Zaranyika Trust. As stated above, in her counter application, Maud sought the clause be declared invalid in so far as it related to the matrimonial property. She further sought that the matrimonial home be awarded to her with full rights of ownership.

On the condition of remarriage, the Court held that the condition on re-marriage is *contra bones mores*. Justice Chirawu-Mugomba further held that,

'*…the testator even went a step further to define re-marriage to include a customary marriage and cohabitation. This carrot and stick approach especially one which has the effect of asking a surviving spouse to choose to remain in the matrimonial home or leave upon re-marriage has no place in modern day society. This provision is invalid and therefore treated as pro non scripto*.'

The *Zaranyika* decision as it relates to conditions of re-marriage upon the death of the testator is welcome in the Zimbabwean law of succession as the first matter to deal with *fidei commissary* jurisdictions in the Zimbabwean jurisprudence. In the past, the reliance on this aspect has been on the South African cases, among other jurisdictions that are influenced by the Roman Dutch law. The inconsistencies by the Courts in determining whether or not conditions on re-marriage are lawful and not *contra bonos mores*. Some Judgments point to the fact that the conditions on re-marriage upon the death of the testator are *contra bonos mores* and in some cases, the Courts have held in the negative. The next part of the paper will analyse the South African Judgments on unlawful testamentary provisions, pointing out the inconsistencies and thus showing the relevance of the *Zaranyika* decision on this aspect in the Zimbabwean law.

5. Unlawful testamentary provisions – conditions of remarriage

Roman law regarded unlawful testamentary provisions or testamentary provisions considered to be *contra bonos mores* as void or ineffective and hence *pro non scripto*.[50] A testator's dispositions were therefore subject to society's estimation as to the legal and moral acceptability of his wishes.[51] Justinian[52] states that:

'*Conditions which are framed against the edicts of the emperors or against statutes or provisions which have the force of a statute or which are against sound morals or derisory or of the kind which the praetors have disapproved are treated as if they were not there, and the inheritance or legacy is taken just as if the condition had not been attached to the inheritance or legacy*.'

50 Kaser Roman Private Law 62.

51 F du Toit: - The Impact of Social and Economic Factors on Freedom of Testation in Roman and Roman-Dutch Law (1999). Stellenbosch Law Review

52 D 28 7 14 translated by Watson, The Digest of Justinian II (1985).

In Roman law, testamentary conditions in restraint of marriage were void and were viewed as offending the legal convictions of the community. However, testamentary conditions in restraint of marriage were valid if accompanied by a time-limit. Roman law clearly restricted freedom of testation with regard to testamentary provisions considered to be unlawful or *contra bones mores*.[53] Despite the fact that such conditions were included in a will, they were disregarded and the beneficiaries could benefit unencumbered.[54] Social considerations provided the basis for the invalidity of such provisions.[55]

In the South African case of *Ex Parte Gitelson,*[56]

> '*A bequest of property (to testator's widow) subject to a restraint against marrying does not conflict with public policy and is valid and enforceable. Under the will of her late husband, to whom she was married out of community of property, the applicant was appointed sole and universal heiress 'subject to the condition that…should she re-marry, she shall, before the solemnisation of such marriage, pay to each of my four children a sum equal to one fifth of the value of my estate as at the date of my death.' The Court held that the condition was valid…'*

The Court took a different approach in the case of *De Wayer v SPCA*.[57] In this case, the testatrix, a divorcee who had remarried bequeathed the residue of her estate both movable and immovable to her 'new' spouse on condition that he remained unmarried after her death. In the event that he remarried, he would only be entitled to the movable assets, with the rest going to the SPCA Johannesburg. The Court held that the condition attaching to the bequest was invalid in that it embodied a restraint on marriage which was contrary to public morals.

In the case of *Ex Parte Dessels,* [58]in terms of his last will, the testator provided that certain annuities were to be paid from a Trust, created in a will, to his wife the Applicant and daughter. Clause 8 of the will prescribed certain conditions in terms of which the benefits accruing to his wife and daughter were subject to forfeiture.[59] The conditions were (a) that the Applicant should in no circumstances follow a way of living which could be regarded as "an immoral lifestyle", (b) that the Applicant wherever she might be live would not permit "any stranger" to live with her except if such a person can be regarded as a mere visitor, and in such a case the visitor may live with her for a maximum period of one week per year.[60] Male persons could not be accepted as visitors except in the case where they were accompanied by their wives, and (e) that the applicant and her daughter did not utter or write any "derogatory words" concerning the testator after his death.[61] The Court held that condition (a) was not against public policy.

In the case of *Rubil v Altschul No and another No*[62], the Court also made a determination on a condition of re-marriage in a Will. Paragraph 5 of the Will stated that,

> '*…The share of inheritance which will accrue to my wife, the said Sophia Rubin, in terms of this, my*

53 F du Toit (n 51 above).
54 F du Toit (n 51 above).
55 F. du Toit (n 51 above).
56 Ex Parte Gitelson 1949 (2) SA 881 (O).
57 De Wayer v SPCA 1963 (1) SA 71.
58 Ex Parte Dessels 1976 (1) SA 851.
59 Ex Parte Dessels (n 58 above).
60 Ex Parte Dessels (n 58 above).
61 Ex Parte Dessels (n 58 above).
62 Rubil v Altschul No and Another No 1961 (4) SA 251.

last will and testament, shall be subject to the condition that if she becomes married at any time after my death, then and in such event, her share of inheritance as aforesaid, shall accrue to my minor daughter, the said Flora Rubin, and shall be dealt with, if my daughter is a minor at the date of my death, as set out in para. 6 hereof.'

The Court held that the condition was not invalid as the condition was made with the probability in mind that if woman married again, the testator's child might not be well cared for especially if the mother had a second family. The next part of the paper will analyse the condition of death and will do a critique of the judgment.

In Zaranyika, the Court held that the condition regarding death is lawful and is not inconsistent with public morality. The Court stated that it did not take away Maud's right to live in the property as she was entitled to the property as long as she lived. To determine the correctness of this position, it is necessary to consider the court's approach in other instances. In the case of *Maponga v Maponga and Others*[63], the Court held that, 'whether a particular abode constitutes the matrimonial home is a factor not to be determined by where the parties set up home, and ordinarily reside. It does not have any direct relations to the property owned by either the parties.' Tsanga J in the case of Madzara v Stanbic[64] held as follows,

'*That the protection of the matrimonial home is legally desirable does not need much argument because of its important role in any family context…*'

Section 26 (d)[65] of the Constitution states that the State must take appropriate measures to ensure that- 'in the event of dissolution of a marriage, whether through death or divorce, provision is made for the necessary protection of any children and spouses.' Mwayera J in the case of *Chiminya v Chiminya and Others*[66] reiterates that:

'*Our Constitution and legislation on deceased estate in so far as it recognises the rights of a surviving spouse in the deceased estate tallies to a greater extent with the Convention of the Elimination of all forms of discrimination against women, in particular the protocol to the African Charter on Human and People's Rights on Rights of Women in Africa…*'

In her pleadings, Maud gave a detailed history of her marriage to Abraham Zaranyika and gave an account of how the matrimonial assets including the house were acquired.[67] However, the property was registered in the name of the testator only yet she argued that it constituted the matrimonial home that she was entitled to.[68] It was Maud's view that as she the holder of real rights in the property, she was free to deal with it as she saw fit.[69] The Court reiterated that:

'*In my view this is misguided as the testator clearly bequeathed the property to Maud subject to certain conditions. Perhaps Maud was relying on Section 3 A of the Deceased Estates Act that states that in intestate succession for persons married under the general law, the surviving spouse inherits the house or other domestic premises in which the surviving spouse as the case maybe lived immediately before the person's death…*'[70]

63 Maponga v Maponga 2004 (1) ZLR (63).
64 Madzara v Stanbic HH 546-1.
65 Constitution of Zimbabwe (n 5 above). See Section 26 (d).
66 Chiminya v Chiminya and Other (HC 4201/14).
67 Justice Chirawu-Mugomba in Zaranyika v Master of the High Court (n 4 above). See page 6 of the judgment.
68 Zaranyika v Master of the High Court (n 4 above). See page 6 of the judgment.
69 Zaranyika v the Master of the High Court (n 4 above). See page 6 of the judgment.
70 Zaranyika v the Master of the High Court (n 4 above). See page 6 of the judgment.

The other relief Maud sought was that the matrimonial house be awarded to her who inherits full rights of ownership. The Court held as follows:

> '*Just as the relief sought as enunciated above, this is also based on a misconception because the basis of distribution is under the laws of testate succession. The property was awarded to Maud subject to certain conditions and there is no basis that it be declared awarded to her as if the will excludes her. Contrary to the assertion, she was not disinherited at all.*'

Agreeably, section 3A of the Deceased Estates Succession Act[71] does not apply as the testator left a will. Therefore, Maud was not disinherited.

6. Unlawful testamentary provisions – registered Immovable property and real rights

A real right, or a *jus in re*, is an exclusive interest or benefit enjoyed by a person in a thing.[72] It is usually defined as real when it entitles the holder thereof to vindicate or enforce it for himself, it being good against the entire world.[73] A real right is considered to be absolute because it entitles the holder to enforce it against any person who seeks to deal with the real right in any manner which is inconsistent to the exercise of the holder's power to control it.[74]

In the case of *Takafuma v Takafuma*[75], Mc Nally JA reiterated that:

> '*The registration of rights in immovable property in terms of the Deeds Registries Act (Chapter 139) is not a mere matter of form. Nor is it simply a device to confound creditors or the tax authorities. It is a matter of substance. It conveys real rights upon those whose name the property is registered…The real right of ownership, or jus in re propria, is "the sum total of all the possible rights in a thing"…*'

It is the argument of this paper that the registration of rights in immovable property in terms of the Deeds Registries Act,[76] conveys real rights upon those whose name the property is registered. For this reason, the Court could have held that Maud as the surviving spouse inherited full rights of ownership thereof and she was entitled to deal with it as she saw fit.

7. Freedom of testation and fidei commissary substitutions

The doctrine of freedom of testation dictates that a testator is free to dispose of his/her estate in any manner s/he deems fit.[77] Hence; the content of the will is left to the discretion of the testator.[78] De Waal and Schoeman-Malan[79] explain that; this is because a high premium is placed on the principle of freedom of testation.

Du Toit, in discussing the principle of freedom of testation in relation to South Africa, states as follows[80]

> '*Freedom of testation is considered one of the founding principles of the South African law of testate*

71 Deceased Estates Succession Act (Chapter 6.02).
72 M.L Mishi-A Guide to the Law and Practice of Conveyancing in Zimbabwe (1984) 14.
73 M.L. Mishi (n 72 above).
74 See Smith v Farrelly's Trustee 1904 TS 949 at 958.
75 Takafuma v Takafuma 1994 (2) ZLR 110 (H).
76 Deeds Registries Act (Chapter 20.05).
77 Florian Beukes; "Freedom of testation v Section 37C of the Pension Funds Act 1956 (No.24 of 1956).
78 Chapeyama v Chapeyama 2000 (2) ZLR 110 (H).
79 De-Waal and Schoeman-Malan (1962) 2.
80 See F.Du Toit, "The impact of social and economic factors on freedom of testation in Roman and Roman Dutch law" (n 51 above) 232 and "The limits imposed upon freedom of testation by the boni mores: lessons from common law and civil (continental) legal systems" (2000) Stellenbosch Law Review 358.

succession: a South African testator enjoys the freedom to dispose of the assets which form part of his or her estate upon death in any manner(s) s(he) deems fit. This principle is supplemented by a second important principle, namely that South African courts are obliged to give effect to the clear intention of a testator as it appears from the testator's will. Freedom of testation is further enhanced by the fact that private ownership and the concomitant right of an owner to dispose of the property owned (the jus disponendi) constitute basic tenets of the South African law of property. An owner's power of disposition includes disposal upon death by any of the means recognized by law, including a lost will. The acknowledgement of private ownership and the power of disposition of an owner then serve as a sound foundation for the recognition of private succession as well as freedom of testation in South African law.'

In Zimbabwe, the concept of testamentary freedom cannot be discussed in isolation from the fundamental rights and freedoms that are enshrined in the Zimbabwean Constitution, Constitution of the Republic of Zimbabwe (Amendment 20) of 2013. Section 71 of the Constitution provides for property rights. Section 71 (2) of the Constitution states that,

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

Justice Chirawu-Mugomba in the *Zaranyika* decision stated that, 'the right to freedom of testation finds resonance in Section 71 (2) of the Constitution in which the right of every person to acquire, hold, occupy, use, transfer, hypothecate, lease or dispose of all forms of property is recognised.'[81] The provision guarantees the right to private ownership. The right to private property also includes the right to dispose of one's property during one's life and at the time of one's death.[82] Interpreted this way, Section 71 (2) of the Constitution guarantees the institution of succession as well as the principles of freedom of testation that support it.[83]

Section 71 (3) of the Constitution provides that '… no person may be compulsorily deprived of their property...' Du Toit[84] commenting on Section 25 (1) of the South African Constitution couched similarly states as follows;

'*…De Waal; Currie and Erasmus submit in this regard that "property" in the context of property clause refers to the set of legal rules traditionally regarded as an embodiment of the claims of the individuals to their patrimony. It does not only comprises ownership as such; but also the rights which traditionally form part of the "bundle of rights" constitutive of ownership; inter alia the right to dispose of an asset; the right to the use and exploitation of an asset and the right to prevent the use and exploitation of an asset by others.*

The fact that the constitutional guarantee of the right to property is premised upon the traditional meaning attributed to the property concept leads to the inescapable conclusion that both private ownership as well as the resultant ius disponendi indeed enjoys constitutional protection in South African law. Such protection invariably results in a concomitant (although unexpressed) guarantee of private succession and freedom of testation; the latter essential to the exercise of the ius disponendi by

81 Zaranyika v the Master of the High Court (n 4 above).
82 Lee and Honore (n 18 above)
83 De Waal, MJ and Schoeman-Malan:-Introduction to the law of succession (2003) 5.
84 Francois du Toit "The Constitutionally Bound Dead Hand? The Impact of Constitutional rights and principles on freedom of testation in South African law".

way of testamentary bequest.'

In the South African case of *In re: BOE Trust Ltd and others NNO*,[85] the Appeal Court entrenched the notion that Section 25 of the Constitution of the Republic of South Africa Act 108 of 1996 protects a person's right to dispose of their assets as they wish upon death. The Court further held that holding otherwise meant an infringement of property rights after the person's death.

A will is defined as a

'Testamentary and revocable document, voluntarily made, executed and witnessed according to law by a testator with sound displaying mind wherein he disposes of his property subject to any limitation imposed by law and wherein he gives such other directives as he may deem fit to his personal representatives otherwise known as his executors, who administer his estate in accordance with the wishes manifested in a will.'[86]

Disposal by will is an exercise of control over the property which is similar to disposal by sale.[87] Both have the same effect of divesting dominion over the property from the testator.[88] The Wills Act[89] of Zimbabwe provides for powers to make dispositions by will. Section 5 of the Act provides as follows,

'(1) …any person who has capacity… to make a will may in his will-

(a) Make provision for the transfer, disposal or disposition of the whole or any part of her or his estate, and

(b) …

(c) Make any other lawful provision, disposition, direction, whether in respect of his own or any other property or in respect of any other matter.'

Section 15 (4) of the Act also recognises that a testator may revoke a will if they voluntarily sell, donate or otherwise dispose of any property that is the subject matter of a legacy in a will.[90] This is against the background of the overall right of a testator to revoke their will wholly or partly and either absolutely or conditionally.[91]

It is the argument of the paper that *fidei commissary* substitutions do not affect freedom of testation. The testator has great freedom to dispose of his or her property upon death. He is free to bequeath property to anyone and put conditions in a will that are not contrary to public policy. In the South African case of *James King No and 5 others v Cornelius Albertus De Jager and 8 others*,[92] Bozalek J stated that

'Testation is a field where the courts will proceed…from the starting point that a testator has maximum freedom to dispose of his or her property upon their death as he or she sees fit subject to existing rules of law set out in case law and any statutory constraints which exist.'

In the case of *Robertson v Robertson's Executors* (*supra*), the Court explained that the golden rule in the interpretation of testaments is to ascertain the wishes of the testator. Freedom of testation is however not absolute or unfettered. [93]A number of jurisdictions including the South African one have some limitations on

85 In re: BOE Trust Ltd and Others NNO 2013 (3) SA 236 (SCA).
86 K. Abayoni, Wills: law and Practice 2004 page 6.
87 Estate Late Wakapila v Matongo (n 3 above).
88 Estate Late Wakapila v Matongo (n 3 above).
89 Wills Act (n 14 above). See Section 5 (1) (a) (b) (c).
90 Wills Act (n 14 above). See 15 (4).
91 Zaranyika v the Master of the High Court (n 4 above).
92 James King No and 5 others and Cornelius Albertus De Jager 21972/15.
93 F. Du Toit 'Constitutionalism, Public Policy and Discriminatory Testamentary Bequests-A Good Fit Between Common

the freedom of testamentary disposition. The limitations are contained in the statute and common law.

The Wills Act limits freedom of testation in Section 5(3)(a)(b) and (c). The provisions state that dispositions and directions made by the testator shall not operate as to vary or prejudice the rights of**:**
'(a) any person to whom the deceased was married to a share in the deceased's estate or in the spouses joint estate in terms of any law governing the property rights of married persons, or
(b) any person to receive any property, maintenance or benefit from the testator's estate in terms of any law or award or order of court, or
(c) any creditor in respect of any debt or liability payable from or attaching to the testator's estate except in so far as such variation or prejudice is brought about with the consent of the person or creditor concerned or through the exercise by him of a right of election.'

Freedom of testation is also limited by the provisions of the Deceased Persons Family Maintenance Act.[94] In terms of its section 8 (1) (i), a will may be varied to meet maintenance for a dependant.[95] At common law, individual freedom in the liberal Roman society was not completely unrestricted.[96] Roman legal convictions, embodied in *pietas*, *fides* and *humanitas*, imposed real limitations on freedom of testation as a measure to curb abuses of this freedom.[97] Schulz[98] states as follows,
'*Public opinion operated…to restrict the freedom accorded to a testator to the limits imposed by good sense. The contents of private wills were of general interest, they were looked upon as mirroring contemporary customs*.'
Under common law, a provision in a will cannot be executed if it is generally unlawful,[99] against good morals (*contra bonos mores),*[100] impracticably vague,[101] or impossible.[102] Such conditions are considered as not written (*pro non scripto*). In the South African case of *Levy v Schwartz*,[103] the Court held that if such a provision exists, the beneficiary will receive the benefit without the unlawful, good morals, impracticably vague or impossible condition.

8. Perpetual fideicommissary substitutions and freedom of testation

Voet,[104] explaining perpetual *fideicommissary* substitutions and restriction of freedom of testation with regard to *fideicommissary* substitutions states as follows,
'*But since frequent mention has been made…of a 'permanent fideicommissum', you should be aware that it has generally been held that such perpetuity is in case of doubt only extended up to the fourth generation, and that after it the property is free, so that the fifth generation has the capacity to dispose of it at discretion. That*

Law and Civil Law in South Africa's mixed jurisdiction' 2012.
94 Deceased Persons Family Maintenance Act (Chapter 6.03).
95 Zaranyika v the Master of the High Court (n 4 above) 19.
96 F. Du Toit 'The Impact of Social and Economic Factors on Freedom of Testation in Roman and Roman-Dutch Law' (n 51 above) 234.
97 F. Du Toit (n 51 above) 234.
98 Schulz Principles of Roman law (1936)158.
99 F Beukes Freedom of Testation v Section 37 C of the Pension Funds Act, 1956 (No. 24 of 1956). 47
100 F Beukes (n 99 above). See footnote 25 where the author states that, 'A testamentary provision is invalid if its enforcement would be shocking to the public morals. Conditions calculated to destroy an existing marriage…or those absolutely forbidding a beneficiary to marry are regarded as against public policy and are, therefore, invalid…'
101 Erasmus, HJ and MJ de Waal (1989) The South African Law of Succession 65
102 F Beukes (n 99 above).
103 Levy v Schwartz 1984 (4) SA 930 (W).
104 Voet Commentarius 36 1 33 translated by Gane The Selective Voet (1955).

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