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Final Papers of the 2022 National Symposium on Ten Years of the Declaration of Rights in the Zimbabwean Constitution

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Final Papers of the 2022 National Symposium on Ten Years of the Declaration of Rights in the Zimbabwean Constitution

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Foreword

The seven research papers contained herein are the final, peer reviewed papers from the 2022 National Symposium on Ten Years of the Declaration of Human Rights in the Zimbabwean Constitution, held at Cresta Lodge, Harare, Zimbabwe, on 31 October and 1 November 2022, under the Zimbabwe Human Rights Capacity Development Programme (hereinafter 'Zimbabwe Programme').

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

The national symposium is an annual event under the Zimbabwe Programme. It is co-organised by RWI together with the academic partner institutions and CALR, and is a forum where research funded and conducted during the year is packaged and presented before an audience representing diverse sectors of Zimbabwean society, thereby allowing the presenters and participants to in plenary engage in vibrant discussions around the topics at hand and together deliberate on the way forward with regard to critical human rights reform issues. The feedback and experiences shared during the national symposium also aid and feed into the preparation of final papers for publication and dissemination.

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

About the Raoul Wallenberg Institute:

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

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1 An Analysis of the Accessibility of Sanitation and Hygiene Services to People with Disabilities since the Passing of the 2013 Constitution: The Case of the City of Mutare

Tawanda Nyikadzino, Godfrey Dzveta and Tapiwa Dzapasi*

Abstract

People with Disabilities (PwDs) in Africa face multiple challenges including restricted access to sanitation and hygiene services. This is the case regardless of concerted national and international efforts to enhance disability-inclusive development. The dearth of disability-friendly sanitation and hygiene services causes accidents, and injuries and compromises the dignity of PwDs. This study sought to assess the accessibility of sanitation and hygiene services, in particular public toilets, among PwD and explore the challenges the Mutare City Council (MCC) faces in its endeavour to provide inclusive services. The researchers adopted a human rights-based qualitative approach in which they conducted key informant interviews, in-depth interviews, observation and documentary review for the data collection. The findings of the study exemplify that, regardless of the constitutional provisions that every person has a right not to be treated in an unfairly discriminatory manner, the MCC, nearly a decade after the promulgation of the 2013 Constitution, is failing to provide sanitation and hygiene facilities and services that are accessible to PwDs. Most of the public toilets in the Central Business District (CBD) are inaccessible to PwDs, particularly wheelchair and crutch users. The MCC has four public toilets in the CBD and most of them are raised and have steps making it difficult for wheelchair users to access the facilities. Against this background, the study recommends the MCC prioritise PwDs in service delivery by involving them in planning processes.

Keywords: accessibility; sanitation and hygiene services; people with disability; Mutare

1 Introduction

The need for disability-inclusive development has gained popularity across the globe. Countries around the world are adopting legal and institutional reforms to enhance the inclusion of people with disabilities in development processes.[1] Globally, the ratification of the Convention on the Rights of Persons with Disability (CRPD), which Zimbabwe ratified, is the first human rights convention to expressly protect persons with disabilities.[2] Through this, the world testifies the global recognition of the rights of persons with disabilities. The CRPD provides an opportunity to enhance and strengthen the provision of disability-inclusive sanitation and hygiene services. The ratification of the CRPD makes addressing disability inclusivity a legal obligation. Different countries should now align national legislations and policies with the purpose and intent of the CRPD.[3] The 2030 Agenda for Sustainable Development and Sustainable Development Goals (SDGs) provides a firm foundation for the enhancement of disability-inclusive development. The Agenda 2030 prioritises disability as a key issue to be considered in all programming activities towards the realisation of all the SDGs. It is designed to leave no one behind and is thus inclusive of people living with disabilities (PwD). However,

* The authors are human rights professionals and researchers active in Zimbabwe.

[1] S. Thompson, 'Accessible sanitation in the workplace – Important considerations for disability-inclusive employment in Nigeria and Bangladesh'. *Working Paper Number 561 (*2022).

[2] N. C. Richards *et al*. 'Disability, non-communicable disease and health information'. 94(3), *Bulletin of the World Health Organization* (2016), p. 230.

[3] United Nations Convention on the Rights of Persons with Disabilities (CRPD), A/61/611, 2006. <www.un.org/disabilities/documents/convention/convoptprot-e.pdf> (accessed 3 January 2023).

notwithstanding noble global efforts to enhance disability-inclusive development, PwDs, especially those with severe disabilities in developing countries are still facing challenges in accessing sanitation and hygiene facilities and services.[4]

In Zimbabwe, there are local legal and policy frameworks that set the tone for disability-inclusive development. For instance, section 56(3) of the Constitution provides that every person has the right to be free of being treated in an unfairly discriminatory manner.[5] The National Disability Policy of 2021 further makes commitments towards disability-inclusive development.[6] However, nearly a decade after the promulgation of the 2013 Constitution, sanitation, hygiene facilities, and services remain largely inaccessible to people with disabilities in the Mutare. Most of the public toilets in the Central Business District are inaccessible to PwDs, particularly to wheelchair users. The inaccessibility of public toilets, for instance, creates difficulties for PwDs with mobility challenges as they struggle to locate bathrooms and have to wait in the queue. For many years, sanitation and hygiene needs for PwDs have been denigrated and treated as low-priority needs. The lack of disability-friendly facilities and services means that PwDs are forced to engage in dangerous and unhygienic practices. For instance, wheelchair users end up crawling on the floor and, in the worst case, some end up defecating in open spaces.

Very few systematic studies have been done from a human-rights-based perspective to unpack the challenges faced by local authorities, as duty bearers, in providing disability-friendly sanitation and hygienic services. This study addresses the identified gap and provides new knowledge on the challenges and measures that can be adopted towards the enhancement of disability-inclusive sanitation and hygienic services. If such studies are not conducted in cities and other urban areas, the marginalisation of PwDs in the provision of sanitation and hygienic services will persist to the detriment of their rights as provided for in the 2013 Constitution. PwDs will be exposed to increased health risks because of dangerous and unhygienic practices. Mutare, as a medium-sized, integrated city in Zimbabwe, is an ideal site for this investigative study which serves as initial research that can be replicated in other cities and urban areas. The study is guided by the following questions:

- What are the international, continental and national obligations to PwDs with special reference to public sanitation and other related facilities in Zimbabwe?
- To what extent are the sanitation and hygiene facilities and services in the Mutare accessible to people with disabilities?
- What measures did the MCC take since 2013 to make sanitation and hygiene facilities and services accessible to people with disabilities?
- What challenges did the MCC face as the duty bearer in providing disability-inclusive sanitation and hygiene services since 2013?
- What can the MCC do to provide disability-inclusive sanitation and hygiene facilities and services?

[4] H. Jones, 'Mainstreaming disability and ageing in water, sanitation and hygiene programmes - A mapping study carried out for WaterAid'. *WaterAid UK*, 2020. < wedc-knowledge.lboro.ac.uk/resources/learning/EI_WASH_ageing_disability_report.pdf> (accessed 3 January 2022).
[5] Government of Zimbabwe. *Constitution of Zimbabwe*. 2013. <www.constituteproject.org/constitution/Zimbabwe_2013.pdf> (accessed 3 January 2023), section 56(3).
[6] Government of Zimbabwe. *National Disability Policy*. 2021. <veritaswomen.net/wp-content/uploads/2021/09/National-Disability-Policy-June-20211.pdf> (accessed 3 January 2023).

2 Literature Review

This section reviews literature to understand the current stock on literature around disability, disability inclusive development and its importance

2.1 Understanding Disability

Disability is an evolving and contested concept.[7] There is no consensus concerning a singular definition in the literature. The World Health Organization's International Classification of Functioning (ICF), a popularly used disability classification framework, defines disability as an "umbrella term for impairments, activity limitations and participation restrictions, referring to the negative aspects of the interaction between an individual (with a health condition) and that individual's contextual factors (environmental and personal factors)".[8] The ICF definition highlights three factors critical in defining disability, namely, impairment, activity limitations and participation restriction. *Impairment* involves complications in body function or structure (e.g. physical, vision, hearing); *Activity limitations* entail challenges in executing everyday tasks or actions (e.g. walking, eating); and *participation restrictions* encompass problems individuals may face in participating in life activities (e.g. attending school, work, community activities).[9] Similarly, the CRPD defines disability as "the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others".[10]

Disability is "any condition of the body or mind (impairment) that makes it more difficult for the person with the condition to do certain activities (activity limitation) and interact with the world around them (participation restrictions)".[11] A person with a disability has a long-term physical, mental, intellectual, or sensory impairment which interacts with various barriers to hinder their full and effective participation in society on an equal basis with others. [12] Although literature uses the phrase *PwD* to refer to a single population, there are many types of disabilities. Some disabilities affect a person's vision, movement, thinking, remembering, learning, communicating, hearing, mental health and social relationships.[13] This study, however, focused on those with body impairments that affect movement, for example, wheelchair users, crutch users, those with compromised strength and those who crawl. These were selected because they require toilet facilities with special design features.

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[7] World Health Organization (WHO), 'Disability-inclusive health services toolkit-A resource for health facilities in the Western Pacific Region'.2020. <apps.who.int/iris/bitstream/handle/10665/336857/9789290618928-eng.pdf?sequence=1&isAllowed=y> (accessed 3 January 2022).

[8] WHO and World Bank, 'World report on disability'. 2011. <documents1.worldbank.org/curated/en/665131468331271288/pdf/627830WP0World00PUBLIC00BOX361491B0.pdf> (accessed 3 January 2022).

[9] WHO, *supra* note 7.

[10] WHO. 'Emergency medical teams: minimum technical standards and recommendations for rehabilitation – Emergency Medical Teams'. <www.who.int/publications/i/item/emergency-medical-teams> (accessed 3 January 2023).

[11] Centre for Disease Control and Prevention. 'Disability and Health Overview', <cdc.gov/ncbddd/disabilityandhealth/disability.html#:~:text=A%20disability%20is%20any%20condition,around%20them%20(participation%20restrictions)> (accessed 3 January 2023) .

[12] www.washingtongroup-disability.com/about/definition-of-disability

[13] Centre for Disease Control and Prevention. 'Disability and Health Overview', <cdc.gov/ncbddd/disabilityandhealth/disability.html#:~:text=A%20disability%20is%20any%20condition,around%20them%20(participation%20restrictions)> (accessed 3 January 2023) .

2.2 Understanding Disability Inclusivity and Its Importance

Similar to the word disability itself, disability inclusivity has been defined widely in the literature. According to Al Ju'beh, disability inclusivity "seeks to ensure the full participation of people with disabilities as empowered self-advocates in development processes and emergency responses and works to address the barriers which hinder their access and participation".[14] Rimmerman highlights six fundamental dimensions of disability-inclusive development as follows:

1. being accepted and recognised as an individual beyond the disability;
2. having personal relationships with family, friends and acquaintances;
3. being involved in recreation and social activities;
4. having appropriate living accommodation;
5. having employment; and
6. having appropriate formal and informal support.[15]

Thus, disability-inclusive development implies that "all stages of development processes are inclusive of and accessible to persons with disabilities".[16] Disability inclusivity underscores the importance of affording PwDs equal opportunities to access socio-economic development through enhanced healthcare services, education, employment, and social protection, among others.[17] This is against the background of widespread exclusion of PwDs in both developed and developing countries alike.

The existing literature indicates that discrimination and exclusion impoverish PwDs and undermines their involvement and active participation in public discourses and development planning processes.[18] Given the nexus between disability and poverty, the inclusion of PwDs in development processes becomes critical. It contributes towards "the elimination of poverty, achievement of social inclusion and equitable, fair and sustainable development".[19].Disability inclusivity is, therefore, crucial for the realisation of local, national and international development goals. Across the world, "there is growing recognition that disability-inclusive development benefits not only persons with disabilities and their families, but also societies as a whole".[20]

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[14] K. Al Ju'beh'Disability-inclusive development toolkit'. CBM Christoffel-Blindenmission Christian Blind Mission e.V. <cbm.org/article/downloads/54741/CBM-DID-TOOLKIT-accessible.pdf> (accessed 3 January 2023) p.49.

[15] A. Rimmerman*Social inclusion of people with disabilities: National and international perspectives*. CUP. (Cambridge University Press, Cambridge, 2013) p. 1.

[16] UN Division for Social Policy Development and Department of Economic and Social Affairs. 'Toolkit on disability for Africa: Disability-inclusive development'. 2016. <un.org/esa/socdev/documents/disability/Toolkit/Disability-inclusive-development.pdf> (accessed 3 January 2023).

[17] *Ibid.*

[18] WHO,*supra* note 7; H Kuper,. *et al.* 'Should disability-inclusive health be a priority in low-income countries? A case study from Zimbabwe', 15(1) *Global Health Action,* (2022); T. Smythe, *et al.* 'A path toward disability-inclusive health in Zimbabwe Part 1: A qualitative study on access to healthcare', 11(0) *African Journal of Disability* (2022).

[19] UN Division for Social Policy Development and the Department of Economic and Social Affairs. 'Toolkit on disability for Africa: Disability-inclusive development'. 2016.

[20] *Ibid.*

3 Methodological Orientation of the Study

The study was anchored on the human rights-based approach (HRBA). It was selected because of its emphasis on the enhancement of human rights in various public policy processes. Its dual objectives, namely, a)"to empower people (rights-holders) to claim and exercise their rights, and b) to strengthen the capacity of the actors (duty-bearers) who have a particular obligation or responsibility to respect, protect and fulfil the rights of the poorest, weakest, most marginalized and vulnerable, and to comply with these obligations and duties"[21] made it very useful for this study.

The HRBA enabled an understanding of the perceptions of PwDs (rights-holders) towards the sanitation and hygiene services provided by the MCC (duty-bearer). It also helped in understanding the challenges the MCC is experiencing concerning the provision of disability-friendly sanitation and hygiene services.

3.1 Research Design

To develop an in-depth account of the accessibility of sanitation and hygiene services among PwDs in Mutare, a qualitative research design was utilised. The choice of qualitative research was based on the need to understand the experiences of PwDs with sanitation and hygiene services in Mutare's CBD. Through qualitative research, the researchers also managed to obtain insights into the experiences and perceptions of the MCC officials within the health department regarding the provision of disability-inclusive sanitation and hygiene services. Thus, the interactions between the researchers, PwDs and the MCC officials who are involved in the provision of sanitation and hygiene services enabled the researchers to understand the reality from the participant's point of view. The researchers mainly relied on purposive sampling in selecting PwDs and officials from the MCC. A sample of 14 participants was used. The principle of data saturation was used to determine the study's sample size.

The researchers collected data through a triangulation of obtrusive and unobtrusive methods. Under obtrusive data collection methods, the researchers used key informant interviews and in-depth interviews. Key informant interviews were used to unpack the initiatives that the MCC undertook to make sanitation and hygiene services accessible to PwDs and the challenges undermining the provision of those services. The researchers utilised in-depth interviews to gather data on the extent to which sanitation and hygiene facilities and services in the MCC are accessible to PwDs. On the other hand, a documentary review and observation were undertaken, and this involved discrete observation and unobtrusive research.

To guide the observation process, the researchers developed an observation checklist for assessing public toilets in the CBD. The observation checklist was designed based on the following parameters of accessible toilets developed by von Münch:

> *Proximity:* A short distance to the toilet is important. […]
> *Approach path:* The ideal path is 120-180 cm wide. Elevations are crossed via ramps, which should have handrails at 70-90 cm height and curbs on both sides. […]

[21] A. Hausen and A. Launiala, 'Introduction to the Human Rights-Based Approach: A Guide for Finnish Finnish Ngos and Their Partners'. *UNICEF Finland*, 2015, <unicef.studio.crasman.fi/pub/public/pdf/HRBA_manuaali_FINAL_pdf_small2.pdf> (accessed 4 January 2023) p. 8.

Path surface: A firm, even, non-slip surface such as concrete benefits everyone […]. It prevents the surface from becoming muddy and slippery during the rainy season.
Doors: The minimum door width should be 90 cm. The door should fully open and have grab bars out-side and inside instead of knobs to allow easy opening and closing from a wheelchair or by people with reduced strength.
Floors should have smooth and easy to clean surfaces, especially for those people with impairments who have to crawl due to lack of assistive devices.
Room size: Allow for a wheelchair-turning circle of 150 cm, and a space of at least 80 cm beside or in front of the toilet to allow positioning.
Toilet seat: Provide a sitting toilet (pedestal) or bench rather than a squatting pan. The toilet seat should be easily cleanable. It should be well attached, or moveable in case other family members prefer a squatting position.
Interior: Provide adequate handrails or grab bars attached to the walls or to the floor at 70-90 cm height to assist people moving from a wheelchair or people with reduced strength to reach the seat. […][22]

Regarding the documentary review, the researchers reviewed documents such as the Constitution of Zimbabwe), the Urban Councils Act, and the Disability Policy. The data obtained through all these approaches were analysed and organised thematically using thematic analysis. The study was guided by ethical principles in line with the RWI's ethical guidelines including gender inclusivity, informed consent, avoidance of harm, voluntary participation, confidentiality and anonymity.

4 Results

In this section, guided by the research questions of the study, the researchers present the major findings.

4.1 The International, Continental and National Obligations to PwDs

This section presents the international, regional and national legal provisions that oblige governments to prioritise PwDs, with special reference to public sanitation and related facilities. The study revealed that "against a historic background of 'benign neglect' of disability rights,"[23] the world has witnessed a paradigm shift towards disability-inclusive development. Countries across the world have made concerted legal efforts to reposition PwDs in political and socio-economic processes. The United Nations, through the CRPD, set the tone for the international shift towards inclusivity in the area of disability rights. The CRPD is widely regarded as a landmark and comprehensive international human rights treaty and development tool that catalyses worldwide transition towards viewing PwDs as full and equal members of society.[24] It represents an ideological shift from treating PwDs as "subjects of charity, medical treatment and social protection".[25] According to the CRPD, all PwDs, as any other member of the society, must be able to enjoy all human rights and fundamental freedoms. It affirms that PwDs must enjoy rights related to all facets of life, for example, equality, accessibility, education, independent living, health, environment and freedom from violence.[26]

[22] E. von Münch, 'Making sustainable sanitation inclusive for persons with disabilities', Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH (2011), <susana.org/_resources/documents/default/2-1210-giz-2011-sustainable-sanitation-and-disability-barrierefreie-version-final.pdf> (accessed 4 January 2023).
[23] T. P. van Reenen, and H. Combrinck, 'The UN Convention on the Rights of Persons with Disabilities in Africa: Progress after 5 Years'. 8(14) *International Journal on Human Rights* (2011), p.133.
[24] Government of Canada, 'Promoting rights of persons with disabilities', <www.international.gc.ca/world-monde/issues_development-enjeux_developpement/human_rights-droits_homme/rights_disabilities-droits_handicapees.aspx?lang=eng> (accessed 4 January 2023).; United Nations, *supra* note 3.
[25] Government of Canada, *supra* note 24.
[26] United Nations, *supra* note 3.

Of particular importance to this study is Article 9 of the CRPD that underscores the centrality of accessibility in advancing inclusivity.[27] To realise the above-mentioned benefits, Article 9(2) of the CRPD mandates States to development mechanisms to ensure that public facilities and services are accessible to PwDs.[28]

To monitor compliance with the provisions of the CRPD among member states, the UN established a committee, namely, the UN Committee on the Rights of Persons with Disabilities (UNCRPD). The committee reviews the implementation of the convention. States parties are mandated to report to the committee on measures taken to operationalise the provisions of the convention two years after ratifying it.[29]

Following international developments towards disability inclusion, the African Union, on January 29th, 2018, in Addis Ababa, adopted the Protocol to the African Charter on Human and People's Rights on the Rights of Persons with Disabilities in Africa, also referred to as African Disability Rights Protocol (ADRP). Although there has been reluctance among African countries in ratifying the ADRP[30], its adoption was widely celebrated as a milestone achievement towards the protection of PwDs' rights.[31] The ADRP seeks to "promote, protect and ensure the full and equal enjoyment of all human and people' rights by all persons with disabilities, and to ensure respect for their inherent dignity".[32] This is important given the historical marginalisation of disability issues in Africa. To address the challenges that PwDs face on a daily basis, the protocol obliges member states to:

> […] take appropriate and effective measures, including policy, legislative, administrative, institutional and budgetary step, to ensure, respect, promote, protect and fulfil the rights and dignity of people with disabilities, without discrimination on the basis of disability […].[33]

Of particular importance to this study is Article 15 of the ADRP which emphasises the importance of accessibility. It provides that:

> Every person with a disability has the right to barrier free access to the physical environment, transportation, information, including communications technologies and systems, and other facilities and services open or provided to the public.[34]

Against this background, the Protocol provides that state parties ought to take appropriate and pro-active steps to enable the full enjoyment of rights by PwDs through the modification of all inaccessible infrastructure and the implementation of universal designs of all new infrastructure.[35]

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[27] United Nations, *supra* note 3, Article 9 (1).
[28] *Ibid*., Article 9 (2).
[29] United Nations, *supra* note 3.
[30] CIPESA, 'CIPESA Submission to the ACHPR on Ratification of the African Protocol on Disability Rights', <cipesa.org/2022/05/cipesa-submission-to-the-71st-ordinary-session-of-the-achpr-calls-upon-states-to-ratify-the-protocol-to-the-african-charter-on-human-and-peoples-rights-on-the-rights-of-persons-with-disabilit/> (accessed 4 January 2023).
[31] United Nations, 'African states affirm the rights of persons with disabilities in a new landmark Protocol - Africans with disabilities', 2018, <ohchr.org/en/press-releases/2018/02/african-states-affirm-rights-persons-disabilities-new-landmark-protocol> (accessed 4 January 2023).
[32] African Union, *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa*, 2018, <au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-persons-disabilities-africa> (accessed 4 January 2023), Article 2.
[33] *Ibid.,* Article 4.
[34] African Union, *supra* note 32, Article 15 (1).
[35] *Ibid.*, Article 15 (2e).

Zimbabwe, after ratifying the CRPD, also took some legal steps towards the protection and promotion of the rights of PwDs. The Constitution of Zimbabwe of 2013, as the supreme law, mandates state entities to take measures to ensure the equal enjoyment of human rights by all persons with disabilities. For instance, section 56(3) of the Constitution provides that "every person has the right not to be treated in an unfairly discriminatory manner on such grounds as their nationality, race, colour, tribe, place of birth, […] disability or economic or social status".[36] Furthermore, section 83 of the Constitution of Zimbabwe also provides for the rights of PwDs. Section 83 provides that:

> The State must take appropriate measures, within the limits of the resources available to it, to ensure that persons with disabilities realise their full mental and physical potential, including measures—
>
> a) to enable them to become self reliant;
> b) to enable them to live with their families and participate in social, creative or recreational activities;
> c) to protect them from all forms of exploitation and abuse;
> d) to give them access to medical, psychological and functional treatment;
> e) to provide special facilities for their education; and
> f) to provide State-funded education and training where they need it.[37]

In addition, section 73(1a) of the Constitution provides that "every person has the right to an environment that is not harmful to their health or well-being"[38]. As provided in sections 44 and 45 of the Constitution, the MCC, as part of the State, "must respect, protect, promote and fulfil the rights and freedoms" provided in chapter 4 of the Constitution.[39] More so, Zimbabwe enacted the Disabled Persons Act (Chapter 17:01), which provides for the welfare and rehabilitation of PwDs. Section 8 of the Disabled Persons Act (Chapter 17:01) prohibits denying PwDs access to public premises, services and amenities.[40] This section, therefore, mandates state institutions, the MCC included, to make provisions to enhance the accessibility of public facilities such as public toilets. The National Disability Policy of 2021 further makes commitments towards disability-inclusive development.

4.2 The Accessibility of Public Toilets in Mutare's Central Business District

In theory, the MCC officials acknowledged and appreciated the importance of disability-inclusive sanitation and hygiene services, particularly of public toilets. Disability-friendly public toilet facilities are a central part of many PwDs' public outing experiences. In essence, inaccessible public toilets alienate PwDs from attending public gatherings. Mr Maynard Mutamuko, the Hitbay Sanitation Services' Chief Executive Officer, succinctly captured the criticality of toilets in his World Toilet Day commemoration message in Mutare, explaining that:

> […] a toilet is not just a toilet. It's a lifesaver, dignity-protector and opportunity-maker. We must expand access to safe toilets and leave no one behind. Because whoever you are, wherever you are, sanitation is your human right.[41]

[36] Government of Zimbabwe. *supra* note 5, Section 56(3).
[37] *Ibid*., Section 83.
[38] *Ibid*., Section 73 (1a).
[39] *Ibid*., Section 44.
[40] Government of Zimbabwe, Disabled Persons Act, Act 5/1992, 6/2001. Chapter 17:01.
[41] The Manica Post, 'Mutare commemorates World Toilet Day' 2019, <manicapost.co.zw/mutare-commemorates-world-toilet-day/> (accessed 4 January 2023).

In reality, however, disability-inclusive public toilets were limited, if not lacking, in Mutare's CBD. The analysed data from observations and in-depth interviews suggest that there are only four public toilets in Mutare's CDB. The toilets are located at the Mudzviti Bus Terminus, in Meikles Park, at the Manica Post Market, and the Old-rank Cross Border Rank. It is important to note that, of the four public toilets, only one, the Mudzviti toilet, is not prepaid. The rest are prepaid.

There was a consensus among the interviewed PwDs in the study that Mutare lacks adequate public toilets that accommodate them. Respondent 2 expressed concern about the nature of public toilets in the Mutare, explaining that "there are no adequate toilets for PwDs in the city". This view was supported by Respondent 3 who averred that "I don't have a toilet in town. I use hotel toilets and bush toilets instead". Respondent 3, a wheelchair user, highlighted that the four available toilet facilities are not user-friendly and hence opts to use toilets at local hotels with the nearest being around one kilometre from his place of work.

Respondents further complained that public toilets in the CBD are not only inadequate but also concentrated in the upper part of the town. According to Respondent 1 "the toilets are too far from where I do my business-like shopping. In downtown there are no public toilets, you have to walk a long distance towards uptown to access a toilet." The above-mentioned views highlight that PwDs feel discriminated against seeing as sanitation and hygiene services provided in the CBD are not easily accessible and are not disability-friendly. This goes against section 83 of the Constitution of Zimbabwe, which provides for the rights of PwDs. Most importantly, it violates section 56(3) of the Constitution of Zimbabwe which clearly states that:

> Every person has the right not to be treated in an unfairly discriminatory manner on such grounds as their nationality, race, colour, tribe, place of birth, ethnic or social origin, language, class, religious belief, political affiliation, opinion, custom, culture, sex, gender, marital status, age, pregnancy, *disability* or economic or social status, or whether they were born in or out of wedlock.[42] (Emphasis added)

Findings from observations complemented the respondents' review. The researchers, guided by a literature review, developed a disability-inclusive toilet observation toolkit that assessed the disability-inclusiveness of public toilets in the CBD.

4.3 Physical Barriers That Undermine the Accessibility of Public Toilets to PwDs

PwDs were asked whether the public toilets in the CBD have disability-friendly design features. There was consensus among PwDs that the public toilets lack the basic infrastructure that would accommodates their needs. The following section presents some of the disability design gaps that the study identified.

4.3.1 Surface

In-depth interviews with PwDs, particularly with wheelchair and crutch users, showed that public toilets in the CBD are not properly designed to accommodate PwDs. The following are some of the views the respondents expressed when asked about the path surface. R1 explained that "the surface is not easy to walk, the pavements are always filled with vendors. We, wheelchair users, have challenges navigating to toilets." In support of the preceding view, R2 also indicated that the surfaces have potholes and raised pavements that make it difficult for wheelchair users to move smoothly. Some respondents complained that the surfaces are

[42] Constitution of Zimbabwe section 56(3), emphasis added.

sometimes slippery and muddy, especially during rainy seasons. This is particularly the case with the Mudzviti public toilets which are mostly wet due to lose water taps and overflowing urinary wastes. Given that the Mudzviti toilets are the only ones that are not prepaid, they are usually congested and have very poor hygiene standards. The public toilets at Meikles Park are prepaid and, as a result, people frequently prefer the Mudzviti toilets. A respondent quoted in the Manica Post described the state of the Mudzviti toilets as follows, “they are so dirty that most people have to wait until day end so they can use their toilets back home”.[43] Respondents with walking impairments without assistive devices complained that they crawl, and it becomes difficult for them to use wet and slippery toilets. Slippery surfaces not only compromise PwD’s mobility but also expose them to accident risks, thus endangering their hygiene and health.

4.3.2 Entrance Space

In addition, PwDs were asked whether the entrance space of public toilets in Mutare's CBD accommodates wheelchair or crutch users. The responses indicated that most public toilets are not easily accessible. As R7 explained, "the entrances got stairs which are a big challenge to wheelchair users. My wheelchair can't pass through in all of the toilets because of the stairs and the size of the entrance". Similarly, R10 indicated that "I face difficulties with steps and the absence of rails when accessing the facility. The steps are narrow limiting space to accommodate us as users of crutches". Evidence from observations also substantiated the lack of disability accommodative entrances to all the public toilets in the CBD. Through observations, the researchers discovered that the entrances are either raised or have steps without ramps and rails to assist the physically impaired.

During observations, a member of the research team, a crutch user, could not enter one of the Meikles Park toilets due to steep steps and narrow entrance space. The presence of steps without an alternative entry point with ramps and rails excludes many PwDs from accessing sanitation and hygiene facilities in the CBD. As a result, PwDs often have to be lifted to access toilet facilities, a situation which significantly undermines their dignity and privacy. Even if there might be other people willing to assist, the narrow entrances and passages present mobility challenges. This exposes PwDs to risks of injuries. However, the newly built toilet at the Old Rank shows some improvements regarding disability inclusivity. The entrance space is wide enough to accommodate a wheelchair user. There is also a gentle ramp that enables PwDs, particularly wheelchair users, to independently enter the toilet. The only shortcoming, however, is that the authorities fitted bars to secure the toilets at night. The bars on the women's toilets wing require someone to lift a wheelchair for one to enter the toilet. Despite the highlighted limitations, the Old Rank toilet serves as a good starting point towards disability-inclusive public toilets.

4.3.3 Cubicle Size and Availability of Doors

The study further analysed the quality of doors and the size of cubicles at the public toilets in the CBD. Through observation, the researchers discovered that most public toilets do not have doors. The site visit at Mudzviti toilets exemplified an intolerable situation that fails to fulfil any acceptable standards of privacy and dignity. The researchers saw some people squatting where everyone can see. PwDs interviewed in the study flagged the absence of doors as a major cause for concern. To them, toilet facilities without privacy undermine their dignity and because of that, they force them to shun public toilets. However, respondents had divergent views

[43] The Manica Post, *supra* note 41.

regarding the size of the cubicles. Some respondents, particularly wheelchair users, expressed concern over the narrow cubicle spaces in most of the public toilets. The respondents indicated that most of the cubicles were too small to allow wheelchair turning. R8 explained that "the rooms at Mudzviti do not accommodate wheelchairs. The space there is not enough for my wheelchair to turn freely. I do the positioning with great challenges". In concurrence, R10 indicated that "I cannot turn when I am in the toilet area. I have challenges in positioning myself when the facility has a small cubicle area and no seats". On the other hand, crutch users were comfortable with the cubicle spaces. For instance, R9, a crutch user, revealed that "I have no challenges of turning on my crutches. The area allows me to appropriately position myself to use the toilet facility well". The above view highlight that most of the public toilets in Mutare's CBD are not accommodative to a wheelchair users. They fall short of international best practices and standards.

Observations, however, showed that some of the toilet cubicles at the Old Rank toilets are wide enough to accommodate a wheelchair user. The Old Rank toilets are designed in such a way that for both male and female toilets, there is one wide toilets cubicle to accommodate PwDs and other people with compromised strength who might need support in using toilet facilities. The MCC should, therefore, use the Old Rank toilets as a model in developing other public toilets.

4.3.4 Availability of Handrails or Grab Bars Attached to the Walls or the Floor

Generally, most of the toilets in the CBD do not provide adequate handrails and grab bars attached to the wall or floor to assist wheelchairs and people with compromised strength to reach the toilet seat. Observation results showed that, of the four public toilets in the CBD, only one toilet, the Meikles toilet 1, has handrails on the stepped passage. However, although Meikles toilet 1 has handrails attached to the passage wall, the toilet interior does not have any. This presents mobility challenges in and out of the toilet cubicles. International standards emphasise the importance of handrails in the cubicles to allow wheelchair users and other PwDs with compromised strength to easily navigate toilet spaces.

4.3.5 Availability of a Sitting Toilet (Pedal) or Bench and Flushing System

A disability-inclusive toilet provides a sitting toilet (pedestal) or bench rather than a squatting pan. Observations revealed that only one toilet, the Mudzviti toilet, was still using squatting pans while all the other toilets had toilet seats. Nevertheless, the flushing systems of the toilets were not properly functional. Some toilets used the bucket flushing system which presents challenges for PwDs, particularly those with mobility challenges and reduced strength.

4.3.6 The Measure the MCC Adopted to Provide Disability-Inclusive Services

Interviews with the MCC key officials revealed that, although the discourse of disability inclusivity is relatively new in Zimbabwe, the Council is making efforts to address the disability gap in council operations. R11 (MCC) explained that the city has the plan to revamp sanitation facilities in the CBD and accommodation for PwDs to make them disability friendly. The respondent highlighted that the problem of disability-exclusive sanitation and hygiene services prevails not only in the CBD but also in council offices and council houses that accommodate PwDs, for instance, houses in Sakubva. R11 (MCC) indicated that even council offices are not accessible to PwDs. She expressed concern over a PwD, who is a member of one of the council committees, who is always lifted to access council offices. The involvement of PwDs in council

committees, however, provided a policy window for disability issues to be on the council's agenda (R12, MCC). The council is now taking disability matters seriously because of the increased involvement of PwDs in local government structures.

Another important development the study revealed was the inclusion of PwDs in budgetary processes. R11 (MCC) highlighted that, in the past, the disability dimension was not adequately represented in council operations. This perpetuated the marginalisation of the disability dimension in socio-economic development. To address this gap, R11 (MCC) pointed out that the council has created structures to enhance the inclusion of PwDs in the budget consultation processes. He referred to the budgetary consultations that were ongoing during the time of data collection. The PwDs are represented in the consultation processes which allows them to raise their grievances. However, PwDs interviewed in the study expressed concern regarding the lethargic pace at which the MCC is moving towards the provision of disability-inclusive public toilets. R3 (PwD) highlighted that they have been participating in the consultative process for decades, but nothing has changed. In support of this view, R9 (PwD) explained that:

> I don't see the reason for me to participate in the budget processes because even if you participate the council will not do anything to address the issues that we raise. I don't think the council takes us seriously.

The preceding views show that although the MCC official made efforts to include PwDs in socio-economic development, the efforts have not yet changed the fortunes of PwDs. The people affected are disgruntled and feel side-lined in local development processes.

4.4 Factors Undermining Disability-Inclusive Sanitation and Hygiene Services in Mutare

The study revealed two main factors undermining the provision of disability-inclusive public toilets. Firstly, inquiries on the disability-inclusive sanitation and hygiene services gap revealed that, in the past, there was limited recognition of disability-inclusive development in the council. A key informant from the MCC explained that:

> In the past, there was not much recognition of the PwDs getting into town. People thought that persons with disabilities would stay at home. This was the idea and it explains why the infrastructure was built in a way that does not accommodate persons with disabilities. Now that they have been integrated into society wholly, they are participating in socio-economic activities like the other community members. That is why they now need access to all facilities.

It can be inferred from the preceding excerpt that the concept and practice of disability inclusivity is a relatively new development in the MCC. Regardless of the promulgation of the 2013 Constitution, which emphasises non-discrimination on any grounds, disability included, the MCC failed to recognise and prioritise disability-inclusive public toilets. The views of the PwDs interviewed in the study support the lack of recognition and prioritisation of disability matters. There was a general agreement among PwDs that the council is not prioritising disability matters. Instead of prioritising disability-inclusive development, some key informants from the MCC viewed disability investments as costly, non-performing social investments.

Secondly, there was consensus among the key informants from the MCC that funding is the major obstacle in the council's pursuit of disability-inclusive development. A senior official from the MCC highlighted that while the council was committed to disability-inclusive development, securing adequate funding to revamp the council's infrastructure and make it disability compliant has remained a challenging task (R12, MCC). R11 (MCC) highlighted that, since the central government's 2013 debt cancellation directive, revenue generation in local governments has dwindled to levels that cannot sustain service delivery. The economic

challenges that befell the country since the passing of the 2013 Constitution further exacerbated the crisis. As R13 (MCC) explained:

> Addressing the current disability inclusivity in all council operations requires capital. Before we talk of public toilets in town, just look around and consider this building (council head office). Wheelchairs cannot navigate this place. As a council, we know about this problem and we have plans to address the problem but we don't have the means. We don't have funding.

Another council official from the department of finance (R14, MCC) blamed the inflationary environment and central government monetary controls for the council's failure to renovate public toilets to make them disability-inclusive. The respondent observed that the council collects revenue in Zimbabwe dollars (ZWL) whilst infrastructural development requires the American dollar (USD). The respondent further explained that ratepayers frequently fail to uphold their duties and do not pay their rates, a situation that further paralyses the council's operations. It can be inferred from the foregoing discussion that financial constraints and economic challenges Zimbabwe experienced have compromised the capacity of the MCC to modernise public toilets to make them disability friendly and accommodate everyone.

However, PwDs had different views. The perceived problem, from the PwDs' perspective, was the matter of prioritisation. The PwDs interviewed in the study argued that the MCC was not prioritising disability issues. This line of argument is exemplified through the answers of some key informants from the CoM who classified public toilets investments as non-performing social investments that do not generate any income for the council (R14, MCC).

4.5 Discussion of Findings

Generally, the study sought to assess the extent to which the sanitation and hygiene facilities and services in Mutare's CBD are accessible to people with disabilities. As highlighted above, the public toilets in Mutare’s CBD are widely inaccessible to PwDs. The toilets’ surfaces have potholes and elevated pavements, and some are slippery. This affects the mobility of wheelchair and crutch users and also those who crawl. The study further revealed that the entrance space of public toilets in Mutare's CBD do not accommodate wheelchair or crutch users. Most of the entrances are raised and some have steps with ramps and rails to cater for wheelchair and crutch users and other people with reduced strength. This exposes PwDs to accident risks. Most of the toilets had narrow entrances, cubicles and passages that could not accommodate wheelchairs. In addition, the toilets lacked basic design requirements such as doors to enhance privacy and protect people’s dignity. Although the other two public toilets had toilet seats, the Mudzviti toilets, which are the only free public toilets in the CBD, had squatting pans. Squatting pans are not disability friendly. The state of public toilets revealed serious insufficiencies, inequalities, and discrimination for PwDs that warrant the council's attention to make sure that citizens from all walks of life are accommodated in social and economic development. The public toilet situation in the CBD violates section 56(3) of the Constitution, which provides that every person has the right not to be treated in an unfairly discriminatory manner, and section 73(1)(a), which provides that every person has the right to an environment that is not harmful to their health or well-being. As provided in section 44 and 45 of the Constitution, the MCC, as part of the State, must respect, protect, promote and fulfil the rights and freedoms set out in Chapter 4 of the Constitution.

These problems are, however, not specific to Mutare. Other local authorities in Zimbabwe and across the world are grappling with the problem of making public toilets disability friendly. A study by the Poverty Reduction Forum that focused on access to health services for PwDs in

Zimbabwe focusing on Mutasa, Mutare urban and Mutare Rural District also highlighted similar disability management gaps in municipal healthcare provision.[44] The study highlighted that PwDs are generally left behind in the provision of disability-friendly health services. The survey results from the Zimbabwe Coalition on Debt and Development (ZIMCODD) indicated that 95 per cent of public toilets in Zimbabwe were not user-friendly to people with disabilities.[45]

The findings of the study are also consistent with Kuper *et al*., who found that PwDs are lagging behind in the core pillars of Universal Health Coverage (UHC).[46] PwDs also face difficulties in accessing basic health services.[47] This gap requires serious attention so that local government services accommodate citizens with different needs. Consistent with the findings of this study, Kuper *et al.* argue that Zimbabwe's failure to provide disability-inclusive healthcare services might hamper the country's efforts to achieve the SDGs.[48]

Studies outside Zimbabwe also revealed a similar concerning picture in terms of disability-inclusive provisions of public toilets. Lakwo's study on disability inclusion in water, sanitation and hygiene services in Uganda found limited local planning and budgeting for PwDs at sub-county levels.[49] The study also highlights that local governments have limited capacity to address disability needs and provide disability-inclusive sanitation and hygiene facilities.

5 Recommendations

The duty bearer, in this case the MCC, should prioritise the provision of disability-inclusive public toilets considering that the report found a glaring gap in the provision of public toilets that accommodate PwDs. The lack of disability-inclusive public toilets significantly undermines the mobility of PwDs and, as a result, excludes these important constituents from socio-economic activities. The ZIMCODD emphasised that equal rights as provided by the Constitution can only be achieved if "significant investments in adaptive infrastructure like public toilets and transport should be prioritized".[50]

The MCC should actively involve PwDs in addressing disability exclusion in the provision of public toilets and other local government services. The MCC should ensure more participation and involvement of PwDs in the council's decision-making and planning structures and processes. PwDs should be actively involved in local government budget processes so that disabilities are prioritised in local economic development processes. In line with Article 4 of the CRPD, PwDs, directly or through their representative organisations, should be fully consulted and actively involved in all stages of formulating policies, laws and services that relate to them. The MCC should, therefore, involve or partner with local and national

[44] Poverty Reduction Forum Access to health services for people with disabilities in Zimbabwe – a case of Mutasa, Mutare Urban and Mutare Rural Districts in Manicaland Province', 2021, <evidenceforinclusion.org/wp-content/uploads/2021/09/Zimbabwe-ECID-Research-Report.pdf> (accessed 4 January 2023).
[45] Zimbabwe Coalition on Debt and Development (ZIMCODD), 'Public Resources Management: Situational Report', 2021, <zimcodd.org/wp-content/uploads/2022/06/Public-Resources-Management-Situational-Report_April-2022-1.pdf> (accessed 4 January 2023).
[46] Kuper *et al., supra* note 18.
[47] Smythe *et al., supra* note 18.
[48] Kuper, *et al., supra* note 18.
[49] L. D. Lakwo, 'An assessment of disability inclusion in water, sanitation and hygiene services. A case study of Gulu District, Northern Uganda', 2020.
[50] ZIMCODD, *supra* note 45, p.24.

organisations that represent and work for the rights of PwDs. As highlighted by the WHO, these organisations can "play a representative role, undertake advocacy, provide services and peer support".[51] Through cooperation and collaboration, the MCC can actively involve PwDs, identify barriers to disability inclusivity and co-create strategies to enhance access to sanitation and hygiene services for PwDs. Collaborative governance is critical given the financial challenges that the MCC is confronted with. The MCC leadership can also initiate collaborative initiatives to mobilise community members, the business community, non-governmental organisations and other interested stakeholders in raising resources for the construction of disability-inclusive sanitation and hygiene services.

The MCC should develop a comprehensive local disability-inclusivity reforms. Firstly, the MCC should conduct an inventory analysis of all council sanitation and hygiene facilities, other council facilities (offices, health facilities, among others) and by-laws to determine if they are disability inclusive. Based on the results of the inventory analysis, the council should act on the findings to facilitate accessibility to local services. The MCC should holistically address disability exclusion through the adoption and implementation of comprehensive disability reforms. The council should focus on the cultural, physical, attitudinal and policy barriers to disability-inclusive sanitation and hygiene services. It is important to note that enhancing disability-inclusive sanitation and hygiene services is not a matter of simply installing ramps and some rails. Instead, it involves paying particular attention to the various factors undermining accessibility such as toilet style, design, dignity concerns and hygiene needs.

The residents' associations and other interested stakeholders should raise awareness among council leaders and staff on disability-inclusive sanitation and hygiene services and their implications on the participation and involvement of PwDs in socio-economic development activities. This can be achieved through the training of council staff. The council leadership and employees should be trained on the needs and rights of PwDs. In addition to disability-inclusivity awareness raising, organisations representing PwDs should collaborate with resident associations in lobbying for the rights of PwDs.

In the interim period, the MCC could utilise mobile public toilets to specifically cater for PwDs who cannot access the existing public toilets. This is critical given the urgent need for disability-inclusive public toilets.

Some of the factors undermining the accessibility of public toilets, highlighted above point to maintenance gaps in the MCC. For instance, the study found that some toilets do not have doors, properly functioning flushing systems, seats and have potholes, are paved and often have slippery surfaces. The MCC should, therefore, have an ongoing monitoring plan of the toilet facilities to identify and rectify damages. The MCC should also conclude the pending construction stages at the Old Rank toilets. Although the toilets are already in use, they are not yet connected to electricity supply lines. This presents challenges in using the facility at night and during extreme weather conditions.

6 Conclusion

Although the MCC recognised the importance of disability-inclusive development, the state of public toilets in the CBD shows a glaring implementation gap. Most of the public toilets in the CBD are far from meeting the basic requirements for a disability-friendly toilet. As highlighted

[51] WHO, *supra* note 7.

above, the nature of toilet surfaces, entrance space, cubicle size and the absence of handrails or grab bars and toilet seats undermine the accessibility of public toilets in Mutare's CBD. This paper argues that the provision of disability-inclusive public sanitation and hygiene services would strengthen the MCC's inclusive development endeavour as well as help the council, as the duty-bearer, to enhance the realisation of fundamental human rights to achieve local, national and global development goals. Achieving national development goals and the global SDGs will be difficult if PwDs continue to be left behind. Based on this, the paper urges the MCC to prioritise disability inclusivity in the provision of sanitation and hygiene services and local services in general. This can be achieved through the development and enforcement of a disability policy, disability-inclusive development awareness programmes, inclusion and integration of PwDs in sanitation and hygiene service provision, and possibly collaborative crowdfunding initiatives for disability-inclusive sanitation and hygiene services.

2 A Review of the 2013 Constitutional Environmental Rights Clause, Policy Developments and Judgements for the Protection of the Environment

Alpha Chikurira[1] and Mutuso Dhliwayo[2]

Abstract

The 2013 Constitution has an environmental rights clause. The clause protects and promotes environmental rights as human rights and help in addressing the negative impacts of climate change. However, the realization and fulfilment of the environmental rights clause is dependent is dependent on the enactment of laws, adoption of policies and setting up of institutions. This chapter assesses the laws that have been enacted, the policies that have been adopted and the institutions that have been put in place by the Government of Zimbabwe since 2013 in support of the environmental rights clause and how these have helped in the protection and promotion of environmental rights as human rights and addressing the negative impacts of climate change.

1 Introduction

The year 2022 marks the 10th anniversary of the adoption of a new Constitution in Zimbabwe.[3] The Constitution enshrines the right to an environment that is not harmful to one's health and well-being as well as the right to have the environment protected for the benefit of present and future generations through reasonable legislative and other measures.[4] The constitutional environmental right builds on the foundation laid by the Environmental Management Act of 2002.[5] As the Government of Zimbabwe reflects on a decade of constitutionally enshrined environmental rights, the world gathered for the Stockholm + 50 International Meeting under the theme "A healthy Planet for the Prosperity of All – Our Responsibility, Our Opportunity".[6] The meeting was timely as it took place 50 years after the first United Nations Conference on the Human Environment (UNCHE) also known as the Stockholm Conference which was held in 1972. The conference's conclusions, which are commonly referred to as the Stockholm Declaration, provided a set of principles aimed at giving a guide on how humans can preserve the environment for their own economic development. The UNCHE eventually led to the evolution and adoption of the concept of sustainable development, which is based on three pillars namely the economic, social and environmental spheres.[7] It is described as "a conceptual framework for achieving economic development that is socially, equitable and protective of the natural resources base on which human activity depends"[8].

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[3] Government of Zimbabwe. Constitution of Zimbabwe (No.20). 2013 <www.constituteproject.org/constitution/Zimbabwe_2013.pdf> (accessed 23 January 2023).
[4] *Ibid*., Section 73.
[5] *Ibid*., Section 4.
[6] United Nations General Assembly, *Stockholm +50: A Healthy Planet for the Prosperity of All – Our Responsibility, Our Opportunity*. A/CONF.238/3,2022. <documents-dds-ny.un.org/doc/UNDOC/GEN/K22/117/97/PDF/K2211797.pdf?OpenElement> (accessed 23 January 2023).
[7] J. C. Dernbach, 'Sustainable Development as a Framework for National Governance', 49 (1) *Case Western Reserve Law Review* (1998).
[8] UN General Assembly, Resolutions 2994/XXIII,2995/XXVIII and 2996 XXII(1972),p.11.

The Stockholm Declaration laid the foundation for the Brundtland Report, [9] the United Nations Conference on Environment and Development[10], the World Summit on Sustainable Development[11] and the United Nations Conference on Sustainable Development.[12]

It is, however, important to note that since 1972, environmental challenges in the form of biodiversity loss, climate change and pollution, have increased. In November 2022, the world gathered in Egypt for the Conference of the Parties 27 (COP27) to reflect on one of the most existential threats facing the world today – climate change. Climate change continues to pose serious environmental problems globally, and approaches dealing with the phenomena must be given serious consideration. Environmental rights protection in the Environmental Management Act and enshrined in section 73 of the Constitution are all based on the concept of sustainable development. Hence, the need to pause and reflect on what has been achieved and the opportunities that are there to further develop the protection of environmental rights and the negative effects of climate change.

The growing importance of framing environmental rights as human rights and the need to address the climate crisis is reflected in several multilateral environmental agreements (MEAs), declarations and resolutions. These include the United Nations Framework Convention on Climate Change (UNFCC), the Rio Declaration on Environment and Development, Sustainable Development Goals (SDGs), the African Charter on Human and Peoples' Rights, the Kyoto Protocol, and the Paris Climate Agreement. In 2021, the Human Rights Council adopted a resolution on "the human right to a clean, healthy and sustainable environment".[13] The resolution urges member states to adopt policies for the enjoyment of the right to a clean, healthy, and sustainable environment as appropriate including with respect to biodiversity and ecosystems.[14] In 2022, the United Nations Assembly adopted a resolution on the same topic.[15]

Zimbabwe, as a member of the international community, is required to adopt policies and enact legislation at the national level to fulfil its commitments and obligations at the international level reflected in various MEAs, declarations and resolutions.[16] Zimbabwe is one of the countries that has adopted the concept of sustainable development which is reflected in several laws and policies. These include the adoption of a Constitution that recognises environmental rights as human rights[17] and incorporated the Environmental Management Act[18]. The objective

[9] UN General Assembly, *Report of the World Commission on Environment and Development: Our Common Future*, A/42/427,1987 <digitallibrary.un.org/record/139811#record-files-collapse-header> (accessed 23 January 2023).
[10] The meeting was held in Rio de Janiero, Brazil from the 3-14 June 1992 and is also known as the Rio Earth Summit and came up with Agenda 21 as an action plan
[11] The meeting was held in Johannesburg , South Africa from 26 August-4 September, 2002 and came up with the Johannesburg Declaration on Sustainable Development and the Plan of Implementation of the World Summit on Sustainable Development
[12] This meeting was held in Rio de Janeiro, Brazil from the 20 -22 of June ,2012 and is also known as the "Future We Want".
[13] UN General Assembly, *The human right to a clean, healthy and sustainable environment*, A/HRC/RES4813, 2021, <documents-dds-ny.un.org/doc/UNDOC/GEN/G21/289/50/PDF/G2128950.pdf?OpenElement> (accessed 23 January 2023).
[14] *Ibid.*, 4 (c).
[15] UN General Assembly, *The human right to a clean, healthy and sustainable environment* ,A/76/L.75, 2022<digitallibrary.un.org/record/3982508?ln=en> (accessed 23 January 2023).
[16] Government of Zimbabwe, *supra* note 3, Section 327. *See also* Government of Zimbabwe, *Constitution of Zimbabwe Environmental Management Act Chapter 20:27*, 2005, <ucaz.org.zw/wp-content/uploads/2019/08/ENVIRONMENTAL-MANAGEMENT-ACT.pdf> (accessed 23 January 2023).
[17] Government of Zimbabwe, *supra* note 3, Section 73.
[18] Chapter 20:27, *supra* note 16.

of this research paper is to assess executive, legislative and judicial developments and measures that have taken place since the adoption of the 2013 Constitution to promote and strengthen environmental rights as human rights and respond to the climate crisis.

1.1 Justification and Relevance

This review is very important because the realisation of environmental rights is progressive[19] rather than immediate and, therefore, depends on supportive measures that the government takes. Without these measures, the constitutional right to a clean and healthy environment will remain a pipeline dream. This has become even more urgent and necessary considering the triple threat that the planet faces because of climate change, increased environmental degradation and biodiversity loss and pollution. Climate change is no longer regarded as an environmental issue only but a human rights issue which has the potential to and is undermining the realisation of human rights that are provided for and protected under national, regional, and international law. Such rights include the right to food, water, health, shelter, life, and development among others. Hence, the question is, has Zimbabwe made progress since 2013? This can only be determined by analysing legal, policy and institutional measures that have been put in place by the Government of Zimbabwe since the adoption of the Constitution in 2013 to determine the effectiveness of their implementation and court judgements.

The review is based on existing laws, policies and institutional frameworks and proposed legal and policy reforms that have implications on the environment and climate change. These laws and policies include the Renewable Energy Policy, Energy Policy, the National Environmental Policy and Strategies, Integrated Solid Waste Management Plan, National Climate Policy, Wetlands Policy, Zimbabwe Climate Change Response Strategy, Zimbabwe's National Development Strategy 1, Zimbabwe 's Long Term Low Greenhouse Gas Emissions Development Strategy (2020-2050) and Nationally Determined Contributions under the Paris Agreement. There are also ongoing legal and policy reforms. These include the amendment of the Parks and Wildlife Act, the Environmental Management Act, the review of Zimbabwe's Wildlife Policy of 1992, the Mines and Minerals Amendment Bill, the development of a Climate Change Act and the National Forest Policy. There are also several judiciary pronouncements that have implications on environmental rights and climate change. There are also conversations about establishing specialised environmental courts. These will be analysed to determine if they promote environmental rights as human rights and help in the fight against the climate crisis.

2 Legal Developments Since 2013

There have been many developments that have changed the legal, policy and institutional framework of environmental management in the country over the last decade. Most of the notable legal developments that have taken place since the inclusion of environmental rights in section 73 of the Constitution in 2013 have been through Statutory Instruments (SIs). Pollution and poor management of waste including the transboundary movement (TBM) of plastic waste and the environmentally sound management of plastic waste (ESM) is a major challenge in Zimbabwe.[20] These challenges are reflected in the National Development Strategy 1(NDS 1) 2021-2025. The NDS1 set environmental protection, climate change and the sustainable use of

[19] Government of Zimbabwe, *supra* note 3, Section 73(2).

[20] Environmentally Sound Management of Plastic Waste is defined as the taking of all practical steps to ensure that hazardous wastes or other wastes are managed in a manner which will protect human health and the environment against adverse effects which may result from such wastes

natural resources as key priority areas. It is estimated that Zimbabwe generates about 1.9 million tonnes of waste annually.[21] Plastic as well as other hazardous and domestic waste are sources of pollution, and this affects the realisation of environmental rights that are provided under the Environmental Management Act and the Constitution.

2.1 Environmental Management Regulations on Prohibition and Control of Ozone Depleting Substances and Greenhouse Gas Dependent Equipment [22]

The regulations give effect to the provisions of the Montreal Protocol under the Vienna Convention to which Zimbabwe is a signatory. The regulations recognise that, as a signatory, Zimbabwe must mitigate the emission of ozone-depleting substances (ODSs) and ODS-dependent equipment that destroy the ozone layer. Through the regulations, the Ozone Office in the Ministry of Environment, Climate, Tourism and Hospitality Industry controls the importation and use of such substances and equipment through permits. Although not present at border posts, the Ozone Office works in collaboration with the Zimbabwe Revenue Authority (ZIMRA) and the Environmental Management Agency (EMA) in screening imports destined for Zimbabwe or transits through the country. Although not directly affected by the depletion of the Ozone layer, Zimbabwe has an obligation to act due to the common but differentiated responsibility principle.

2.2 Environmental Management Regulations on Control of Hazardous Substances[23]

The ESM of chemicals and their waste is critical in promoting the realisation of environmental rights.[24] The poor management of chemicals has demonstrated negative effects on human health and the environment owing to their toxicity, persistence, long-term environmental impacts and ability to bioaccumulate. It is against such a background that global action has been taken in terms of the Basel, Rotterdam and Stockholm (BRS) and Minamata Conventions to restrict or ban the use of highly hazardous chemicals. In order to fully realise the benefits of such actions they, however, need to be domesticated or contextualised in the country's individual legislation. To this end, Statutory Instrument 268/2018 attempts to include key elements of global action through the consolidation of several prior amendments to the principal regulations. The amendment not only sought to capture changes in terms of the ESM of chemicals in MEAs but also sought to capture changes in the functional currency after the adoption of the United States Dollar in 2009. License fees under the regulation are pivotal for the implementation of the "polluter pays principle". The regulation repealed a notable number of SIs that provided the general framework for the management of chemicals in Zimbabwe. The repealed SIs include the following:

- Environmental Management (Hazardous Substances, Pesticides, and other Toxic Substances) Regulations, 2007.
- Environmental Management (Importation and Transit of Hazardous Substances and Waste) Regulations, 2009; and

[21] Governemnt of Zimbabwe, 'Intergarted Solid Waste Management Plan,2021. https://www.ema.co.zw/agency/ziswmp

[22] FAO, *Environmental Management (Prohibition and Control of Ozone Depleting Substances, Greenhouse Gases, Ozone Depleting Substances and Greenhouse Gases Dependent Equipment)Regulations, 2016.* Statutory Instrument 131 of 2016, [CAP. 20:27]. <faolex.fao.org/docs/pdf/zim203470.pdf> (accessed 23 January 2023).

[23] FAO, *Environmental Management (Control of Hazardous Substances) (General) Regulations, 2018.* Statutory Instrument 268 of 2018, [CAP. 20:27]. <faolex.fao.org/docs/pdf/zim187704.pdf>. (accessed 23 January 2023).

[24] Health Safety Executive,'Background: Globally Harmonized System (GHS)'. <www.hse.gov.uk/chemical-classification/legal/background-directives-ghs.htm> (accessed 23 January 2023).

- Environmental Management (Hazardous Substances, Pesticides, and other Toxic Substances) (Amendment) Regulations, 2011.

The regulation also incorporated the Globally Harmonized System (GHS) for the classification and labelling of chemicals, a key requirement for identifying and communicating the risks associated with a chemical. Such information is critical in chemical screening at ports of entry as well as for informing emergency preparedness and responses in the event of a chemical spill or incident. In the Plan of Implementation of the World Summit on Sustainable Development held in Johannesburg, South Africa, in 2002, countries were encouraged to implement the GHS as soon as possible with the goal to have the system fully operational by 2008.[25]

In keeping with the prior informed consent (PIC) requirement of the BRS and Minamata Conventions, the regulation provides an inclusive list of chemical substances that are considered dangerous and that, as a result, require to be licensed prior to importation, transportation, storage, use and sale. Given the infinite number of chemical formulations that are possible, this presents an operational challenge in terms of the implementation of the regulation, notwithstanding the footnote to the Third Schedule of SI 268/2018 that reads:

> The list of hazardous substances provided in this Schedule is non-exhaustive. Any substance not specifically covered under the list will be identified and licensed or labelled in accordance with the characteristics or hazard posed by the substance as provided in this Schedule[26]

Notable additions included in the SI 268/2018 include PIC from the Environmental Management Agency before the manufacture, storage, sale, use, import, transport, distribution or transit of derivatives of cyanide and mercury in particular. Cyanide and mercury are predominantly used for the extraction of gold in the mining sector. The leading source of mercury in Zimbabwe is artisanal mining in the amalgamation sector. The regulation, in keeping with the Minamata Convention on Mercury, therefore, seeks to ensure that mercury imports are regulated given the public health and environmental risks associated with exposure. A survey conducted by the World Health Organisation (WHO) in 2014 indicated that chronic mercury intoxication is likely to have been one of the top 20 hazards for the population health in Zimbabwe[27].

2.3 The Environmental Management Regulations on the Control of Alluvial Mining[28]

Statutory Instrument 92/2014 created a legal framework that regulates riverbed mining, also known as alluvial mining, and gives further support to the need to conduct an environmental impact assessment (EIA) beforehand. Alluvial mining has been proven to harm aquatic ecosystems which in turn affected their ability to continue to offer ecological services. The ecological services that such ecosystems produce include water for irrigating crops and for drinking by farm animals and communities. Where water courses are diverted or polluted, this affects the livelihood of communities and spurs further environmental damage. The principal

[25] SAICM, 'Pilot Project to support African Countries in overcoming barriers in implementing the UN GHS',<saicmknowledge.org/projects/pilot-project-support-african-countries-overcoming-barriers-implementing-un-ghs> (accessed 23 January 2023).
[26] Environmental Management (Control of Hazardous Substances) (General) Regulations, 2018 p2853
[27] Steckling, N., Bose-O'Reilly, S., Pinheiro, P. *et al.* The burden of chronic mercury intoxication in artisanal small-scale gold mining in Zimbabwe: data availability and preliminary estimates. *Environ Health* **13**, 111 (2014). https://doi.org/10.1186/1476-069X-13-111
[28] FAO, *Environmental Management (Control of Alluvial Mining) Regulations, 2014.* Statutory Instrument 92 of 2014, [CAP. 20:27], <faolex.fao.org/docs/pdf/zim170806.pdf> (accessed 23 January 2023).

regulation sought to initially protect water courses and wetlands by creating a 200-meter buffer from the highest flood level in which mining, processing plants, washing plants, ore stockpiles and slimes dams would not be allowed. Further restrictions imposed in the buffer zone include banning the use of the highly toxic chemicals mercury and cyanide. In addition, the regulation in section 5(4) empowered a magistrate to direct that remedial action should be taken to restore degraded ecosystems during alluvial mining, at any point of cessation and upon mine closure.

Statutory Instrument 92/2014 was subsequently amended by the Environmental Management (Control of Alluvial Mining) (Amendment) Regulations, 2018 (No. 1), published in Statutory Instrument 258 of 2018 which was in turn repealed by the Environmental Management (Control of Alluvial Mining) (Amendment) Regulations, 2021 (No. 2) published in Statutory Instrument 92 of 2014. The amendment introduced the following key provisions in a bid to foster the conservation of watercourses and wetlands:

- The no mining buffer was increased from 200 meter to 500 meter; and
- mining operations were permitted to only go as deep as the original bed of the water system and not deeper than the distances specified in the geological report of the water system.

There are also a number of strategies that have been developed since 2013 that relate to waste management. These include the Harare Integrated Solid Waste Management Strategic Plan (2021-2025) and the Draft National Strategy for the Environmental Sound Management of Plastic Waste in Zimbabwe (2022-2025). These strategies will address waste management including plastic waste which is a big threat to the realisation of the right to a clean environment as provided for in the Constitution and the Environment Management Act.

3 Policy Developments Since 2013

Equally, there are a number of important policy developments that have taken place since 2013. While policies, by their nature, are not enforceable in a court of law, they are a statement of intent that can be harnessed or marshalled for the realisation of environmental rights depending on political will.

3.1 The National Development Strategy (NDS 1)

The NDS1 recognises environmental protection and climate resilience as key enablers for the attainment of vision 2030 and the SDGs.[29] If climate change and its impacts on human rights are not addressed, then it will affect the realisation of environmental rights as envisaged by the Constitution. The relevance of NDS1 to the promotion and protection of environmental rights as human rights is very evident under strategies to achieve improved climate action. These include the improvement of pollution and waste management, land and ecosystems management and protection, strengthening capacity building and awareness on climate change adaptation and mitigation and promoting low emission development pathways and the reduction of GHG and alternative energy sources.

[29] Government of Zimbabwe, 'National Development Strategy 1, January 2021-December 2025. Towards Prosperous and Empowered Upper Middle-Income Society by 2030', 2020, p.205 <www.dpcorp.co.zw/assets/national-development-strategy-1_2021---2025_goz.pdf> (accessed 23 January 2023).

3.2 The Zimbabwe National Climate Change Response Strategy (NCCRS)

This strategy was developed as a response to the acknowledgement that Zimbabwe is experiencing climate change and variability.[30] Its objectives is to coordinate Zimbabwe's efforts to respond to climate change through mitigation and adaptation. This is reflected in its vision, mission, and goal. The goal of the NCCRS is to mainstream climate change adaptation and mitigation strategies in economic and social development at national and sectoral levels through multistakeholder engagements.[31] The strategic objectives of the NCCRS lay a very strong foundation for developing laws, policies and strategies that can help the country to respond to the climate crisis and its impacts on human rights including environmental rights.

3.3 The National Environmental Policy and Strategies (NEPS)[32]

The NEPS is a national environmental policy that is recognizes environmental rights as human rights and the climate crisis. This is provided under its key policy principle provisions.[33] The provisions are the same as the ones under section 73 of the Constitution and section 4 of the Environmental Management Act. The policy recognises the importance of energy to Zimbabwe's economic development but is also recognizes the contribution of the energy sector to climate change especially one generated from coal-fired power stations, hydro petroleum products, propane gas and wood fuel. It notes that "coal-fired power stations release greenhouses to the atmosphere and gases that form acid rain. These and other emissions from fossil fuels may initiate climate change"[34]. To address climate change problems that may be caused by the use of fossil fuels that emit GHGs, the policy calls for the promotion of renewable sources of energy through the introduction of appropriate incentives and investments.[35] Furthermore, it calls on the government to observe and support international conventions and protocols designed to promote the use of more energy-efficient and environmentally friendly energy sources.[36]

It further recognises that oil and gas operations can result in environmental pollution, including air pollution that contributes to climate change. Based on this understanding, the policy calls for the consideration of sustainability, biodiversity, and ecology to counteract environmental impacts, including climate change. The policy lays a broad foundation for the development of laws and policies to deal with climate change thereby protecting and promoting environmental rights as human rights.

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[30] Government of Zimbabwe, Ministry of Environment and Natural Resources Management. 'Zimbabwe National Climate Change Response Strategy',2013, <swm-programme.info/documents/20142/407481/ZWE_MI_WE_20141231.pdf/00ca1677-6620-cce6-5fb3-367a57cfe71b?version=1.0&t=1626442737947&>(accessed 23 January 2023).
[31] *Ibid.*, Goals 1-3,p.9.
[32] Government of Zimbabwe,Ministry of Environment and Natural Resources Management, 'National Environmental Policy and Strategies',2009. <swm-programme.info/documents/20142/407481/ZWE_PO_WE_20090630.pdf/28c96ebd-e12e-5248-5cb9-7b22781e6782?t=1626442767886> (accessed 23 January 2023).
[33] *Ibid.*, Section 3.1.
[34]*Ibid.*, Section 6.2.5.
[35] *Ibid.*, Section 6.2.5.
[36] *Ibid.*, Section 6.2.5

3.4 The National Climate Policy

The objective of the National Climate Policy is to "guide climate change management in the country, enhance the national adaptation capacity, scale up mitigation actions, facilitate domestication of climate related global policies and ensure compliance with to the global mechanisms"[37]. It also further provides an overarching framework for the country in form of basic principles and guidance under which the National Climate Change Response Strategy (NCCRS) and other climate related strategies can be implemented.[38]

3.5 The Renewable Energy Policy

This policy framework provides a pathway of how Zimbabwe can move away from fossil fuels that are among the major contributors of GHG emissions that cause climate change. The good thing is that Zimbabwe has an abundance of renewable energy sources that can be harnessed as alternatives to create a sustainable energy portfolio in the country. The Renewable Energy Policy thus builds on the priorities and aspirations of the Zimbabwe National Climate Policy and the country's efforts to reduce GHG emissions.[39] One of the policy's primary objectives is setting overall targets for renewable energy based on the Nationally Determined Contributions (NDCs) interventions.

3.6 The National Wetlands Policy

Wetlands play a very important role in the realisation and protection of environmental rights including the right to water. It is against this background that the Government of Zimbabwe adopted a Wetlands Policy.[40] The policy aim to "establish an effective and efficient institutional and legal framework for integrated management and wise use of wetlands which will provide an enabling environment for the participation of all stakeholders".[41] The policy is based on a number of principles that are all at the core of sustainable development. These include integration, precautionary, polluter pays, collaborative and participatory and global dimension.[42] To improve and enhance wetlands management, the Government of Zimbabwe adopted the National Wetlands Management Guidelines.[43]

4 Institutional Arrangements

The institutional framework is important in the environmental rights agenda since it raises awareness in communities concerning their rights and because it supports them to be able to effectively participate in the management of the environment and to take action through litigation where necessary.[44] In this context, it is noteworthy that the key institutions ensuring the monitoring of environmental rights from a regulatory standpoint, include the Environment

[37] Government of Zimbabwe,Ministry of Environment, Water and Climate,*National Climate Policy*,2017.
[38] *Ibid.*, p. 2.
[39] Government of Zimbabwe, Ministry of Environment, Water and Climate, *supra* note 37.
[40] Government of Zimbabwe, Ministry of Environment, Climate, Tourism and Hospitality Industry, *Zimbabwe Wetland Policy*,2020.
[41] *Ibid.*, Section 5.
[42] *Ibid*., Section 6.
[43] Ministry of Environment, Climate, Tourism and Hospitality Industry, *National Wetlands Management Guidelines*,2021.
[44] T. Madebwe, 'A rights-based approach to environmental protection: The Zimbabwean experience', 15(1) *African Human Rights Law Journal* (2015), 110-128.

Management Agency (EMA), the Zimbabwe Parks and Wildlife Authority (ZIMPARKS) and the Forestry Commission. The mandate of these institutions is outlined in their respective enabling Acts. The sections that follow will discuss the evolution of the institutional framework over the last decade including funding mechanisms and programmes implemented that raise awareness and enhance the capacity of communities to uphold their environmental rights in terms of section 73 of the Constitution.

4.1 Environmental Management Agency

The role of the EMA appears to primarily focus on coordination as espoused in section 10(1) of the Environmental Management Act. The function of the agency includes the formulation of quality standards on air, water, soil, noise, vibration, and waste management; and assisting and participating in any matter on the management of the environment. In addition, the Act extends EMA's mandate to:[45]

- the preparation of guidelines for the preparation of a National Environmental Action Plan (NEAP);
- regulating the disposal of environmental discharges and wastes;
- overseeing the Environmental Impact Assessment (EIA) process;
- develop model environmental bylaws;
- coordinate the state of the environment formulation; and
- Undertake work deemed necessary for the protection of the environment.

Although many SIs have been enacted to regulate various areas that include chemicals and waste, namely SI 10/2007 & SI 268/2018, water and solid waste (SI 6/2007), air pollution (SI72/2009), and ecosystems (SI 7/2007), SI 61/2009, it is through institutions such as Environmental Management Agency that they are implemented. In order to facilitate the work of the agency, the Environmental Management Act in section 42 establishes funding mechanisms that include grants from parliament and the government, donations, the proceeds of Carbon Tax and any other funds that may accrue from its operations. These sources of funding are meant to establish a predictable source of financial resources to sustain the operations of the agency. In its annual report[46], the agency indicated that the bulk of its revenue in 2020 accrued from environmental licence fees and penalties. Additional support was granted from the treasury for the capital projects that included the purchase of a state-of-the-art emergency response van. Although additional support is provided as grant funding through projects sponsored under MEAs there is still a need for additional resources to cater for capital-intensive projects such as the reclamation and rehabilitation of disused mines in terms of section 10(1)(b)(xii) of the EMA Act.

Despite the limitations in funding, notable milestones in the capacity-building of the agency over the last decade include:[47]

- the accreditation of the agency's laboratory to ISO17025 in 2012 and expansion of its analytical capacity from 12 methods to 34 methods covering folia, fauna, water and soil samples - a key enabler for producing data on environmental quality;
- roll-out of vehicular emissions and point source monitoring programmes in 2013;

[45] Environmental Management Act [CAP20:27] Section 10
[46] Environmental Management Agency, "Annual Report", 2021
[47] Environmental Management Agency, "Annual Report", 2022

- establishment of a biomonitoring programme to monitor variations in biota as a result of water pollution episodes in 2014;
- establishment of a specialised Environmental Law Enforcement Unit in collaboration with the Zimbabwe Republic Police (ZRP) to expedite the opening and processing of dockets for environmental offences and ticket follow-ups
- expansion of the ambient water monitoring programme to monitor dam and lake water quality in 2021;
- enhanced chemical emergency capacity through the procurement of a state-of-the-art HAZCHEM response vehicle and training of responders in 2021;
- development of several guidelines including the Wetland Utilisations Policy and Guide, draft guidelines for the design and operation of landfills, guidelines for the Local Environmental Action Plans (LEAPs);
- establishment of an ambient air quality monitoring system for particulate pollution focusing on PM_{10} and $PM_{2.5}$ in 2022.

4.2 Environmental Management Board

The Environmental Management Act established an Environmental Management Board.[48] The board controls and manages the functions of the Environmental Management Agency including giving guidance on the promotion and protection of environmental rights as human rights. The board also has access to all the ministers when carrying out its mandate which means that it can approach any minister on environmental rights and environmental issues whenever it deems it necessary. This is very important in promoting integrated decision making and cooperative governance. The board also has the authority to hold hearings on any matter and it can sit as a court.[49] The board is further required to consult experts on technical issues which can include problems related to environmental rights as human rights as well as to climate change.[50] An Audit and Risk Committee was established under the board in order to align the agency's operations with the corporate governance tenets.

4.3 National Environmental Council

The establishment of the National Environmental Council (NEC) is provided for in terms of section 7 of the Environmental Management Act. The NEC plays an important role in facilitating the enjoyment of communities' right to a clean, safe and healthy environment. The duties of the NEC, in terms of section 8, are to advise the minister on policy formulation and give directions on the implementation of the Environmental Management Act, national goals and objectives and determine policies and priorities for the protection of the environment. The NEC was set up and constituted in 2013.

4.4 The Standards Enforcement Committee (SEC)

The Committee was established under section 55 of the Environmental Management Act. As a committee of the board, its functions as provided in section 56 include the following:

a) To advise the board on how to come up with criteria and procedures for the measurement of water quality; and

[48] Government of Zimbabwe, *supra* note 16, Section 11.
[49] *Ibid.*, Section 27
[50] *Ibid.*, Section 26

b) To recommend to the board minimum water standards

While the committee's constitution is currently biased towards water which is good in that water quality is a key component of the realisation of environmental rights, it should be broadened to include other aspects of environmental rights as human rights. Although the Act provides for the SEC it has not been constituted as a result affecting the formulation of environmental quality standards that should otherwise form the basis of setting pollution reduction targets. The ambient waster standards adopted for benchmarking water quality are derived from the discharge standards set in terms of the SI 6/2007.

4.5 Parliamentary Portfolio Committee on Environment, Climate and Tourism

Another important institution is the Parliamentary Portfolio Committee on Environment, Climate and Tourism. The committee has an oversight role over the Executive that includes the following:

a) To consider and review all international treaties , conventions and agreements relevant to it , which are from time to time negotiated , entered or agreed upon
b) To monitor , investigate , inquire , or make recommendations relating to any aspect the legislative programme or policy or any other matter it may consider relevant to government departments falling within the category of affairs assigned

The Committee's oversight role is broad enough to include issues that may relate to environmental rights as human rights and climate change.

4.6 Climate Change Management Department

To facilitate the coordination and mainstreaming of climate change programmes in the country, the Government of Zimbabwe established a Climate Change Management Department in the then Ministry of Environment, Water and Climate. The department has overseen the development of several climate-related policies and strategies which are key for mitigating the effects of climate change. Furthermore, the policy is a key enabler for accessing multilateral funds from the Global Environmental Facility and other sources of climate finance.

5 Judicial Developments Since 2013 That Reflect Judicial Awareness of Environmental Rights

One of the ways of assessing the constitutional environmental rights clause and its role in promoting environmental rights as human rights is through judicial developments that have taken place since 2013. The protection and promotion of environmental rights entails finding a balance between developmental and environmental issues for which courts play a crucial role.[51] Similar to other rights, constitutional environmental rights mean nothing if they are not adjudicated, enforced and developed by courts.[52] It is through the interpretation by courts that the right to a clean and healthy environment can promote environmental conservation and sustainable development. The way the courts interpret and adjudicate environmental rights as human rights, provides guidance to both the executive and the legislature. This is particularly

[51] L.J. Kotze, 'The constitutional court's contribution to sustainable development in South Africa', 6 (2) *Potchefstroom Electronic Law Journal* (2003).
[52] C.B. Soyapi, 'The role of the judiciary in advancing the right to a healthy environment: eastern and southern African perspective',PhD Thesis. (Northwestern University, 2018).

useful as they attempt to balance two important competing demands, namely economic development and environmental protection.[53]

This balance is usually achieved through the concept of sustainable development. Sustainable development is defined as a conceptual framework for achieving economic development that is socially equitable and protective of the natural resource.[54]The concept of sustainable development is made up of a number of principles that derive largely from the Rio Declaration on Environment and Development.[55]These include the polluter-pays-principle[56], the precautionary principle,[57] EIA,[58] and access to information and public participation.[59] The protection of property rights, *locus standi,* the awarding of costs and the role of the judiciary in developing the law, are also among some important principles that can be used to determine how the constitutional environmental rights have been promoted and advanced by the judiciary in Zimbabwe since the adoption of the 2013 Constitution. This section consequently reviews and analyses environmental jurisprudence that has been developed through court decisions since the adoption of the new Constitution. Several cases have been brought before the courts based on section 73 of the Constitution which builds on section 4 of the Environmental Management Act.

6 Understanding Section 73 of the Constitution

Since the analysis of the court decisions will be based on section 73 of the Constitution, it is worthwhile to reflect on its provisions. The environmental rights provision in the Constitution of Zimbabwe is modelled after those of Kenya, Uganda and South Africa.[60] Section 73 provides as follows:

> (1) Every person has the right
> (a) to an environment that is not harmful to their health or wellbeing; 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.[61]
>
> (2) The State must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realistation of the rights set out in this section.[62]

It is important to note that while this provision is justiciable, its realisation is progressive and some have argued that this may explain why significant progress in the realisation of

[53] F. Ndhlovu, 'An appraisal of the judicial enforcement of environmental protection in Zimbabwe', Master Thesis, (Northwestern University, 2021).
[54] Dernbach, *supra* note 7.
[55] United Nations General Assembly, Report of the United Nations Conference on Environment and Development, A/CONF.151/26 (Vol. I), 1992. <www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf> (accessed 24 January 2023).
[56] *Ibid.*, Principle 16.
[57] *Ibid.*, Principle 15.
[58] *Ibid.*, Principle 17.
[59] *Ibid.*, Principle 10
[60] Soyapi, *supra* note 52.
[61] Section 73(1)(a)(b), p.37
[62] Section 73 (2)

environmental rights has not been achieved even though a decade has passed since the enactment of the 2013 Constitution.[63] Section 73 of the Constitution builds on the provisions of section 4 of the Environmental Management Act. Its provisions are as follows.[64]

Both the constitutional and EMA provisions are based on the concept of sustainable development. With regards to the enforcement of the fundamental human rights and freedoms, under which section 73 falls, the Constitution provides as follows:

> (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
> (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.[65]

The expanded *locus standi* which is provided for in section 85 is very important when it comes to environmental rights and their role to address the negative effects of climate change. It is important to note that environmental rights, as provided in section 73, are not absolute but are subject to limitation. With regards to the limitation of rights, section 86 of the Constitution provides as follows that "[t]he fundamental rights and freedoms set out in this Chapter must be exercised reasonably and with due regard for the rights and freedoms of other people".[66] This means that the rights and freedoms, including environmental rights as human rights, can be limited in those cases where they infringe on other people's rights including property rights.

7 Analysis of Court Decisions

In analysing the constitutional environmental right since its implementation in 2013, it is important to note that there are limited cases that have been brought before the courts based on section 73. As Soyapi observes "[t]here is little scholarship and commentary on the right to a healthy environment in Zimbabwe or on the cases in which the right has been an issue (both before and after the 2013 Constitution)"[67]. Soyapi further argues that there is a dearth of scholarship analysing the development, or lack thereof, of the right to a healthy environment in relation to the work of the courts.[68] While Soyapi's observations are correct in that there are limited cases that have been adjudicated by the courts based on section 73 for a number of reasons, there is evidence that there is an increasing interest, to test its justiciability, from stakeholders that include civil society organisations, residents associations, the Environmental Management Agency and community-based organisations and individuals alike. Several cases have been brought before the Administrative Court, the High Court and the Supreme Court.

[63]M. Dhliwayo, 'A critical examination of the scope, content and extent of environmental rights in the Constitution of Zimbabwe' Master Thesis (Midlands State University, 2016).
[64] See section 4 of the Environmental Management Act
[65] *Ibid.*, Section 85.
[66] Government of Zimbabwe, *supra* note 3, Section 86(1).
[67] Soyapi, *supra* note 52.
[68] *Ibid.*

7.1 The Concept of Sustainable Development

In the case of *Harare Wetlands Trust and Newlands Residents Association v New Life Covenant Church and Others*[69], the judiciary had an opportunity to make a pronouncement on the concept of sustainable development. The first respondent New Life Covenant Church was building a superstructure on area which is a wetland. The applicants averred that the development would result in detrimental and irreparable harm to the environment in violation of sections 73 and 4 of the Constitution and the Environmental Management Act respectively which provides for the right to a clean and health environment which is not harmful to one 's health and encompassing sustainable development. Justice Chinamora pointed out the need to strike a balance between development and sustainable environmental management which is at the heart of the concept of sustainable development. He articulated the concept by noting as follows:

> in each individual case the particular economic and benefits of planned action must be assessed and weighed against the environmental costs, alternatives must be considered which would affect the balance of values.[70]

Based on the need to strike a balance between economic development and environmental protection, the court was able to grant both a declaratory order and an interdict that was sought by the applicants. This judgement shows that judges are increasingly becoming aware of the importance of environmental rights as human rights.

7.2 Environmental Impact Assessment

In *RCM Civil (Private) Limited v. Petrotrade (Private) Limited*,[71] the issue centred on the construction of a service station without obtaining an Environmental Impact Assessment (EIA) certificate from the Environmental Management Agency as required by the Environmental Management Act. The construction was stopped by the EMA. In his ruling the judge pointed out that the defendant had begun construction of the service station without an EIA certificate which was in direct violation of section 97 of the Environmental Management Act. Under the first schedule of the Act, petrochemical projects including service stations, are among the projects that should not be implemented in the absence of an EIA certificate. The plaintiff was trying to recover costs from the defendant. The judge noted that the plaintiffs knew the requirements of the law. Furthermore, they had employed a specialist consultant whose services they ignored when he advised on the need to obtain an EIA certificate before the commencement of the project. He concluded by saying that:

> any project to do with fuel or petroleum products is potentially hazardous to the environment and the community. It would not in my view be in the interests of public policy to allow the plaintiff to recover under circumstances where it has brazenly acted in violation of the law. To do so would be to send the wrong signal to would be offenders.[72]

This shows judicial understanding and consciousness about environmental issues.

The importance of an EIA certificate before the commencement of activities was also reinforced in the case of *Debsham (Private) Limited v. The Provincial Mining Director for Matabeleland*

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[69] *See Harare Wetlands Trust and Newlands Residents Association* v. *New Life Covenant Church and Others,* HC 3440/19.
[70] *Ibid.,p.1*
[71] *See RCM Civil (Private) Limited* v. *Petrotrade (Private) Limited* , HH 34-20, 2020.
[72] *Ibid.*, p. 4

South and the Provincial Mining Director for Matebeland North and Others.[73] In that case, the respondents had been granted mining permits and rights in the absence of an EIA certificate. This was based on the wrongful understanding and assumption that an EIA certificate was not a prerequisite for the issuance of a mining certificate. Issuing mining licences, certificates and permits in the absence of an EIA certificate is in violation of sections 97 and 100 of the Environmental Management Act. The respondents argued that the EIA certificate was only required for the commencement of mining operations or activities and not before. In granting the declaratory order against mining authorities, the judge pointed out that trying to get an EIA certificate after the granting of mining licences, certificates and permits is like trying to close the gate after the horse has bolted. The judge noted that the Environmental Management Act, based on the first schedule, has a requirement for an EIA certificate before mineral prospecting, mineral mining or processing and concentrating and quarrying can be undertaken.

This understanding and interpretation are also reinforced in the recent case of *Shangani Holistic (Pvt) Ltd v. Pearline Mineral Exploration (Pvt) Ltd*.[74] In this case, the High Court through Justice Musuthu granted an interim interdict to the applicant prohibiting Pearline Mineral Exploration from conducting an aeromagnetic over the applicant's property before carrying out and obtaining an EIA certificate from the Environmental Management Agency as required by section 62 the Environmental Management Act. The judge correctly noted that, in terms of section 97 of EMA, it was unlawful for one to carry out mineral prospecting. The judge had this to say:

> The mere fact that one had obtained an Exclusive Prospecting Order (EPO) under s90(2) of the Mines and Minerals Act does not in exempt them complying with section 97 (1) of the EMA Act. It follows that the respondent conducted the mineral prospecting in violation of the law.[75]

He further noted that exploration had the potential to cause harm to the environment. The importance of this case with regards to EIA is aptly captured by Mitsi when he noted that:

> [t]he statement by the judge with regards to the requirement for EIA before commencement of mining related activities should be closely looked at by mining companies as an indication of how the judiciary is likely to look at future cases brought on an urgent basis for interdicts. Mining companies should make efforts to comply with environmental legislation as they invest in the mining sector. Failure to comply may delay projects or affect their projects leading to financial loss. The case is a flashpoint on litigating environmental rights and mining rights.[76]

Similarly, in the case of *Fidelis Chima and Zimbabwe Environmental Law Association v. Zimbabwe Zhongxin Mining Group Tongmao Coal Company (Pvt) Ltd and Others*[77], the court upheld the need to conduct an EIA and obtain a certificate before carrying out mining activities that include exploration, prospecting, and drilling in the Sinamatella Camp of Deka Safari Area within the Hwange National Park. The respondents had obtained a Special Mining Grant and had commenced exploration without an EIA certificate as required by the EMA Act.

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[73] *See Debsham (Private) Limited* v. *The Provincial Mining Director for Matabeleland South and the Provincial Mining Director for Matebeland North and Others*, HB 11/17, HC 538-16, 2017.
[74] *See Shangani Holistic (Pvt) Ltd* v. *Pearline Mineral Exploration (Pvt) Ltd*. , HH 4074/22, 2022.
[75] *Shangani Holisitic (Pvt) Ltd v. Pearline Mineral Exploration (Pvt) Ltd*
[76] S. Mtisi, 'Environmental Impact Assessment at the Mining and Environmental Litigation Flashpoint', *Africa Institute for Environmental Law* (2022).
[77] See *Fidelis Chima and Zimbabwe Environmental Law Association* v. *Zimbabwe Zhongxin Mining Group Tongmao Coal Company (Pvt) Ltd and Others*, HH 4888/20, 2020.

In the *Hillside Residents Association v Glorious All Time Functions (Private) Limited and Others*[78] case, the applicant wanted to establish/build a function or a wedding venue on a wetland without an EIA certificate. In granting the order to stop the construction of the venue without EIA certification, the judge exemplified that the applicant Hillside Residents Association was representing the public interest, specifically residents' rights to protection of Harare's natural resources in terms of section 73, 77 and section 4 of the Environmental Management Act.

Such cases also help to promote the concept of sustainable development. More often than not, projects have been approved based on economic considerations at the expense of the environment. In some cases, a cost-benefit analysis through a Strategic Environmental Impact Assessment (SEIA) may show that it would be better to not proceed with the project taking into account the irreparable environmental and ecological damage that it would cause.

7.3 Precautionary Principle

The precautionary principle is aptly demonstrated in the case of *The Cosmo Trust and Others v. City of Harare and Others*.[79] The case pertained to the awarding of a development permit by the City of Harare for the construction of 121 clusters houses on part of stand within a wetland called Meadows of Monavale which attracts a range of birds and mammals. It was argued during the hearing that the wetland attracts a diverse range of migratory birds from as far as Europe, Cameron, Kenya and the Democratic Republic of the Congo for breeding purposes. However, there were no scientific studies that determined what attracted these birds to this wetland. In that case, Justice Mandeya relied heavily on the Ugandan case of *Amooti Godfrey Nyakaana v. National Environmental Management Authority and 6 Others*[80] to provide an understanding of the concept of the precautionary principle. He noted that the precautionary principle alongside the polluter-pays principle is at the core of the concept of sustainable development. He defined it as requiring the State to anticipate, prevent and attack the causes of environmental degradation. Consequently, where there is a serious threat of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

In this case, all the parties agreed that the proposed area for the construction of the housing units was a wetland. However, the scientific studies that had been conducted were not clear on the potential impact of the construction of houses on the wetland and the bird habitat. The court correctly reasoned that this was a proper case for the application of the precautionary principle as allowing the project could result in massive degradation and irreparable destruction of the wetland thereby affecting the bird habitat and the natural water processes performed by a wetland.

The same reasoning regarding the precautionary principle was applied in the case of *Munyaradzi Mutsai and Others v. City of Harare and Others*.[81] This case was concerned with the construction of Rhodesville Holding Bay. The respondents argued that the holding bay was not being constructed on a wetland. The court held that "in the absence of any scientific

[78] *See Hillside Residents Association* v. *Glorious All Time Functions (Private) Limited and Others*, SC 327/19, 2019.
[79] *See The Cosmo Trust and Others* v. *City of Harare and Others*, AC3/19, 2019.
[80] *See Amooti Godfrey Nyakaana* v. *National Environmental Management Authority and 6 Others*, CA 5/11, 2011.
[81] *See Munyaradzi Mutsai and Others v. City of Harare and Others*, HH 835/17, 2017.

certainty that the Holding Bay is not being constructed on a wetland, it is prudent to err on the side of caution by granting a provisional order"[82]. The court's reasoning in these two cases on the precautionary principle is admirable and is comparable to the reasoning by the court in the South African case of *Fuel Retailers Association of Southern Africa v. Director General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga and 11 Others*.[83]

7.4 Public Participation and Access to Information

One of the ways of promoting environmental rights is through access to information and encouraging public participation. In their rulings, the courts have tried to promote both publication participation and access to information. The cases in which projects have been stopped because of failure to carry out an EIA before their commencement, promote public participation and access to information. During the EIA process, interested and affected stakeholders are consulted which contributes to a participatory policy and decision-making process related to environmental rights. Stakeholders also have the opportunity to object to projects during the EIA process. The EIA process also provides access to information as provided for in section 62 of the Constitution and section 4 of the Environmental Management Act. During that, EIAs stakeholders are informed about projects that they may not be able to know about in the absence of an EIA. With this vital access to information, they are able to participate effectively in the policy and decision-making process and hold duty bearers accountable for the violation of their environmental rights.

In the case of *Community Water Alliance v. Environmental Management Agency and Minister of Environment, Tourism and Hospitality Industry*,[84] the Community Water Alliance, an organisation with vested interests in service delivery and the right to water which relates to the preservation of wetlands, tried to gain access to EIA reports from the Environmental Management Agency. While unsuccessful, this was an attempt to promote accessibility of information as provided for under section 4 of the EMA Act and section 62 of the Constitution. They were challenging section 108 of the Environmental Management Act which restricts members of the public from making copies or reproducing copies of the EIA reports. They argued that this restriction infringed the right to access information that is provided for under the Constitution. They further argued that the provisions of SI 7 of 2007[85], which required the payment of 3000 Zimbabwean dollars to gain access to the EIA reports for inspection, also effectively limits the access to information. The applicant was seeking a declaratur to have section 108 declared unlawful and inconsistent with the constitutional provision on access to information and SI 7 of 2007 to be ultra vires section 62 of the Constitution. The court ruled as follows:

> a) Section 180 of EMA was held to be ultra vires section 62 to the extent it prohibited the reproduction in possession of EMA and was therefore null and void
> b) Members of the public were allowed to make inspections on the machine-readable record and make notes of the Environmental Impact Assessment report and copies thereof

[82] *Ibid*., p.129.
[83] 2007(6) SA 4 (CC)
[84] *See Community Water Alliance* v. *Environmental Management Agency and Minister of Environment, Tourism and Hospitality Industry*, HH258/19, 2019.
[85] *Environmnental Management (Environnental Impact Assement and Ecosystems Protection) Regulations , 2007.*

> c) The Ministry of Environment, Climate, Tourism and Hospitality Industry was ordered to take reasonable measures to review the fees in line with reasonable standards to promote rather than impinge access to information.[86]

The decision by the court is a remarkable judgment of our time in the environmental justice sector. It is progressive and vindicates fundamental rights that are provided for under section 62 of the Constitution.[87] Access to information is a key anchor for effective public participation and a lack of it results in speculations, mistrust and, at times, conflicts.

Cases such as *The Cosmo Trust, Shangani Holistic (Pvt) Ltd v Pearline Mineral Exploration (Pvt) Ltd, RCM (Private) Limited v Petrotrade and Debshan (Private) Limited v The Provincial Mining Director Matebeland South and Others* must also be viewed from this perspective of promoting access to information.

7.5 Locus Standi

Before the adoption of the 2013 Constitution, one of the major drawbacks to promoting environmental rights as human rights was *locus standi*. Applicants were required to demonstrate that they had a direct and substantial interest in the case. This was meant to curb busy bodies who would bring cases to court for frivolous and vexatious reasons and a lot of cases were dismissed based on this technicality.[88] The respondents argued in this case that the applicants lacked *locus standi*, yet the judge ruled the contrary. While the judge made the correct decision on *locus standi*, he based it on international and foreign law. There was no need for that as the Constitution is very clear in terms of section 85 which provides for expanded *locus standi*. In this context, Dhlakama notes that:

> [w]hile it went at length to look at the interpretation of standing for an environmental organization in a foreign jurisdiction, the question could swiftly have been answered based on section 85 of the Constitution. The Constitution incorporates environmental rights in section 73. This right is clearly subject to the expanded locus standi provision just like all other rights within the Declaration of rights.[89]

7.6 Property Rights and Environmental Protection

Property rights is another opportunity that the courts have had to deal with the constitutional right to a clean and healthy environment that is not harmful to one's health. The Constitution provides for concrete property rights.[90] While property rights are fundamental rights, the courts have had the opportunity to apply the limitation of rights and freedoms clause provided in section 86 of the Constitution with regards to property rights to promote environmental rights as human rights. This was very evident in the case of the *Cosmo Trust and Others v City of Harare and Others*.[91] In that case, Justice Mandeya relied heavily on the Ugandan case of

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[86] *Community Water Alliance and Anor v. City of Harare and Anor , HH 194-20*
[87] R. Ncube, '*Case note – Community Water Alliance v Environmental Management Agency HH 258/19', 2019,* <zela.org/case-note-community-water-alliance-vs-environmental-management-agency-hh-258-19/> (accessed 24 january 2023).
[88] Dhliwayo, *supra* note 63.
[89] T.Dhlakama , J.Tsabora and M.Dhliwayo,'*Harare Wetlands Trust and Newlands Residents Association v. Life Covenant Church and Others*:A commentary on Wetlands Conservation v Physical Development in Zimbabwe', 2020, <zela.org/download/harare-wetlands-trust-and-newlands-residents-association-v-life-covenant-church-and-others-a-commentary-on-wetlands-conservation-versus-physical-development-in-zimbabwe/> (accessed 24 January 2023).
[90] Government of Zimbabwe, *supra* note 3, Section 71.
[91] *See Cosmo Trust and Others* v. *City of Harare and Others*, SC 172/19, 2019.

Amooti Godfrey Nyakaana v National Environmental Management Authority and 6 Others. With regards to property rights and the environment, The Chief Justice of Uganda noted as follows:

> A person cannot degrade a wetland and cause pollution to other citizens simply because he owns the land. This would defeat the whole purpose of the Constitution which requires that citizens may own land, but not cause pollution or degradation of the environment which may affect other people and the country as a whole.[92]

He further stated that "[t]he individual's interest must be viewed in the context of the larger interest of society as a whole and in the context of the Constitution and the laws made there under"[93].

Similar approaches of limiting property rights to promote environmental rights as human rights were used in the cases of *Harare Wetlands Trust and Another v. Life Covenant Church and Others*[94] and *Munyaradzi Mutsai and Others v. Harare City and Others*[95] respectively. In both cases, environmental rights triumphed over property rights.

7.7 Award of Costs

This awarding of costs against the losing party have been a big stumbling block for the promotion and protection of the constitutional right to a clean and healthy environment. The promotion of this right is dependent on an active civil society that is able to litigate on matters of public interest related to the environment even if they lost. It is through public interest litigation that courts are able to give scope and content to the constitutional environmental right. However, if punitive costs are awarded to those that litigate in the public interest in environmental cases when they lose, this will discourage future public interest litigation.

This principle was evident in the case of *Harare Wetlands Trust and Newlands Residents Association v. Life Covenant Church and Others*. The court ruled that the costs application were to be borne by the defendant. This award was based on the manner in which the defendant defended its case as it lacked evidence. The defendant argued that the area was not a wetland despite the fact that an independent consultant, hired by the defendant, clearly stated in its EIA report that the area was a wetland. In awarding the costs against the defendant, Justice Chinamora said that "[t]he first respondent cannot escape an exemplary order of costs in defending these proceedings. The applicants have been put out of pocket by having to deal with an opposition which lacks merit".[96]

This approach by the courts where by costs are not awarded against those that brings cases that are in the public interest, helps to promote Public Interest Litigation (PIL). Zimbabwe courts can also further learn from South Africa courts on the awarding of courts in public interest environmental litigation. Exemplary cases include *Silvermine Valley Coalition v. Sybrand van der Spuy Boerdrye and Others*[97] and *Hichange Investments (Pty) Ltd v. Cape Products Company Ltd t/a Pells Products and Others*.[98]

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[92] *Ibid.*
[93] *Ibid.*
[94] *See Harare Wetlands Trust and Another* v. *Life Covenant Church and Others*, HH819/19, 2019.
[95] *See Munyaradzi Mutsai and Others* v. *Harare City and Others*, HH835/17. 2017.
[96] *Harare Wetlands Trust and Anor v Life Covenant Church and Others , HH 819-2019, HC3440/19*
[97] *See Silvermine Valley Coalition* v. *Sybrand van der Spuy Boerdrye* and *Others*, (1) SA 478 (C), 2002.
[98] See *Hichange Investments (Pty) Ltd* v. *Cape Products Company Ltd t/a Pells Products and Others*, JDR00040, 2004.

7.8 Development of the Law by the Courts

The court judgements have also resulted in the development of environmental law. In the case of *Shangani Holistic (Pvt) Ltd v. Pearline Minerals Exploration (Pvt) Ltd* , the respondent argued that the applicant should have approached the Environmental Management Agency for relief support in stopping prospecting activities as an alternative remedy as provided under section 97 (3) of the Environmental Management Act. In dismissing the argument for an alternative remedy, the judge said that:

> The victim of the illegal exploration may well fold their arms, and wait for the Agency to issue the order referred to in section 97 (3) of the EMA Act. Such an argument is clearly unsustainable since a party, in the position of the applicant with all the massive investments at stake, would not choose to remain nonchalant while its rights were being trampled upon.[99]

Similar arguments of seeking an alternative remedy under the Environmental Management Act have been raised in the case of *Zimbabwe Environmental Law Association and Others v. Anjin Investments and Others.*[100] In that case, the plaintiffs wanted a declaratory order against the defendants who were discharging wastes into the Odzi, Singwizi and Save Rivers. The court rejected the arguments by the defendants regarding the need to exhaust remedies offered under the EMA Act pointing out that the High Court has the discretion to hear and offer relief when approached at the instance of an interested person.

These cases and the judgements by the High Court are help developing/advancing the law with regards to the constitutional environmental rights clause. One of the ways that rights are vindicated or claimed is through litigation including public interest litigation. Judgements such as these help stakeholders to develop trust in the law that assures them that when they approach courts for adjudication regarding violations of their environmental rights the courts are ready to hear their cases and where their rights have been violated, they will get remedy. One of the reasons for public interest in environmental litigation is to promote environmental justice and environmental jurisprudence. These two cases show that the courts are in the right direction.

The case of *Augur Investments v. Minister of Water and Climate and Environmental Management*[101] also encourages the advancement of environmental rights jurisprudence. In this case, the Minister of Environment declared an area a wetland through a general notice in terms of the Environmental Management Act. The applicant wanted the order to be declared a nullity. While the judge ruled in favour of the applicant by declaring it a nullity on the basis that the minister cannot declare a wetland outside of what is defined by the EMA Act as such, she made some observations that can be used to promote environmental rights as human rights. She observed as follows:

> It is hoped that the citizens of Zimbabwe will vigorously pursue and enforce their rights as provided in terms of the Environmental Management Act, lest we be judged and found wanting, by future generations, for failing to play our part in preserving and protecting the environment.[102]

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[99] *Shangani Holistic (Pvt) Ltd v Pearline Minerals Exploration (Pvt) Ltd, supra* note 74, p.6
[100] *See Zimbabwe Environmental Law Association and Others* v. *Anjin Investments and Others*, HH523/15, 2015.
[101] *See Augur Investments* v. *Minister of Water and Climate and Environmental Management*, HH278/15, 2015.
[102] *Ibid.*

This is an encouragement by the judge for stakeholders like communities and civil society organisations to litigate in pursuit of their environmental rights as provided under the EMA Act and the Constitution. The essence of the judge's point here is that the more stakeholders litigate, the more the courts will have an opportunity to give life and meaning to environmental rights as provided in the Constitution and EMA Act, through their judgements. Although Soyapiis critical of the judge in that this was an opportunity for the court to give meaning to the right to a healthy environment by interpreting the Act in detail which it failed to do[103], this must nonetheless be seen as a clarion call to public interest environmental litigation. Since the Augur Investment judgement, we have seen a steady increase on environmental litigation cases based on the EMA Act and constitutional provisions.

8 Ongoing and Proposed Legal and Policy Reforms

There are ongoing legal and policy reforms that present an opportunity to further strengthen the protection and promotion of environmental rights as human rights and fight the climate crisis. The ongoing legal reforms include the amendments of the Mines and Minerals Act[104], the amendment of the Parks and Wildlife Act[105]and the amendment of the Environmental Management Act[106]. Regarding climate change, the development of a Climate Change Act is in the process. The Climate Change Bill Principles have already been submitted and presented before the cabinet.

Concerning policies, the review of the Wildlife Policy of Zimbabwe and the National Forest Policy, present valuable/promising opportunities to establish clear policy directions on strengthening environmental rights as human rights and fighting the climate scourge.

9 Emerging Findings from the Analysis

From the analysis, several findings with regards to the protection and promotion of environmental rights and the fight against the climate crisis are emerging. These are reflected in the legal and policy developments and provisions, institutional provisions, and court judgements.

Firstly, it is evident that Zimbabwe has adopted a number of laws, policies and institutional frameworks since the 2013 Constitution that are aimed at advancing and promoting environment rights as human rights and addressing climate change. Concerning climate change, Zimbabwe's actions primarily focuses on policies that are specific to climate change such as the Climate Policy and the Zimbabwe National Climate Change Response Strategy. An evaluation of said policies showed that there is a recognition and understanding of the threats and risks that climate change poses to Zimbabwe' developmental ambitions as reflected in the NDSI. The responses include both adaptation and mitigation strategies. However, when it comes to laws, the response has been mainly through Statutory Instruments. While policies are needed, the next logical step for Zimbabwe to comprehensively deal with the human rights

[103] Soyapi, *supra* note 52.
[104] Government of Zimbabwe, Mines and Minerals Act Chapter 21:05, 2021, <www.veritaszim.net/sites/veritas_d/files/Mines%20and%20Minerals%20Act%20Cap%2021-05%20updated%20to%201%20August%202021.pdf> (accessed 23 January 2023).
[105] Government of Zimbabwe, Parks and Wildlife Amendment Bill, 2021. *See also* the proposed Principles to amend the Parks and Wildlife Act, Chapter 2014 of 1975.
[106] Environmental Management Amendment Bill (2021)

impacts of climate change, is to enact a Climate Change Act.[107] This is what Kenya, Uganda and Nigeria have done, with South Africa also being in the process of enacting one. Promisingly, momentum seems to be gathering in Zimbabwe towards the enactment of a Climate Change Act. Recently, the Minister of Environment, Climate Tourism and Hospitality Industry submitted a Memorandum to the cabinet on the Principles of The Climate Change Bill.[108]

Secondly, there are several institutions that have been put in place to advance environmental rights as human rights and address the negative impacts of climate change. However, while these institutions exist, there appears to be a general agreement that these could be improved through the establishment of a Climate Change Authority. Such an institutional body could be particularly valuable in an advisory role on climate change to conduct regular and specific commissioned reviews and research on climate change-related topics. Uganda has an Advisory Committee under its National Climate Change Law. Kenya has a National Climate Change Council. Therefore, as Zimbabwe works towards the enactment of a Climate Change Act, this is something that should be considered.

Thirdly, there is a general increase in environmental cases that are being brought before the courts, especially over the past five years, primarily focusing on wetlands and mining. Wetland cases are predominant in Harare spearheaded by Residents Associations while mining cases occur mainly in rural areas. Most cases are based on project proponents' failure to carry out an EIA before the commencement of projects. EIAs are a very important way of promoting environmental rights and the courts have generally ruled favourably in those cases where an EIA was not conducted. While the work by the judiciary in the last five years is commendable, it can further be enhanced through the establishment of specialised courts focusing on environmental crimes similar to other jurisdictions.[109] The Environmental Management Agency's Strategic Plan[110], advocates for the establishment of such a specialised environmental court.

Fourthly, while climate change is a big threat to the realisation of environmental rights as human rights, none of the cases assessed dealt specifically with climate change. Climate change is implied through section 73 of the Constitution and section 4 of the EMA. With the lack of a Climate Change Act, issues related to it are currently embedded into the right to a clean and healthy environment. However, a specific Climate Change Act can help to spur specifically tailored litigation. In South Africa, where there is currently no Climate Change Act either, litigants have nonetheless addressed climate change through the inclusion in the mandatory EIAs. In the South African case of *Earthlife Africa Johannesburg v. Minister of Environmental Affairs and Others*[111], it was argued that a climate change EIA was to be considered before the grant of an EIA certificate. A climate change impact assessment must be conducted before an environmental authorisation is granted. This aims to enable relevant decision makers to determine firstly whether the proposed activity, which was in this case the construction of a coal-fired power station, should be allowed at all. If allowed, this also ought to establish which

[107] M. Dhliwayo, 'The Urgent Need for a Climate Change Act in Zimbabwe', 2022, <zela.org/the-urgent-need-for-a-climate-change-act-in-zimbabwe/> (accessed 24 January 2023).
[108] *Minister of Environment, Climate, Tourism and Hospitality Industry, Honorable N.M Ndhlovu, MP " Memorandum to Cabinet on the Principles of the Climate Change Bill" (2021).*
[109] Africa Institute for Environmental Law , " Feasibility of the establishment of Special Environmental Courts in Zimbabwe",(2022).
[110] Republic of Zimbabwe, 'Environmental Management Strategic Plan 2021-2025',2020.
[111] *See Earthlife Africa Johannesburg* v. *Minister of Environmental Affairs and Others*,65662/16.

conditions and safeguards should be imposed to limit the GHG emissions that contribute to climate change.

10 Conclusion

From the analysis, it is evident that the Government of Zimbabwe has taken legal, policy and institutional measures to advance the protection and realisation of human rights that are provided for in the 2013 Constitution. After initial hesitation, there is evidence that the support and interest of stakeholders to vindicate the right to a clean and healthy environment that is not harmful to one's health has increased/grown over the past five years as reflected by the strengthening of environmental laws and policies as well as an increase in court cases, especially with regards to mining and wetlands protection. This contributes to cautious optimism among researchers and the broad public alike. While the courts are fulfilling their obligations to develop environmental jurisprudence, this can be greatly enhanced through the establishment of specialised environmental courts.

3 The Conflict Between Mining Investment and the Communal Land Rights of Indigenous Communities in Zimbabwe: Case Study of Nharira Hills

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Abstract

The chapter draws from section 10 of the Communal Land Act [Chapter 20:04] which allows the President to alter purposes of communal land usage. Under the country's second President Emmerson D. Mnangagwa, Zimbabwe envisions becoming a middle-income economy by 2030. This has led to rigorous diplomatic and economic re-engagement efforts with the global community. As such, foreign direct investments are a priority and mining has become a leading industry that is being exploited at an unprecedented rate to facilitate the country's expansion. This, however, has far-reaching consequences for indigenous land inhabitants such as the Nyamwenda of Nharira Hills who were evicted to pave way for mining by a Chinese company. Guided by the conflict theory, the chapter explores the consequences for human rights that such mining developments have, especially for local communities. Data was collected through multiple methods including desk reviews, documentary analysis, and key informant interviews, transect walks and observation. The Nyamwenda and Nharira communities at large experienced numerous losses largely of intangible socio-cultural value. While Zimbabwe enshrines most international human rights statutes in its Constitution, the Nharira case exemplifies a lagging position in terms of implementation. Without opposing economic development, the chapter proposes reconciliation of Acts of Parliament to the Constitution for sensitivity towards indigenous peoples' property rights. Further, the chapter proposes a clear implementation framework in terms of legal and administrative procedures in cases where land is reserved for mining activities. .

Keywords: Nharira, constitution, land rights, indigenous people, Chinese investments

1 Introduction

The chapter takes a socio-legal approach to analyse human rights consequences of mining developments in Zimbabwean communities. A special consideration of the case of the Nyamwenda of Nharira Hills located about twenty-four kilometres to the west of Harare towards Norton is hereby made. The Mwembe people of Moyo Ziruvi clan commonly known as the Nyamwenda of Nharira Hills are officially recognised as custodians of the Nharira heritage. The group was, however, forcefully evicted from their inhabited land to pave way for mining activities. In turn, the mining caused the destruction of the Nyamwenda's cultural and religious shrines among other socio-cultural artefacts. The community, therefore, bemoans a forsaking of the nation's history as evidenced through an escalating dearth of reverence towards traditional heritage sites and practices. Consequently, the community suggests that socio-economic ills such as droughts and diseases devilling the country are consequences of 'careless' decisions that forsake the nation's traditional values.[1] Beyond that, the key argument is that land constitutes a person's identity, and a separation is comparable to living without a soul. In a rather appalling manner, which numerous human rights conventions have sought to redress, the circumstances at Nharira are indicative of a perpetuating indigenous peoples' loss of a voice

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[1] Emphasis is added. This is in allusion to the conscious decisions made to advance economic merits over preservation of indigenous people's cultural heritage which is essentially of national significance.

and authority.[2] Unfortunately, these events continue despite the existence of a Constitution that advances indigenous people's rights including the right to property and enabling circumstances to prosperity.[3]

The purpose of this chapter is threefold. In the first instance, the chapter assesses Zimbabwe's adoption of regional and international human rights principles in respect of indigenous people's rights and economic developments. Next, an exploration of the human rights the Nyamwenda and Nharira community at large perceive to have lost because of the mining developments in their community is done in view of the law as it is. The paper aims to use those insights to provide recommendations that facilitate human rights-based futures for communities. Those are then put into relation with the often competing need for economic advancement. . Zimbabwe is celebrating a decade of its Constitution which came into effect in 2013. As such, this chapter is a contribution to the assessment of the country's progress in terms of implementation.

2 Background: A Land, History and Socio-Cultural Legacy – The Significance of the Nharira Hills

The Nharira Hills are a collection of independently standing hills. Despite the distances between them, the hills are conjoined by their historical, cultural and traditional religious uses. Studies have often suggested that the term Gwiranenzara Hills collectively refers to the Nharira Hills, alas, they are a collection. Each of the hills has its own name and cultural significance. Further, they have a complementary role in the performing of traditional rites. Namely, the hills are Gwiranenzara, Bvopfo, Chembudzi, Chikomo chaDzapasi, Chikomo chaMachembere, Gwendesu, Mafemera, Washamira, Ziware raMachembere, Zvingwere and Zvematura.[4] Gwiranenzara, Bvopfo and Ziware raMachembere have alternative names which are Gwiranemuzvo, Stonehearst and Sam Levy, respectively.

The hills have almost similar cultural artefacts and uses, and some are interconnected with each other through underground tunnels. Most known are the Somerby tunnels which interlink with the Chinhoyi caves.

The reigning chief of the Mwembe people of the Moyo Ziruvi clan, Chief Ziruvi took over following the death of his father the celebrated Chief Mushore and acclaimed spirit medium who dwelt amongst the Nharira Hills.[5] Chief Mushore is believed to have mostly lived in Bvopfo and Gwiranenzara whereas the latter is believed to be his final resting place.

The Gwiranenzara Hills were declared a national heritage site in 2000 but became a target of mining activities soon after the death of Chief Mushore. Out of respect, which extended to socio-political obeisance, Sekuru Mushore had derailed plans of an even earlier occupation at

[2] The chapter considers indigenous peoples as those with particular social and cultural practices and ancestral ties with their land.

[3] Government of Zimbabwe. *Constitution of Zimbabwe*. 2013, Section 282. <constituteproject.org/constitution/Zimbabwe_2013.pdf> (accessed 3 January 2023).

[4] On average, these are the hills that local interviewees could identify. This is significant in this chapter as it correlates to their perceived losses. There are other hills as suggested by Morreira and Illif (2021) and these are; *Chevakadzi, Chiburi, Chiturike, Chizhanje, Chemukoreka, Gnoriono, Marimizike, Maringapasi* and *Zvetsoko*. *See* S. Morreira and F. Iliff, 'Sacred Spaces, Legal Claims: Competing Claims for Legitimate Knowledge and Authority over the Use of Land in Nharira Hills, Zimbabwe', in A.S. Steinforth and S. Klocke-Daffa (eds.), *Challenging Authorities*, (Palgrave Macmillan, Cham, 2021). p. 301.

[5] *See* T. Chara, 'Stranger than Fiction. Revisiting Sekuru Mushore's mysteries', *The Sunday Mail*, 14 March 2021, Revisiting Sekuru Mushore's mysteries | The Sunday Mail> (accessed 20 September 2022).

Gwiranenzara. In the later turn of events even the periphery of Gwiranenzara Hills was occupied and active mining currently takes place. Besides the Gwiranenzara Hills being Sekuru Mushore's resting place, the Moyo royal ancestry are also buried in the caves. Additionally, artefacts of socio-cultural and economic value such as grains, jewellery, and pottery were also hidden in the secret tunnels.[6] As such, the hills are sacrosanct religious and cultural entities. Due to the perceived sacredness of these underground places, Chief Ziruvi acknowledged that he would only go there when summoned by the spirits, especially to Gwiranenzara.

Gwiranenzara which are synonymously called Gwiranemuzvo Hills also have *nharira dzemuzvo.* These are grains believed to have been stored away by the ancestors and the name strongly resonates with the hills' name. As applicable to other hills, this is reflective of a traditional Shona naming system that derives from a person or object's most special or outstanding attribute. Amongst other uses, the hills are used for traditional ceremonies such as *mukwerera.*[7] As the Nyamwenda peoples argue, the hills are not only crucial to the Nharira community but the entire nation. Despite the peoples' belief or appreciation of the traditional practices, the Nharira chief pleads for good rains and fortunes on the nation's behalf. Community members acknowledged that the rains are mostly abundant and harvests bounty even during the harshest farming seasons across the country. This has perpetuated the belief that such circumstances are due to observation of traditional rites particularly by the community's traditional leadership.

The history of the Nyamwenda reflects their dedicated custodianship of the Nharira Hills as religious and cultural sites. During the colonial era of the country in the 1960s, Sekuru Mushore had a gentleman's agreement with Ross Hinde the then legitimate white settler farmer at Saffron Walden Farm. The duo agreed that the former could have three months long stays once per annum to perform rain-making ceremonies in the hills.[8] Despite this agreement, a desire for permanent residency on the ancestral land caused Sekuru Mushore and his community to illegally settle on the farm. This was resisted through evictions and burnings of the huts of the illegal tenants by the colonial law-keepers. Post-independence, several developments ensued and these include the fast-track land reform programme, assessment and verification of the "cultural, historical and archaeological significance of the Nharira Hills. This saw the hills being gazetted a national heritage status in 2000 for purposes of protecting the burial sites, rock paintings, cave deposits and the grain bins."[9]

During the colonial era, the Nharira area was split into large commercial farms namely Rasper, Kilworth, Lilfordia, Saffron Walden, and Bardwell also known as Stonehurst. Post-independence, the Land Acquisition Act gazetted the fast-track land reform programme which saw white settlers being evicted. The farms were then divided into smaller plots for the national land settlement programme.[10] The land was redistributed to individuals and entities through official land offer letters, leases or permits and through this process, Sekuru Mushore obtained an offer for the Saffron Walden Farm. He also facilitated the issuance of offer letters to members

[6] Morreira and Iliff, *supra* note 4, p. 296.
[7] A traditional rain-making ceremony.
[8] Morreira and Iliff, *supra* note 4, p. 301.
[9] Morreira and Iliff, *supra* note 4, p. *306.*
[10] Chapter 20:10 which is now the Gazetted Land (Consequential Provisions) Act Chapter 20:28 in terms of Section 16B and Schedule 7 of the former Constitution (Constitution of Zimbabwe Amendment (No. 17) Act, 2005), and now Section 72(4) of the current Constitution (Constitution of Zimbabwe Amendment (No. 20) Act, 2013) and the Land Acquisition Act [Chapter 20:10] (now the Gazetted Land (Consequential Provisions) Act [Chapter 20:28]).

of his family and nominated community members for purposes of safeguarding other hills and performing cultural rites.[11]

The land reform programme created a scenario whereby sections of the Nharira Hills fell within different plots. The Mwembe people in question became residents of an area falling within Somerby Farm. The land remained communal land as it was not redistributed during the land reform programme due to its small size. They settled there in 2001 under Sekuru Mushore as custodians of the Somerby caves. It is from this location that in December 2018 the community was evicted and relocated to three hector settlements at Stonehurst Farm. The evictions were done to pave way for mining activities by Chinese-owned Berrytech Investments (Pvt) Ltd at Bvopfo Hills. The company first started in 2007 but had operations suspended after the community's outcry. Operations were later resumed in 2012 after the company was issued an Environmental Impact Assessment (EIA) by the Environmental Management Agency. By October of the same year, the company had started re-pegging. It was only at the beginning of 2019, after evictions of the Nyamwenda the previous December that the company began reconstructing a mine at the site.[12] This was not an isolated incident as other cultural custodians at sites such as Sam Levy and Kilworth were also evicted. The Ministry of Mines has allegedly continuously eluded providing information on issued mining rights. However, it is believed that mining claims have been granted for the entire Nharira area.[13] There is a general belief that the mining activities, which also led to the evictions of the Nyamwenda community, began after the partitioning of districts. This exercise transferred Nharira from Mhondoro North to Zvimba South District and later to Zvimba East District in 2000 and 2008 respectively. The community argues, in contrast, that the entire Nharira traditionally falls under the Nyamwenda jurisdiction. It is noteworthy that the traditional authority was transferred to Chief Zvimba and Beperere of the Gushungo clan after the administrative partitioning, allegedly, for political gain by the then President Robert Gabriel Mugabe.[14] As such, Chief Ziruvi lost his official recognition and was excluded from consultative protocols. He remains uninformed of developments in the community including mining trajectories at the periphery of Gwiranenzara which is a short distance from his residence. Further, it is alleged that following the community's initial outcry, the mining activities were continued out of need to honour existing relations between Zimbabwe and China. However, the operations were supposed to be ceased after the lapse of permits. Yet, the contrary occurred with the granting of widespread expansions. .

The Indigenous and Tribal Peoples Convention upholds respect and protection of cultures, spiritual values, land and territories.[15] A relationship with land constitutes identify forms of human beings yet, unfortunately, is often overlooked. [16]Increasingly, indigenous groups are threatened with being uprooted from their natural territories to pave way for economic advancements.[17]

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[11] Morreira and Iliff, *supra* note 4, p. 303.
[12] Ibid, p. p.303.
[13] Morreira and Iliff, *supra* note 4. p. 30.
[14] *Ibid.*, p. 310.
[15] *See* L. Swepston, 'Indigenous and Tribal Peoples Convention, 1989 (No. 169)', in *The Foundations of Modern International Law on Indigenous and Tribal Peoples* (Brill Nijhoff) p. 345..
[16] S. Weil, 'The Need for Roots: Prelude to a Declaration of Duties Towards Mankind' (Ark. New York, 1987). p. 43.
[17] Centre on Housing Rights and Evictions (COHRE) COHRE International Secretariat, 'Global Survey on Forced Evictions: Violations of Human Rights 2003-2006,' December 2006. < COHRE Forced Evictions Global Survey No.10 2006 by The Centre on Housing Rights and Evictions (COHRE) - Issuu > (accessed 12 September 2022).

2.1 Conceptual Framework

The chapter is guided by the conflict theory. The theory was first proposed by Karl Marx in 1848 and propounds issues of competition and structural inequality. A key argument of the theory is that due to competition for limited resources, society is drawn into conflicts and social order becomes obtainable through domination and power.[18] Instead of conformity and consensus, the theory explains how the vulnerable are suppressed. The Nyamwenda and Nharira community at large are feeble against the status quo which is enabled through the legislature. The loss of normal habitats impacts mental, psychological and spiritual well-being and this results in conflicts at an early stage. Further, cultural norms are eroded due to forced evictions and they are replaced by prescribed norms.[19] Accordingly, the Nharira case constitutes a typical example of how the absence of war and physical demonstrations does not imply peace. The theory explains influential and powerful actors prescribe outcomes in society through means often void of consent.

3 Methodology

Data was collected through a desk review, documentary analysis, legal analysis and extrapolation. Additionally, primary data was collected through key informant interviews with traditional leaders, in-depth interviews with members of the community as well as transect walks and observation which complemented narratives provided by the community. Participants in key informant interviews included the chief, a community member involved in traditional rites such as the *mukwerera* ceremony, a member of the Nyamwenda police and the evictees. Most informants were generous in their responses and provided a detailed history of the contestations over the land, losses and preferred future. The evictees were apprehensive and generally unwilling to disclose information. They unanimously suggested to engage the chief as he was the most suitable informant in terms of knowledgeability and authority. Having explained the importance of hearing their personal experiences and reiterating their rights as informants, the respondents mostly remained silent through a series of questions. This provoked questioning of whether "intimidations or violence often supported by the state" had occurred in this case of forced evictions.[20] The answer was not far as the experiences of force, threats and physical assault upon them had been well documented.[21]

Due to the limited responses that the relocated informants offered, each interview was a pertinent complimentary piece in generating a complete script from the displaced Nyamwenda. Interviews were then extended to indigenous locals who had an appreciation of the local affairs and who also had a relationship with the hills despite not having been displaced. While focus group discussions had been scheduled, the reluctance of participants regrettably led to the abortion of the planned data collection. As an alternative, additional interviews were conducted with migrant locals for an assessment of an outsiders' envisaged value of the hills. A tour with

[18] P. Kivisto (ed), *Illuminating social life: Classical and contemporary theory revisited*, (Pine Forge Press, 2011). p. 155.
[19] C. L. Robertson and S. J. Hoffman, 'Conflict and Forced Displacement. Human Migration, Human Rights and Science Health'. *Nursing Research*, (2014), <journals.lww.com/nursingresearchonline/FullText/2014/09000/Conflict_and_Forced_Displacement__Human_Migration,.1.aspx >, (accessed 21 November 2022).
[20] Amnesty International, 'Indigenous People,' 2022, <amnesty.org/en/what-we-do/indigenous-peoples/ >, (accessed 10 September 2022).
[21] Kubatana, 'ZLHR Challenges Eviction of Community Members from Sacred Heritage Site', *Kubatana.net*, 18 December 2018, <kubatana.net/2018/12/18/zlhr-challenges-eviction-community-members-sacred-heritage-site/ > (accessed 3 September 2022).

three participants, each from the respective categories (evictee, indigenous, and migrant locals) provided insights into spaces held dear and where possible, the extent of land degradation because of the mining activities.

4 The Lived Realities

The locals and affected Nyamwenda were particularly shocked by having had neither consultative engagements nor information about the land privatisation plans and scheduled evictions communicated to them. Yet, this was not even the culmination of the disrespect for the communities' right to be consulted as they later became aware of the administrative dissections of the land and consequently the newly presiding traditional leadership. Neither consultations nor notices before immediate evictions and consequent mining activities at the hills were issued to any member of the concerned community. All informants stated unanimously that they were solely given 24 hours to vacate their land and properties. . There was a heavy police presence and the Nyamwenda faced physical violence. In the absence of civil engagements, the entire process translates to forced evictions. As a common form of violence, forced evictions are coercive and aim to dislodge habitants from their housing or land whereas, typically, the evictees have little to no legal protection.[22] . From the list of characteristics that describe forced evictions, the following apply to the Nharira case: removal from dwellings against will, use of force, disregard of human rights obligations and action motivated by the need to pave way for mining activities.[23] There is a shocking lack of accountability considering the contradiction between the legal framework and what transpired at Nharira Hills. The sections below consider the legal consequences of the experience.

4.1 A Divergent Course from Conventions on Human Rights

The Nharira case reflects an ambush approach on community. Military studies reveal as a technique, ambush works to surprise, weaken, capture, or kill the enemy.[24] Supported by force through a show of power, the strategy psychologically disbands people and for the Nyamwenda, it caused submission and immediate relocation to allocated spaces. This was, however, after having spent a night directly exposed to elements of the weather as they were barred from accessing their homes.[25] In contravention of the protection of the United Nations Declaration for Human Rights (UNDHR), the action disregarded human dignity. The Nyamwenda were obstructed from the right to shelter, subordinated under force by the police and had no opportunity to access legal representation. Before considerations of the Nyamwenda community as an indigenous group, these basic human rights applied nonetheless based on simply being human.[26]

[22] UN Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No. 7: The right to adequate housing (Art.11.1): forced evictions', *CESCR*, 20 May 1997, <refworld.org/docid/47a70799d.html > (accessed 8 September 2022).
[23] *Ibid.*
[24] United States Marine Corps, 'Actions on the Objective – Ambush', *Marine Corps Training Command*, <benning.army.mil/Infantry/DoctrineSupplement/ATP3-21.8/chapter_08/CombatPatrols/ActionsontheObjective_Ambush/index.html#:~:text=6%2D102.,or%20an%20assault%20by%20fire > (accessed 5 September 2022).
[25] Kubatana, *supra* note 21.
[26] *See* UNDHR, Article 1 and Article 7.

The UNDRH emphasises equality, freedom from discrimination, human dignity, the right to remedy by a competent tribunal and non-interference towards the realisation of rights.[27] Amongst other conventions, developments at Nharira contravened the International Covenant on Civil and Political Rights (ICCPR)[28], the African Charter on Human and People's Rights (ACHPR)[29] and the Convention on the Rights of the Child.[30] The latter ought to ensure the consideration of the best interests of the child as a primary factor in all instances.[31] Regrettably, the state failed as children were among the evictees and slept outside their normal shelters which was a clear violation of the provisions of the Zimbabwean Constitution.[32] The interests of the child constitutes one of the four principal pillars for interpreting and implementing the children's rights. The events at Nharira represented an undeniable failure to uphold them.

To the Nyamwenda, not being priorly informed was as degrading as the evictions. One indigenous local commented, "p*ane kakubatena senge tisiri vanhu*wo (there is treatment of others as lesser beings)". The informant was not directly affected by the evictions, but, as a resident within an area with progressing mining developments, there was apprehension that a similar crisis would befall them. The lack of engagement, in this case, amounts to deprivation of an opportunity to participate. Indigenous people are already disproportionately more vulnerable to such infringements which is only worsened by poverty; a condition they commonly live in. [33]

There was an opportunity for participation through dialogue but this was circumvented. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and the national Constitution compel consultations between the State and concerned communities to ensure informed consent before initialising legislative or administrative measures that would affect concerned communities.[34]'

4.2 The Constitution and Implementation Frameworks

The Constitution of Zimbabwe is the supreme law of the country, and any opposing practices or inconsistent circumstances would be legally void.[35] The Constitution weaved into itself the United Nations fundamental human rights. As such, rights to dignified treatment, personal security, equality, right to property and non-discrimination are salient in the document.[36] Rural local authorities and traditional leaders are responsible for the administration of communal land guided by relevant Acts of Parliament.[37] In the case of privatisation of communal land; the Communal Land Act[38] and the Mines and Minerals Act[39] are respectively applicable.

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[27] *Ibid.,* Articles 2-3, 5, 8 and 30 respectively. These reiterate the need for equality and protection before the law, the right to property and the promotion of human rights..
[28] *See* Article 26 which asserts equity and equality before the law.
[29] Adopted by the second ordinary session of the Assembly of the African Union in Maputo on 13 September 2000, CAB/LEG/66.6; entered into force on 25 November 2005; ratified by Zimbabwe on 5 September 2008.
[30] *See* UNDHR, Article 3.
[31] Kubatana, *supra* note 21.
[32] *See* Government of Zimbabwe, *supra* note 3, Section 19.
[33] Amnesty International, *supra* note 20.
[34] *See* UNDHR, Articles 10, 15,17 and 19.
[35] Government of Zimbabwe, *supra* note 3, Chapter 1 (2) (1).
[36] *Ibid.,* Chapter 4, Part 1 (46) (1b).
[37] *Ibid.,* Chapters 14 and 15.
[38] Communal Land Act, Chapter 20:04, passed as Act 20 of 1982 amended 2016.
[39] Mines and Minerals Act, Chapter 21:05, Revised Laws of Zimbabwe, 1996, an Act to consolidate and amend the law relating to mines and minerals, Supplement to the Government Gazette, p. 659-752.

Communal land usage is limited to residential, agricultural, and pastoral purposes. The inhabitants of the land are mostly identifiable as a traditional community and have distinguishable land rights; either individually or collectively. The evicted Nyamwenda identified as a collective group religiously and culturally connected to the Nharira Hills. The rights of indigenous groups are enshrined in the Constitution which conditions that deprivation should only be in the interests of "[…] defence, public safety, public order, morality, health or town and country planning; or […] in order to develop or use that or any other property for a purpose beneficial to the community […]".[40] In case of change of land usage, those concerned should be issued a notice of intention to acquire the property, be compensated fairly as agreed between both parties and in case of any contestations, have an opportunity to be heard before the law.[41] The human rights enshrined in the Constitution were, therefore, not maintained in this case as the battle for legal arbitration only ensued after resettlement. Where evictions should be done or are inevitable, the Constitution requires that the process be "fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom".[42]

4.2.1 The Communal Land Act – Consequences for Inhabitants

The Constitution has a comparatively progressive position on human rights but the supporting instruments leave gaps for rather regressive outcomes. Communal land in Zimbabwe is governed under the Communal Land Act. The constitution describes communal land as "land set aside under an Act of Parliament and held in accordance with customary law by members of a community under the leadership of a chief".[43]

Under the Communal Land Act, authority over the land is vested in the President and managed on his behalf by responsible ministers and rural district councils. This means the President can declare when communal land ceases to be as such to pave way for other developments in the best interests of the country. Before the execution of any plans, the concerned Minister in his or her representative role of the President is mandated to consult with the rural district council under whose jurisdiction the land in question falls.[44] Traditional leadership in form of chiefs or village headmen have a co-dependant relationship with local government authorities in so far as communal land planning is concerned.[45] Accordingly, the State holds de jure ownership over communal land while rural communities and individuals exert de facto rights. A dweller on communal land does not have a title and can therefore, neither sell, mortgage, lease nor transfer the land. Usufruct rights in respect of agriculture, housing and pasture are awarded by local councils communities that have traditionally used the land in question[46] The Communal Land Act stipulates that the responsible Minister can set aside areas of communal land for respective developmental plans, engage the rural district council under whose jurisdiction the land falls and accordingly publish a notice in the Government Gazette.[47] The Act further provides the need to make the approved plans known to the people in the areas affected "[…] as appear to him [designated Minister] sufficient to disseminate the terms of the notice within the area of the land concerned."[48]

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[40] Government of Zimbabwe, *supra* note 3, Chapter 2 Part, Section 71 (3b).
[41] *Ibid.*, Section 3c.
[42] *Ibid.*, Section 86 (2).
[43] *Ibid.*, Section 332.
[44] *Ibid.*, Chapter 2, Section 8 (2) a1.
[45] Government of Zimbabwe, *supra* note 3 Section 8 (2) a-b.
[46] *Ibid.*, Section 8.
[47] *Ibid.*, Section 10.
[48] *Ibid.*, Section 10 (3) d.

The Act leaves fairness subjective to the authorities' discretion. As happened in the case of the Nharira, occupants of a communal property can consequently be presented with what amounts to an eviction notice without prior or adequate knowledge. Consequently, inhabitants are deprived of a timely opportunity to seek legal counsel and representation as per their constitutional rights.[49]

Considering the aforesaid, the grounds for legal contestation that due processes were followed in the case of Nharira are fertile. In so far as recalling state land concerns, the law is clear; it allows repossession of communal land and relocation of affected inhabitants as was done. Effectively, there is neither security nor communal land tenure rights in Zimbabwe. Communal land can be recalled when the state deems it necessary. This provision only exempts settlers by virtue of the Mines and Minerals Act.

4.2.2 Vision 2030 and the Mines and Minerals Act

The President of Zimbabwe, Emerson Dambudzo Mnangagwa, ushered in a re-engagement drive to mend and expand Zimbabwe's economic and diplomatic relations with the global community. Relations with the West in particular are historically marred by tensions on grounds of perpetration against human rights and regressive economic reforms.[50] These contested circumstances caused the country to be sanctioned with economic and diplomatic restrictions since the Mugabe era and these have been retained to date.[51] Upon ascension to the country's highest office, President Mnangagwa introduced his working mantra Zimbabwe is open for business. This was validated by the National Development Strategy (NDS1) 2021-2025, National Investment Policy (NIP) and Investments Guidelines and Opportunities in Zimbabwe (IGOZ). Collectively, NDS1, NIP and IGOZ are the blueprint towards attaining the Government of Zimbabwe's vision of an upper middle-income society by 2030. In the IGOZ, mining comes first among opportunities available for appropriation.[52] Irrefutably, the industry is lucrative and highly prioritised. This seems utilitarian given its 60 per cent contribution to export earnings and 16 per cent contribution to the national gross domestic product (GDP).[53] Besides the open call to the global community for business investments, China dominates the industry.

The Mines and Minerals Act was first introduced during the colonial era and has been in existence for a longer period than NDS1 and the NIP. The latter reinforce the Act into a powerful provision towards expanding and safeguarding mining interests in Zimbabwe.[54] A, communal land is entirely available for prospecting.[55] Communal land inhabitants have surface rights to land, even after discovery of minerals on one's household. Only those with mining

[49] *See* Government of Zimbabwe, *supra note* 3, Section 71.
[50] M. Musiwaro, 'Zimbabwe's Economic Meltdown: Are Sanctions Really to Blame?,' *The Washington Quarterly* (2021), p. 95.
[51] *Ibid.*
[52] Government of Zimbabwe, 'Investments Guidelines and Opportunities in Zimbabwe,' January 2018, <http://www.zimfa.gov.zw/index.php/media-centre/downloads?download=8:investment-guidelines-and-opportunities-in-zimbabwe>, (accessed 8 September 2022), p. 19.
[53] London School of Economics Consulting, 'Sustainability Impact Assessment in Support of Negotiations with Partner Countries in Eastern and Southern Africa in view of Deepening the Existing Interim Economic Partnership Agreement Case Study: Mining Sector in Zimbabwe and Madagascar', *London School of Economics and Political Science*. May 2021, <lse.ac.uk/business/consulting/reports/sia-in-support-of-the-negotiations-with-esa5 > (accessed 2 September 2022).
[54] Government of Zimbabwe, *supra* note 3, Section 10 (3) d.
[55] Government of Zimbabwe, *supra* note 3, Section 26 (a).

rights are entitled to conduct mining activities. It is worth noting that most people in Zimbabwe live on communal land. Consequently, the larger population are a vulnerable group in terms of land ownership and rights.[56] Miners have more superior land rights which leaves affected communal land dwellers up for eviction or co-existence with the miner. Where co-existence is considered, inhabitants under Communal Land Act should not infringe the miner's interests.[57] In the event that relocations are the best way forward, compensation respective to entitlements as provided in the Act through which land is occupied should be made[58]. Royalties from the mining are channelled to the State. There are no provisions for direct payments to communities but, the local authorities can receive payments from mining companies under directive of the Minister.[59]

5 Findings

Zimbabwe is celebrating ten years since the declaration of human rights through its Constitution of 2013. While the provisions for protection and further developing the scope of economic, social and cultural rights in Zimbabwe are upheld in the Constitution, the country still lags behind in terms of implementation. Research findings from the Nharira case reflect that economic, social and cultural rights largely remain endowed on paper. On the other hand, implementing statues such as the Miners and Minerals Act are segregational. We argue that in consideration of the law as it is, the evictions could have been lawfully executed. Further, we observe how human rights are typically disregarded in such processes. We also dispute the fairness of the prevailing legal provisions in view of how economic considerations are of higher regard compared to intangible components that define the socio-cultural grounding of the human existence. The existence of legal provisions that leave gaps for inequality implies an uneven turf of existence for humanity and this requires rectification. The following testaments from the Nyamwenda and Nharira community at large assist in bringing to light consequences of unnegotiated mining investments in communities.

5.1 Loss of Legitimate Traditional Leadership and the Shortcomings of Customary Law

The Nharira community considers political weaponisation of traditional leadership as one of country's biggest challenges. This is in view of the administrative dissections and appointment of illegitimate chiefs as the community does not recognise them. The general sentiment is that appointments should be done following the traditional norms of succession and the role of the State should only be to endorse those decisions.[60] Legitimate chiefs are argued to be more intimately appreciative of cultural and traditional demands of their geographical jurisdictions.[61] As such, in case of developments requiring mediations an honourable legitimate chief would consider his bestowed mandate to protect his people and the land. These sentiments are problematic given how traditional leadership is guided by customary laws. Customary laws are

[56] J. Nyoni, 'USAID Strategic Economic Research and Analysis – Zimbabwe (Sera) Program Land Tenure and Land Marketability in Zimbabwe: Policy Options and Recommendations', *Nathan Associates Inc (*2016), <pdf.usaid.gov/pdf_docs/PA00MDKB.pdf)> (accessed 2 September 2022).
[57] Communal Land Act, *supra* note 38, *Ibid.*, Part 3, Section 10 (3d).
[58] *See* Government of Zimbabwe, *supra* note 3, Section 12.
[59] Government of Zimbabwe, *supra* note 3, Part XV.
[60] O. Dodo, 'Traditional leadership systems and gender recognition: Zimbabwe', 1 (1) *International Journal of Gender and Women's Studies* (2013) p. 30.
[61] There are many cultural practices in Zimbabwe. Some practices are specific to certain groups of people while others are more widely practised. However, the values that underpin the way of life, particularly customs and traditions, vary between cultural groups guided by their traditional customs and traditional leadership.

rules developed from a people's customs and traditions practised since time immemorial.[62] In Zimbabwe, these laws remain largely unwritten.[63] The Constitution of Zimbabwe recognises African customary law where any unwritten law is also law.[64] The de facto circumstances are that in terms of land distribution indigenous locals should have preference.[65] Traditional leadership works with local authorities in the administration of districts in Zimbabwe.[66] Their rule does not necessarily subscribe to the formal boundaries of districts since numerous chieftainships can fall within one district.[67] In the unwritten state of the customary laws and competing roles for power and influence, customary laws are riddled by challenges of inadequate tenure thereby causing partial protection from the courts.[68] The inhibitive extent of the traditional leaders' roles, as provided in the Communal Land Act, perpetuate these circumstances.[69]

5.2 Loss of Socio-Cultural Identity

Despite the lack of a consultative process in the Nharira ordeal, the authorities made land relocation arrangements. The procedure lacked consent, the extent of readiness for immediate human occupation was questionable, and the intimate relationship between people and their ancestral land was largely disregarded. For the Nyamwenda, the hills in question directly connected them to their ancestors and were a site for related cultural and religious practices. It was for such purposes that they settled on the land in the first place since territoriality "provides a means of reifying power".[70] Indigenous inhabitants gain their strength from their land through the belief that the spirit of the ancestors buried in the land cares and protects their living descendants.[71] In turn, the descendants conduct religious rites in gratitude and honour of their ancestors.[72] Land is not just a place but a story place of ancestral history which defines and shapes a peoples' understanding of themselves.

The UNDRIP stipulates the rights of indigenous people such as full enjoyment, equality, security and self-determination whereby they can freely distinguish their cultural development among other provisions.[73] Further, the State is mandated to put in place effective mechanisms

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[62] Pfumorodze and Chitsove, *infra* note 66.
[63] *Ibid.*
[64] Government of Zimbabwe, *supra* note 3, Section 281 (1).
[65] I. Scoones *et al.*, 'Zimbabwe's land reform: myths and realities', *The Zimbabwean, 18 November 2010,* <ids.ac.uk/download.php?file=files/dmfile/zimbabwean3pdf.pdf> (accessed 2 September 2022).
[66] J. Pfumorodze and E. Chitsove, 'Update: The Law in Zimbabwe', *GlobaLex*. July/August 2021. <nyulawglobal.org/globalex/Zimbabwe1.html > (accessed 3 September 2022).
[67] T. Chigwata, 'The role of traditional leaders in Zimbabwe: are they still relevant?', 20 (1) *Law, democracy and development* (2016) p. 71.
[68] P. B. Matondi and M. Dekker, 'Land rights and tenure security in Zimbabwe's post fast track Land Reform Programme', *A Synthesis report for LandAct.* March, 2011, <humanitarianlibrary.org/sites/default/files/2013/08/Zimbabwe_RuzivoTrust_ASC_0.pdf> (accessed 6 September 2022).
[69] *See* Constitution of Zimbabwe, Section 10. Land governance in event of land repossession by the state largely remain the business of presiding Minister and local government.
[70] R. Sack (ed.), *Human Territoriality: Its Theory and History*, (Cambridge University Press, Cambridge, 1986). p. 32.
[71] J. Artikinson, 'Trauma Trails: Judy Atkinson', *Sharing Culture*, <Judy's Story - Sharing Culture>, (accessed 13 September 2022).
[72] M. Kickett, 'Examination of how a culturally appropriate definition of resilience affects the physical and mental health of Aboriginal people, Doctoral dissertation', *University of Western Australia, School of Population and Global Health*, 2012 <research-repository.uwa.edu.au/en/publications/examination-of-how-a-culturally-appropriate-definition-of-resilie > (accessed 13 September 2021).
[73] *See* UNDRIP, Articles 1-3.

that prevent or rectify any action that deprives indigenous people of their integrity as distinct peoples, of their culture, ethnic identities or seeks to dispossess them of their land.[74] While the country complies with international standards through its Constitution, implementation remains a challenge. For the Nyamwenda, the separation with the land effectively implied the creation of a void, a loss of true being which was replaced by mere existence as a body without a soul.

5.3 Vilification of Sacred Spaces

In the process of losing their identity through separation with the ancestral land, the Nyamwenda simultaneously lost the sacrosanctity of their lost dwelling place. The mining activities at the once sacred spaces extract grains of the soil that once held their traditional faith. The Nyamwenda had a revered and endearing approach to the hills as their sacred place of worship and the connection with their ancestors. Reverend speech was to be used always, artefacts or behaviour offensive to the indigenous traditional faith were not tolerated and delinquent behaviour was believed to bring bad omen to the assailant. With the commencement of the mining activities, it seemed also, these values were withered away. .

The reverence of the hills now seemingly only remains in the memory of the locals whereas some have even began questioning the religion and sacrosanctity of the hills. As apparent, the Chinese miners persisted despite having desecrated the sacred spaces in a deeply horrendous manner. One immigrant local suggested,

> […] *ndokwave kuitirirwa mabasa ose erima ikoko; vobva vasiya zvinhu zvavo imomo*
> (the hills are now undignified. They have become places for the works of darkness [implied sexual immorality] and lovers leave evidence of their immoral deeds there)
> […]. The miners break open the hills, level it out and dig further in leaving patches of hollow ground […]. Nothing is left unused, even quarry dust is used for making bricks and sold back to us […].

With such activities, the once perceived importance was eroded. In consequence of that, the land has allegedly become a hideout for adulterous lovers and thieves while it was once a sacred place of worship and ancestral presence. .

The interviewed migrant locals were mostly present as beneficiaries of the land reform programme or workers at the mines. Despite their direct economic benefit, they agreed that the community had more to lose as the mining did not directly benefit them in any way.

The Nharira community believes that the Chinese are deeply religious people who practice their own traditional and spiritual rites. Further, they believe that for their protection, the Chinese miners engage their ancestors and fumigate the hills through these traditional rituals. Such actions would then protect them from the consequences the subsequent mining activity could potentially bring upon them. Considering such views, the Nharira community bemoans the double-fold embarrassment the circumstances bring to the community and nation at large. In the first instance, the Nyamwenda had to pave way for the mining activities and next, in the battle of the ancestors, theirs were fumigated silent as there are no bad omens known to have befallen the miners. However, some incidences of supernatural activity are believed to have happened and caused suspension of mining activities at some sites, for example, at the heart of Gwiranenzara and Ziware raMachembere.

[74] *Ibid.*, Article 8 (2 a-b).

The reality at Nharira recalled the question of whether, supposedly in the event of discovery of precious minerals under the Great Walls of China, the Chinese themselves would tear down the walls to a grotesque and unredeemable state, particularly, by an enterprising foreign national. The question applies to other historically and culturally significant heritage sites such as the Pyramids of Egypt whose existence premise a spirituality comparable to that of the Nharira Hills. To answer this rhetoric question, the thought of how wars were started over comparatively less-worthy causes in the history of mankind came to mind.

In equal essence of how other heritage sites bear an analogous worth to their indigenous locals and countries, the Nharira hills are equally valuable to the Nyamwenda. Accordingly, there is a need for the State to be firm in preservation of the heritage sites in honour of its Constitution. On the contrary, there is an outcry over how the Nharira heritage sites were preserved during the colonial era only to be destroyed in the post-colonial. As the Constitution provides, there is a need for motivated efforts to preserve traditional cultures, heritage and sacred sites.[75] Economic pursuits undoubtedly bring income to the state coffers, however, balance is a necessity. A suggestion was made to preserve such heritage entities by law, with a breach by an individual or a State entity being accompanied by serious consequences.

5.4 An Embezzled Religious and Recreational Space

The Nharira community practices different religious beliefs as per every individual's constitutional right.[76] While the Nyamwenda and other community members are of an indigenous African traditional religion, the rest of the community belongs to various other religions, most often of Christianity. The use of the affected hills was not restricted to those of African traditional religion but, within customarily approved parameters, anyone could enjoy their existence. Individuals could simply walk to the hills for some air as comparable to a stroll in the park. In case of personal problems, one could go up the hills and tell them (the problems) to the ancestors or pray about it to their God. The hills proffered a space for individual worship, meditation and relaxation. Due to the mining activities the community at large lost a space of therapeutic and psychologically calming effect.

5.5 Lost Conservation Opportunities

The Nharira Hills are viewed as a gift. The community benefitted from them through fruits and firewood. It is noteworthy that use of aids, such as axes and wheelbarrows, was forbidden for the gathering of firewood. . Hands had to be used to collect firewood from the ground, break off branches from trees and carry the firewood back home. These values of conservation and sharing which informed such practices also prevailed for other provisions the hills gifted. In a fashion similar to how vilification of sacred spaces caused a shift of perceptions and attitude, the conservation opportunities that once prevailed because of reverence towards the hills were also lost. Further, the geographical location of the Nharira Hills is not beneficial either since it is situated between a high-density suburb of Harare and the town of Norton. . There is an ongoing challenge of dwindling household incomes, increasing cost of electricity and power cuts in Zimbabwe. Consequently, there is a spike in deforestation as people seek alternative energy sources. The traditional values that once helped with responsible extraction of resources are undermined.

[75] Government of Zimbabwe, *supra* note 3, Section 282.
[76] *Ibid.*, Section 60 (1).

The poaching communities are aware of the Nharira community police which is made up of members of the Moyo clan and their followers. They took it upon themselves to persecute perpetrators. The police is aware that some members view this exercise in mockery. Some members perceive such practises as absurd considering the severity of actions directed towards countrymen gathering firewood in direct comparison to the little counteraction towards miners who disregard the significance of hills, caves, shrines, ancestral graves and traditional artefacts. The local police has remained motivated to preserve what they can as the battle for recognition and conservation of their cultural heritage continues.

The circumstances that befell the Nharira Hills created a general apprehension within the community. There is grave concern of an imminent threat to the futures of other heritage sites and indigenous peoples' rights. This is in hindsight of the growing number of other contested mining investment cases. For example, Zhongxin Coal Mining Group and Afrochine Smelting were granted rights to prospect for minerals in the pristine area of Hwange National Park[77]. The case of granite mining in Mutoko by another Chinese company is also another contested issue and these examples are only a fraction of ongoing mining exploits across the country. [78] ParkOne informant suggested that, "we are in a difficult position as a nation […] because of financial gain, all these (cultural sites) are at risk […] it is not surprising that we will wake up one day and find even Inyangani Mountain under detonations".

6 Comparative Perspectives

The circumstances at Nharira are not isolated occurrences. The legal cases below present realities of higher considerations of economic expansions and continued struggles for preservation of traditional territories by marginalised groups.

6.1 Livison Chikutu and 2 Others v. Minister of Lands

A trio of the Hlengwe Shangani tribe, a Zimbabwean ethnic minority from Chilonga, Chiredzi applied to have sections 4 and 6 (1) (b) of the Communal Land Act declared unconstitutional. This was in a bid to interdict the commercial production of lucerne grass[79] which would cause the relocation of 13 840 Indigenous Shangani people from their indigenous land spanning 12940 hectares.[80] The applicants argued that the land in question was their ancestral heritage from time immemorial, as such, they sought a departure from the Communal Land Act that currently governed them. They stated that relocations undermined and violated the rights to human dignity, property, equal protection, culture and heritage. Further, no consultations had initially been done and at a later point when conversations were initiated, a consensus could not be reached. In making a ruling, the judge argued that land was invested in the President by virtue of his powers provided to him for purposes of development. While the lack of consultations remained a fact, that did not warrant constitutional determination. Further, spans of land would be left for the people's habitation. As such, the case was dismissed.

[77] J. Watts, 'Chinese mining firms in Zimbabwe pose threat to endangered species, say experts', *The Guardian*, 3 September 2020, <theguardian.com/world/2020/sep/03/chinese-mining-zimbabwe-pose-threat-endangered-species-hwange-national-park>, (accessed 13 September 2022).
[78] Mining Zimbabwe, 'Chinese companies fall short of CSR', *Mining Zimbabwe Magazine Issue 58.* 26 April 2022, <miningzimbabwe.com/chinese-companies-fall-short-on-csr/ > (accessed 13 September 2022).
[79] J. Tarusarira, 'The grass versus the people: Sacred roots of environmental conflict in the Chilonga communal lands in Zimbabwe', 6 (1), *Zeitschrift für Religion, Gesellschaft und Politik* (2022), p. 72.
[80] D. Mavhinga, 'Chilonga Evictions Show Government Insensitivity', *Zimbabwe Independent*, 12 March 2021, <hrw.org/news/2021/03/12/chilonga-evictions-show-government-insensitivity >, (accessed 8 September 2022).

6.2 Green Fuel Company v. Chisumbanje Community

The *Chisumbanje* case involves forced evictions to pave way for Greenfuels Company's bio-fuel project. The evictions were forcefully conducted. Villagers under Chief Garahwa reported of beatings and being barred from the land by armed security and dogs.[81] The company later tried to engage the community but that was marred by conflict. An affected informant in Chisumbanje suggested the need for a more human approach through consultations with the community from the onset and queried:

> How do you expect us to accept a deal that is imposed on us and further displaces us while at the same time ignoring our livelihoods and cultural concerns? I am not entirely opposed to the project but I am just not happy with the process as the government failed to engage us during the project inception. It is not fair to us, since we have built a history in this community and we cannot just pack and leave it behind just like that.[82]

In case of any land contestations and evictions, a lack of consultations equals the absence of free and informed consent.[83]

In the *Chisumbanje* case, the project initially started in the 1960s to capacitate the then colonial government's irrigation project at their Agricultural and Rural Development Authority (ARDA) farm. The project did not commence due to escalated inflation and budgetary constraints.[84] Through the present-day Build Operate and Transfer (BOT) agreement with private investors for a period exceeding 20 years, the project required about 40 000 hectares of land for expanded sugar plantations and ethanol plant.[85] As a consequence of the US600 million project, 1754 households were displaced in 2008.[86] This occurrence was in line with the problematic notion of viewing land as a novel way for business deals and new profit opportunities.[87] As a consequence, farming opportunities that sustained the community were lost.

6.3 Satond Investment v. Munashe Shava

The overarching dominance of mining can be seen through *Satond Investment v. Munashe Shava* case.[88] The two co-existed on a piece of land and the applicant had mining rights whereas

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[81] C. Benard Chiketo, 'Green Fuel 'annexes' 500h of cotton, maize fields', *Nehanda Radio*, 13 December 2018, <nehandaradio.com/2018/12/13/green-fuel-annexes-500h-of-cotton-maize-fields/> (accessed 5 September 2022).
[82] C. Mandihlare, 'Large Scale Acquisition and its Implication on Rural livelihoods: The Chisubanje Ethanol Plant Case-Zimbabwe. A Research in Partial fulfilment of the requirement for obtaining the degree of Master of Arts in Development Studies', *International Institute of Social Sciences*, <academia.edu/68423481/Large_Scale_Land_Acquisition_and_Its_Implication_on_Rural_Livelihoods_The_Chisumbanje_Ethanol_Plant_Case_Zimbabwe > (accessed 29 August 2022).
[83] P. Zamchiya *et al.* 'The silent dispossession of Customary Land Rights holders for urban development in Zimbabwe', *Institute for Poverty, Land and Agranian Studies*, 21 June 2021, <plaas.org.za/the-silent-dispossession-of-customary-land-rights-holders-for-urban-development-in-zimbabwe/> (accessed 18 September 2022).
[84] E. K. Makombe, "I Would Rather Have My Land Back": Subaltern Voices and Corporate/State Land Grab in the Save Valley', *The Land Deal Politics Initiative*. February 2013, Microsoft Word - LDPI WP 20 (iss.nl))>, (accessed 16 September 2022).
[85] P. Mutopo and M. Chiweshe, 'Large-scale land deals, global capital and the politics of livelihoods: Experiences of women small-holder farmers in Chisumbanje, Zimbabwe', *International Journal of African Renaissance Studies-Multi-, Inter-and Transdisciplinarity*. (2014) p. 94.
[86] E.K. Makombe , *supra* note 84.
[87] P. Mutopo and M. Chiweshe, 'Large-scale land deals, global capital and the politics of livelihoods: Experiences of women small-holder farmers in Chisumbanje, Zimbabwe', *International Journal of African Renaissance Studies-Multi-, Inter-and Transdisciplinarity*. (2014) p.98.
[88] *Satond Investments (Private) Limited* vs. *Munashe Shava*, High Court of Zimbabwe (HH 336-18, 2018), (18 May 2018 and 20 June 2018).

the defendant was a farmer. The case circumstances are that the defendant instructed his employees to farm on a land within the miner's jurisdiction thereby disturbing the miner's operations. The court considered the miner's superior land tenure rights, as such, a ruling in favour of the applicant was made in terms of Section 22 of the Mines and Minerals Act. To avoid any doubt, Section 179 of the Act was alluded to in the ruling. The section stipulates that a landowner had inferior rights to a miner's which is why the defendant had to exist without infringing Satond Investment's rights.

*6.*4 Shangani Holistic v. South African Pearline Mineral Exploration Firm

In line with the country's Vision 2023, this case reveals how a bias towards economic pursuits generally impacts the status quo. The Oppenheimer family, through their company Shangani Holistic was granted a court interdict that protected its cattle ranch from exploration by the defendant. The family acquired and inhabited the land in 1937. They were not affected by the land reform evictions of white settlers. It has been widely argued that the request was granted on the basis of their political relationship with the former President Robert Mugabe, economic merits of their existence and recognition of the property as their natural home after a 63 year long stay.[89] The same economic merits worked as well in the legal case against Pearline Minerals. In carrying out the ruling, it was considered that a huge herd of cattle would have to be relocated, the export supply of beef disturbed, retrenchment of some farm workers would be inevitable and children would be uprooted from their school at the farm. In contrast to the Nyamwenda who sought the preservation of graves and pottery that is of cultural significance as well as shrines for religious practices respective to their small community, the Oppenheimer case had grounded economic merits. As such, the interdict was granted despite arguments that the stretch of the farm was rich in diverse minerals including gold, copper, graphite and lithium.[90]The rulings above are indicative of how mining and large-scale economic pursuits are of higher recognition over other smaller economic pursuits as demonstrable in the *Munashe Shava c*ase. The bias also overlooks how land is a form of social identity and basic subsistence as in the *Chisumbanje* case. The uneven considerations ignore how land is a traditional and religious symbol that interconnects people to their faith and heritage as in the Nharira and Chilonga cases.

7 Recommendations

The crisis being brought about by mining developments in Zimbabwe is not an isolated phenomenon. Mining investments are a growing concern across the globe and efforts to address human rights issues within affected communities have become more pressing considering the growing plight.[91] We approach the law as it is in making recommendations. Presently, the law

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[89] L. Ndebele, 'Oppenheimer family goes to court to block mineral exploration at their Zimbabwe cattle ranch', N*ews24,* 3 July 2022, <news24.com/news24/africa/news/oppenheimer-family-goes-to-court-to-block-mineral-exploration-at-their-zimbabwe-cattle-ranch-20220703#:~:text=Podcast-,Oppenheimer%20family%20goes%20to%20court%20to%20block,at%20their%20Zimbabwe%20cattle%20ranch&text=Nicky%20Oppenheimer.&text=A%20court%20has%20stopped%20a,owned%20by%20the%20Oppenheimer%20family.>, (accessed 13 September 2022).

[90] *Ibid.*

[91] The Economic, Social and Cultural Council (ECOSOCC) of the African Union, 'Making the Kampala Convention work for IDPs. Guide for Civil Society on supporting the ratification 31 and implementation of the Convention for the Protection and Assistance of Internally Displaced Persons in Africa.' *Africa Union*, July 2010, <internal-displacement.org/sites/default/files/publications/documents/2010-making-the-kampala-convention-work-thematic-en.pdf> (accessed 21 November 2022).

permits the change of purposes of land usage and limits property rights.[92] These provisions leave gaps that contradict provisions of the Constitution. Accordingly, the recommendations are not based on the absence of the law but need for implementation frameworks that can sustain values of equality and fairness. In hindsight, this can be noted in most African countries with adequate laws that are rendered insufficient due to the political culture of impunity. [93] Some state officials, powerful politicians and other influential persons are perpetrators of human rights but often untouchable. However, as a signatory to the Kampala Convention of 2009 on internally displaced people, the country can enhance and catalyse efforts for mainstreaming indigenous people's rights in its economic developmental agenda. This can be achieved through inclusion and participation of earmarked and displaced persons. In the first instance, this begins with obtaining consent of those to be relocated. The beneficiation and protection of communities can come through deliberate consultative efforts by authorities. In the case of the Nharira, there exists widespread concern over neglect due to a lack of consultative processes and accessibility of authorities. While they fail to support affected communities, they are also inaccessible when community leaders seek their audience.

In the case of the Nharira Hills, a consultative process would have influenced a community-informed solution and negotiated relocation plan. As they argued, the community would have assisted in crafting a mutually-beneficial arrangement that advanced economic advancements while also preserving their cultural heritage and human rights. Yet, this was made impossible due to the Ministry of Mines' decision to refrain from being transparent on the magnitude of issued claims.[94] Such information would present an opportunity for authorities, including national museums and monuments and local councils to work together in safeguarding national heritage and the indigenous peoples' rights.

Zimbabwe is advancing the component of concerned persons' consent through the Mines and Minerals Act Amendment Bill. This position will improve the protection of the rights of communities. It will also improve the protection of the rights of communities. As such, we propose catalysed processing of the matter so that it speedily becomes law. In the meantime, a moratorium on all evictions to ensure the protection of indigenous locals' rights would be necessary.

The Nharira community expressed a need for authorities to show that they car. Communities are strong critics even in their eco-socially inferior positions. The community expressed that in the event of officials evidencing of sensitivity towards community needs, confidence in the systems, good governance and good will could be resuscitated. The general sentiment in Nharira made an imprint that every circumstance could be amicably resolved but required both authorities and communities to be intentional about achieving that goal.

A clear implementation framework is also invaluable as it would identify and mandate all responsible stakeholders including representatives of affected communities, government ministries and investors to encourage an agreed course of action. Further, clear channels of communication, a transparent case progression, and a tracking system would be necessary. The platform can be live for the duration of the mining activity until post-mining assessments and remedial action where necessary is carried out.

[92] Government of Zimbabwe, *supra* note 3, Section 71 (3).
[93] ECOSOCC, *supra* note 91.
[94] Chara, *supra* note 5.

For effective consultative processes and the protection of rights of communities, the role of the civil society cannot be over emphasised. As the State cannot audit itself, there is a need for engagements based on good faith with international, humanitarian and civil society organisations. The Kampala Convention recognises the role these stakeholders play in respective phases of displacements and beyond. Apart from financial resources, their expert and technical involvement in negotiations and planning is invaluable.[95] While relations between the State and civil society in Zimbabwe have been tense over the years, success stories have been registered in some interventions such as education, humanitarian aid during disasters and rights for vulnerable groups such as children and people living with disabilities. It is urgently needed that communities scheduled for internal relocations due to economic developments as equally, be recognised as vulnerable groups whose rights require dedicated interventions in Zimbabwe. Communities directly bear environmental and socio-cultural hazards associated with industries such as mining.[96] As such, agreements attached to conditions of issuing a mining license should mandate social corporate responsibility. Further, for added security, transparency and accountability; agreements between mining entities should be entered into for a direct share of royalties with the hosting community. Information of such agreements should also become public so that communities, through their traditional leadership, local government authorities and the legislative arm of the State can hold the miners accountable.

8 Conclusion

This chapter has argued for the urgent need to find a balance between economic pursuits through mining and preventing intangible losses caused by evictions from communal land. This goal can be achieved through consultative processes that ensure consent, compensation and preservation of the human rights of local communities. In sum, an open, meaningful and participatory approach that involves all concerned stakeholders including miners, legitimate traditional leadership, community, non-governmental organisations, respective ministries and local authorities, is necessary. In line with various conventions the country subscribes to, implementation of respective recommendations would assist in the country's efforts to plug the prevailing gaps and effectively implement respective constitutional mandates.

[95] ECOSOCC, *supra* note 91.

[96] "physical and economic displacement, criminal activity, social dislocation, inflationary pressures, impacts on services such as health, education, water, sewerage, communicable diseases, and gender-based violence *etc.*, as well as and environmental impacts such as dust, erosion, vibration, and noise and water pollution", *See* G.L. Smith and L. Brooks, 'Incorporation of the socio-cultural dimension into strategic long-term planning of mineral assets in South Africa', *118*(4), *Journal of the Southern African Institute of Mining and Metallurgy,* (2018) p. 331.

4 Article 5 of the Maputo Protocol and Ten Years of a New Constitutional Order: An Assessment of Child Marriages in Zimbabwe

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Abstract

Article 5 of Maputo Protocol sets a concrete yardstick for effective eradication of child marriage in Zimbabwe, and the rest of Africa. Despite several attempts to implement Article 5 of the Maputo Protocol, child marriage remains a clear infringement of human rights of girls. In 2013, Zimbabwe enacted a new Constitution with a comprehensive Declaration of Rights that guarantees the rights of women and girls was enacted. Further in May 2022, the government of Zimbabwe promulgated Marriages Act (Chapter 5.15) to harmonise various types of marriages and criminalise child marriage. This paper explores the potential efficiency of this Marriages Act in curbing child marriages in Zimbabwe to fulfil the spirit of the Maputo Protocol. It discusses the adequacy of this law to curb child marriage as a way to give effect to Article 5 of the Maputo Protocol in face of other non-legal drivers of child marriage in Zimbabwe. It has been observed that although there is a myriad of harmful practices against girls and women still existing in Zimbabwe, child marriage is among the most significant harmful practices which have thrived against a background of legal lacuna and misalignment of laws as well as cultural and religious value systems existing in Zimbabwe. The paper argues that efforts to eradicate child marriage should be predicated on solid legal framework and advocacy efforts targeting underlying cultural, religious, and socio-political factors contributing to the scourge of child marriages. The paper recommends adequate administrative and technical support and strategies that give full effect to the implementation of the recently enacted Marriages Act.

1 Introduction

Child marriage refers to a marriage in which either one or both contracting parties are below the age of 18 and said marriages can be entered voluntarily or involuntarily. While both men and women can be victims of child marriage, girls and women are disproportionately affected. Child and forced marriage have been identified by the Committee on the Elimination of Discrimination against Women (CEDAW) as one of the most pervasive forms of harmful practices perpetrated against girls and women.[1] These and other harmful practices have negative consequences for the physical and psychological health and infringe the socio-political rights of affected girls and their broader communities. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol) was adopted to protect women and girls' rights against discriminatory cultural practices.[2] In compliance with the Protocol, member states are obligated to eliminate all forms of discrimination against women and girls through appropriate legislative and institutional measures and commit to prohibit all forms of harmful practices which negatively affect the human rights of women and girls.[3] The Protocol provides for a comprehensive legislative framework as a basis for national laws and has been instructive to national and regional courts in the adjudication of cases. It is

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[1] CEDAW, 'Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child (2019) on harmful practices', 8 May 2019, CEDAW/C/GC/31/REV.1 - CRC/C/GC/18/Rev.1, p.7.

[2] Was adopted by the African Union in Maputo, Mozambique on 11 July 2003, and came into force on 25 November 2005.

[3] UNICEF, 'Early Marriage: Child Spouses', *Innocenti Digest No. 7*, <unicef-irc.org/ publications/pdf/digest7e.pdf> (accessed 15 September 2017).

thus, a useful tool to ensure that women's rights enshrined in the Protocol become a reality for women and girls in Africa.

Article 5 of the Protocol states that "States Parties shall prohibit and condemn all forms of harmful practices which negatively affect the human rights of women, and which are contrary to recognized international standards. States parties shall take all necessary legislative and other measures to eliminate such practices."[4] This wording and the language influenced the wording of the Constitution of Zimbabwe concerning the promotion and protection of women's rights especially from harmful cultural practices.[5] Section 80(3) of the Constitution provides that all laws, customs, traditions, and cultural practices that violate or infringe against the broader rights of girls and women are deemed void. [6] This constitutional provision gives effect to Article 5 of the Maputo Protocol that seeks to eliminate harmful cultural practices .The Protocol defines harmful practices as "all behaviour, attitudes, and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity".[7] This definition is unique to the Protocol as it not only includes acts that disregard the fundamental rights of women and girls but also *attitudes* towards women including mind-sets, opinions and ways of thinking. This is not only ambitious but also raises the question of what can realistically be regulated by laws and legal mechanisms. Harmful cultural practises primarily target women and girls in certain communities and are frequently considered and deliberately presented as established and valuable cultural traditions.[8] Harmful practices refer, amongst others, to child marriage, virginity testing, the appeasement of avenging spirits, and forced wife inheritance. These practices often extend beyond multiple generations and are continuously perpetuated.[9]

In Zimbabwe, the Constitution is the supreme law and nullifies all other laws, customs, and cultural practices that are inconsistent with its provisions. The national standard of human rights protection, cannot be compromised even in observance of traditional or cultural norms. In 2016, the Constitutional Court of Zimbabwe delivered a landmark judgment in relation to child marriage. The applicants, young women at the age of 18 and 19 years, applied to the Constitutional Court for a declaratory order that the Customary Marriages Act was unconstitutional in that it did not provide for a minimum age limit of 18 years. [10] It was also held that section 22 of then Marriages Act, Chapter 5:11[11] was unconstitutional as it permitted the marriage of girls under the age of 18 with parental or guardians' permission and provided that girls below the age of 16 require a Minister's permission to marry.

Despite this progressive court ruling, the protection of girls in Zimbabwe from harmful cultural practices remains highly insufficient. Discriminatory and prejudicial norms that are perpetuated across generations are deeply enshrined in religious and cultural norms which effectively

[4] African Union,'Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa', 1 July 2003, <au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-women-africa> (accessed 7 December 2022).
[5] *Ibid*, p.7.
[6] Constitution of Zimbabwe Amendment (No. 20) Act, section 80(3), 2013.
[7] African Union, *supra* note 4, p.4.
[8] Public Health Scotland, 'Harmful traditional practices', <healthscotland. scot/health-topics/gender-based-violence/harmful-traditional-practices#: ~:text=Harmful%20traditional%20practices%20are%20forms, forced%20or%20early%20marriage> (accessed 17 November 2022)
[9] *Ibid.*
[10] Constitution of Zimbabwe, *Chapter 5:11 Marriages Act (No. 1)*, <osall.org.za/docs/2011/03/Zimbabwe-Marriage-Act.pdf> (accessed 7 December 2022).
[11] This Act has since been repealed and substituted by Marriages Act, Chapter 5:15

maintains child marriage. Child marriage predominantly affects girls who live in low-income and rural communities. The prevalence of child and forced marriages oftentimes stems from a lack of education and widespread poverty. Zimbabwe has one of the highest rates of child marriage in Africa, with approximately 31 percent of Zimbabwean girls being married before reaching the age of 18 and 4 percent before they turn 15.[12] Early marriages frequently lead to premature pregnancies that pose numerous health risks for the girl child. In July 2021, a 15-year-old girl, who was married to a 26-year-old man, died giving birth inside a church which is only one example that sheds light on to the horrifying implications attributable to child marriage.[13] This is certainly not a sole incident but rather a representative case that points towards the reality of countless Zimbabwean girls.

This study reviews the continued occurrence of child marriage as an infringement of women and girls' human rights despite the progressive Constitution of 2013. The study recognises the significance of the promulgation of the new Marriages Act for curbing child marriage in an attempt to give effect to Article 5 of the Maputo Protocol. [14] It discusses the possible limitations and obstacles during the implementation of the law to give full effect to Article 5, especially in light of other non-legal drivers of child marriages in Zimbabwe. The study further proposes necessary administrative and technical support measures that may be necessary to facilitate the implementation of the Act to eradicate child marriages in Zimbabwe. Although the Maputo Protocol lists several practices that constitute harmful cultural practices, this study focuses solely on child marriage due to the scope of the paper.

1.1 The Maputo Protocol and Harmful Cultural Practices

The Maputo Protocol is a comprehensive document introduced to complement the African Charter on Human and People's Rights to protect and promote the women and girls' rights in Africa. The Protocol was designed to protect women in a more comprehensive manner than pre-existing instruments. Paragraph 11 of the Preamble explains that the adoption of the Protocol aimed to address the concern that "despite the ratification of the African Charter on Human and Peoples' Rights and other international human rights instruments by the majority of States Parties, […] women in Africa still continue to be victims of discrimination and harmful practices".[15] It is often argued that the Protocol should not be viewed as correcting normative deficiencies in international human rights law dealing with women's rights, but rather as a response to the lack of implementation of these norms'.[16] The Protocol focuses on gender inequality and abuse of women in order to provide legal and non-legal measures to protect them from violence, inequalities within marriages and during divorce as well as from discrimination in the education sector and the workplace. It further aims to extend protection to women concerning inheritance rights and counteract harmful practices such as child marriages and female genital mutilation.

Article 5 obligates state parties to take necessary legislative and non-legislative measures to eliminate harmful cultural practices. Such measures include public awareness campaigns in all sectors of society and the provision of comprehensive support for victims. Further, Article 6(c)

[12] African Union, 'The Republic of Zimbabwe Launches AU Campaign to End Child Marriage in Africa', 2 August 2015, <au.int/en/newsevents/20150802/republic-zimbabwe-launches-au-campaign-end-child-marriage-africa> (accessed 24 September 2022).
[13] https://edition.cnn.com/2021/10/11/africa/zimbabwe-church-abuse-intl/index.html
[14] Chapter 5:15 was announced in May 2022 and came into force on 16 September 2022.
[15] African Union, *supra* note 4, p.2.
[16] F. Viljoen, 'An introduction to the Protocol to the African Charter on Human and Peoples,' 16, *Rights on the Rights of Women in Africa* (2009) page 17

states that the minimum age of marriage is 18, which effectively prohibits the practice of child marriage. Article 6(a) also declares that no marriage should be entered without the free and full consent of both parties. When one or both parties are under 18, their circumstances inevitably dictate that they are not able to give consent, which is why child marriage can never be free nor consensual. Considering that child marriage is frequently described as a cultural practise, it is noteworthy that the Maputo Protocol explicitly addresses the issue of culture. It does not deny the importance or relevance of culture in Zimbabwe's society but rather asserts, through Article 17, states must ensure women's right to live in a "positive cultural context".[17] The Protocol is hailed as the most inventive and promising development in women's rights protection since the formation of the African Union (AU) as it defines essential human rights standards for African women.[18]

1.2 Zimbabwe's Obligation to Eradicate Child Marriages Under Regional and International Conventions

Zimbabwe is a signatory to some of the significant international treaties on children's rights, including the Convention on the Elimination of all Forms of Discrimination against Women (1984) and the Convention on the Rights of the Child (1989).[19] The Joint General Comment No. 31 of the CEDAW Committee and No. 18 of the Committee on the Rights of the Child on Harmful Practices of 2014 provide clarification on child marriage. The provisions of Article 1 of the African Charter on the Rights and Welfare of the Child (ACRWC) weighs in and state that "any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations in the Charter shall, to the extent of such inconsistency be discouraged".[20] Article 21(2) further provides that "child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be eighteen years and make registration of all marriages in an official registry compulsory".[21] This does not provide for any exceptions.

Section 78(1) of the Constitution was enacted for the purpose of complying with the obligations Zimbabwe had committed to under Article 21(2) of the ACRWC to legally establish 18 years as the minimum age for marriage and abolish child marriage. Section 78(1), as read together with section 81(1) of the Constitution, shows that Zimbabwe is a signatory to the Convention on the Rights of the Child (CRC) and the ACRW. The signing of these conventions is an expression of commitment to take all appropriate measures, beyond legislative reforms, to protect, promote, and fulfil children's rights. Under Article 18 of the Vienna Convention on the Law of Treaties which came into force on 2 January 1980, a state party is enjoined to hold in good faith and observe the rights and obligations in a treaty to which it is a party.

Thus, the state parties are placed under a positive obligation to take effective measures, including legislation, to specify the age of 18 years as the minimum age for marriage. The paper is based on the firm conviction that legislation cannot suffice as the sole tool for effectively addressing child marriage. Contrary to other human rights conventions, Article 21(2)

[17] African Union, *supra* note 4, p.16.
[18] E. Durojaye and L.N. Murungi, 'The African Women's Protocol and sexual rights', 18 *The International Journal of Human Rights,* p. 893.
[19] As early as 1998, in its concluding comments addressed towards Zimbabwe, the Human Rights Committee recommended that the Government of Zimbabwe adopt measures to prevent and eliminate prevailing social and cultural attitudes supporting early and child marriage and to address perspective legal reforms.
[20] African Union, 'African Charter on the Rights and Welfare of the Child', 1 July 1990, <au.int/en/treaties/african-charter-rights-and-welfare-child> (accessed 8 December 2022), p.8.
[21] *Ibid.*, p.19.

successfully avoided omissions and exceptions that previously allowed state parties to exploit local laws to authorise child marriages. Article 19(1) of the UN Convention on the Rights of the Child (CRC) provides that the State should take measures to "protect the child from all forms of physical abuse or mental violence, maltreatment or exploitation including sexual abuse".[22]

Zimbabwe's initial report to the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) was submitted in 2013 and considered by the Committee in April 2015 under Article 43 of the ACRWC. In July 2015, the Human Rights Council also adopted its first substantive resolution recognizing child and forced marriage as a human rights violation. In its 2015 concluding observations, the ACERWC raised similar concerns against the Marriages Act of Zimbabwe that still did not provide a minimum age of marriage, hence creating a gap that permitted child marriages in direct violation of Articles 2 and 21 of the African Children's Charter.[23] This shows that Zimbabwe's efforts of eradicating child marriages remained insufficient at that time. The Committee on the Convention on Rights of the Child noted that statutory difference in the minimum age of girls and boys for marriage, should be prohibited by law.[24] The Government of Zimbabwe was asked to adopt measures to prevent and eliminate prevailing social and cultural practices that threaten the welfare of children. CEDAW also noted that section 22(1) of the Marriages Act, which provided for different ages for girls and boys, assumed incorrectly that girls have a different rate of intellectual development from boys or that their stage of physical and intellectual development at marriage was immaterial.[25] The Committee recommended that these provisions should be abolished.

Zimbabwe submitted its initial country report to the UN Committee on the Rights of the Child which was due in 1992, sometime in 1995. The second report was submitted 19 years later in 2015. From a procedural perspective on reporting under the UNCRC, Zimbabwe continuously fails to uphold its obligations has not been doing as well as it should. This inconsistency and poor adherence to reporting requirements prevent effective monitoring and the evaluation of the implementation of the Convention on the Rights of the Child. The 1995 initial report from Zimbabwe to the UNCRC is relevant to the understanding of the commitment of Zimbabwe in fighting child marriages. Converging observations from concluding observations from both committees show that Zimbabwe is still battling to address certain gaps in its legal frameworks which are impeding the full implementation of the provisions of both commitments. The 1995 initial report from Zimbabwe to the Committee on the UNCRC acknowledged the challenges around the definition of the child in the context of cultural and religious practices that perpetuated child marriages.[26] There is a specific reference to the Apostolic Faith Sect sustained a pattern of obstructing national immunisation efforts carried out by the government. The silence in the Customary Marriages Act on the minimum age for marriage perpetuated child marriages. The concluding observations from the CRC Committee recommend that the minimum age should be raised to 18 for both girls and boys and that the government ought to facilitate the effective enforcement of laws that outlaw child marriage to counteract practises based on religious beliefs.

[22] OHCHR, 'Convention on the Rights of the Child ', General Assembly resolution 44/25, 20 November 1989, <ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child> (accessed 8 December 2022), p.5.
[23] CRC Committee, 'Concluding observations on the second periodic report of Zimbabwe', CRC/C/ZWE/CO/2, 7 March 2016, <icj.org/wp-content/uploads/2016/01/Concluding-Observations-CRC-Zimbabwe-2016-eng.pdf> (accessed 22 September 2022).
[24] CRC Committee, 'Concluding Observations on Zimbabwe', A/53/40, (1998), para. 214.
[25] CEDAW, 'General Recommendation No. 21: Equality in Marriage and Family Relations', 1994, para. 38.
[26] CRC Committee, 'Concluding Observations: Zimbabwe', CRC/C/15/Add.55, 7 June 1996.

As part of the internal monitoring systems of state parties, the CRC acknowledged and commended the government for its pledge to submit annual reports to both the parliament and cabinet.[27]Though this was deemed progressive, the lack of alignment of national laws with the UNCRC provisions and the dual system of common law and customary law compromise the successful implementation of the provisions.[28] Some of the key issues highlighted in the concluding observations focus on the rampant corruption which misuses resources from the national budget that could have contributed to end child marriages. In its periodic report in 2015, the CRC concluding observations raised recurring concerns over slow progress, scarce evidence for a practical framework of investigation, and insufficient rehabilitation of all victims including compensation through the government. [29] There was also a highlight of the need to have a robust monitoring system in place to monitor the gains being made.[30]

Zimbabwe continue to undertake to deal with the pervasive issue of child marriage that continues to be a dominant practice. As part of the efforts to address the culturally and religiously imbedded roots of child marriages, Zimbabwe reported that it identified the Apostolic Sect as a risk factor. The government, therefore, partnered with the Apostolic Christian Councils to change the attitudes and perceptions of its members. This was to be followed by a plan to increase awareness through apostolic ambassadors for child rights in collaboration with civil society organisations. The *Mudzuru case* was a step towards the realisation of the provisions of the ACRWC because child marriage was found to be unconstitutional. This judgment affirmed the provisions of the ACRWC that established 18 years as the age of marriage to counteract the prevalence of child marriages in Zimbabwe. The Marriages Act in section 22(1) allowed women of the ages of 16 and older to be lawfully married.[31] In the *Mudzuru case,* the Constitutional Court noted the importance of adopting legislative measures for the abolition of the offending statutory provisions such as section 22(1) of the Marriages Act which had become a compelling social need. The Court further noted that there was overwhelming empirical evidence of the horrific consequences of child marriage. Study after study has exposed child marriage as an embodiment of all the evils against which the fundamental rights are intended to protect the child.[32]

Zimbabwe has remained confronted with a high volume of cases of child marriage that can be attributable to religious and cultural norms which support and protect these practices. The practices also thrive through the persistence of legal dualism, fragmentation of laws and low policy implementation.

1.3 Relevance of the Study to the Overall Theme

Zimbabwe has made substantial progress towards the implementation of Article 5 of the Maputo Protocol from 2008 through constitutional, legal and policy provisions targeting the elimination of harmful practices such as child marriages. Thus, the recent enactment of the Marriages Act is a welcome development, and it is important for the legislation to have the necessary implementation framework and plan of action to give it full effect. The study purposively focuses on the Maputo Protocol Article 5 because of its overarching nature which

[27] CRC Committee, *supra* note 23, para 4.
[28] *Ibid*, para 42.
[29] CRC Committee, 'Concluding observations on the second periodic report of Zimbabwe', 29 January 2016, 47 (a-d).
[30] *Ibid.*
[31] Chapter 5.11 was subsequently repealed in May 2022 through Chapter 5.15.
[32] *Mudzuru & Anor v. Minister of Justice,*

is particularly relevant for the response to child marriage as a harmful practice. It consequently highlights the significance of the Declaration of Rights. Any efforts to eradicate child marriage should be based on solid legal analysis to determine any gaps to then address them systematically through programming and advocacy efforts that target underlying cultural, religious, and socio-political factors. The Constitution provides, arguably, for some of the most advanced international standards for the protection of human rights. This study was conducted at an opportune time, when the enactment of the new legislation was underway and there was a greater room to influence future policy frameworks necessary for the implementation of laws that apply to child marriages. The study sought to generate insights into how child marriage may be effectively dealt with under the new legislative framework while equally acknowledging non-legal drivers of the practice to contribute to recommendations that may be considered for subsequent policy briefs.

1.4 Methodology

The current legislative framework on child marriage particularly section 3 of the Marriages Act, Chapter 5:15, offers an opportunity to consider and build momentum for the eradication of child marriage in Zimbabwe.[33] This study is built on thorough and nuanced secondary review of existing literature and the legal framework, complemented by limited primary data collection using the data collection methods of key informant interviews and mapping. These research tools enabled the data collection on child marriage prevalence in Zimbabwe as well as the legal and policy framework affecting the issue. It is also based on doctrinal review of domestic and international laws, policy documents, court judgements relevant to the study, relevant concluding observations, and general comments from treaty monitoring bodies. In terms of primary data, in-depth interviews from selected key informant interviews were utilised (human rights lawyers, gender activists, programmers and policy makers) to complement the legal and policy analysis.

Since this was an exploratory study done to gather prominent views about the subject, purposive sampling of key informants was preferred as it provided higher chances of including relevant cases for the study. Following this approach, a total of 12 key informant interviewees (KIIs) were selected as the sample. This selection was viewed as adequate since the participants were from diverse backgrounds with substantial organisational experiences and knowledge on the subject matter that goes beyond personal views. This brought to light, historical evidence that has previously been gathered by organisations on the topic of child marriages.

To ensure the effectiveness of the sampling procedure, referral sampling or snowballing method was used to identify participants for the study. Suitable inclusion criteria were established to guide the sampling process that took the commitment of the participants concerning related issues such as girl child rights, education of marginalised peoples and general child protection efforts into consideration. People who had experience in any of the highlighted areas were deemed knowledgeable on the subject matter, hence were recruited as KIIs. The utilisation of different data collection methods for the study intended to generate information relevant for answering the project questions. Although child marriage is now established as illegal, it is still a contested issue as it is deeply embedded in and protected through religious and cultural practices. Such practises are oftentimes met with insufficient counteraction that fails to address

[33] Constitution of Zimbabwe, *Chapter 5:15 Marriages Act (No. 1)*, <veritaszim.net/sites/veritas_d/files/MARRIAGES%20ACT%20No.%201%20of%202022.pdf > (accessed 8 December 2022).

the root causes and usually face little opposition from within cultural and religious communities.

This often takes place with the consent from the girls' parents or guardians. Special attention has been paid to the ethical considerations given the sensitive nature of the research topic that requires participants to share highly personal information. The researchers were aware that getting people to freely share such information could be problematic hence a strict observance to ethics was followed. The data that was collected from KIIs was treated confidentially with any potentially identifying information being carefully omitted in the presentation. An effort to restrict narratives to broader societal dynamics was followed to respect the sources of information. This also involved not mentioning the organisations from which KIIs came from since their participation in the study involved sharing information to third parties.

2 Child Marriage and the Law: Understanding Recent Legal and Policy Developments in Zimbabwe

When discussing the issue of child marriage, regard must also be paid to the existing legal framework and emerging consensus of values in the international community to which Zimbabwe is a party. The said frameworks provide on how children should be treated and their well-being protected so that they can play productive roles in society upon attaining adulthood.

2.1 The Law and Child Marriage in Zimbabwe

The Constitution ensures gender equality, which provides for justiciable rights and well-elaborated array of children's rights under section 81. Section 78 of the Constitution (Marriage Rights) sets a minimum age for marriage at 18 and prohibits forced marriage. Section 80(3) of the Constitution permits no exception for religious, customary, or cultural practices that permit child marriage, nor does it allow for exceptions based on the consent of a public official, or of the parents or guardian of the child. When read together with section 81(1) of the Constitution, section 78(1) has effectively reviewed local traditions and customs on marriage. The legal change is consistent with the goals of social justice at the centre of international human rights standards requiring Zimbabwe to take appropriate legislative measures, including constitutional provisions, to modify or abolish existing laws, regulations, customs and practices inconsistent with the fundamental rights of women and by implication the girl child.[34] The apparent need to overcome obsolete traditions that allow for girls to enter into marriage below the age of 18, or at times, even at the age of 16, is indisputable.

The Domestic Violence Act criminalises domestic violence, any cultural or customary rites as well as any practices that discriminate or degrade women.[35] Examples of such practices include virginity testing, female genital mutilation, offering women and girls for purposes of appeasing spirits, abductions, child marriage, forced marriage, and forced wife inheritance. In terms of section 4 of the Act any person who commits an act of domestic violence shall be guilty of an offence and liable to a fine, not exceeding level fourteen, or imprisonment for a period not exceeding ten years, or to both. Section 94(1b) Criminal Law (Codification and Reform Act)

[34] http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S2225-71602021000100002 accessed September 2022

[35] Constitution of Zimbabwe, *Chapter 5:16 Domestic Violence Act (14)*, <www.law.co.zw/download/160> (accessed 8 December 2022).

also prohibits the pledging of a woman without her consent and of anyone under 18 years of age in marriage.[36]

In the case of *S v Ivhurinosara Ncube*, the High Court on review noted that, although the State had not incorporated the CRC into domestic law, it takes its obligations seriously, including the requirement under Article 19 that it ought to protect children from all forms of violence including sexual abuse.[37] The High Court disapproved of the magistrate considering a consensual relationship as a mitigating factor in such a case, particularly due to the age discrepancy seeing as the accused was 30 years old and the complainant was only 15 years old at the time of the crime. In the court's view, this age difference placed the girl in a vulnerable position. The High Court did not approve the decision by the marriage to endorse a child marriage, the magistrate ought to have been more critical of the nature of the relationship and considered that the family reported the criminal charges against the accused.

The Customary Marriages Act did not specify the minimum age of contracting into a marriage. The new Marriages Act in section 3 outlaws child marriage. This legislation is in line with the SADC Model Law on Eradicating Child Marriage and Protecting Children Already in Marriage (Model law). The main objective of the Model Law is to serve as a measurement and advocacy tool for legislators in the SADC region. It also establishes the most advanced practice and language that can be easily adopted or adapted by member states in their national laws. The Marriage Act reaffirms a human rights approach focused on the rights of women and children to effectively tackle the issue of child marriage. This is the first legislation in Zimbabwe that comprehensively outlaw's child marriages without any exceptions. However, it can be argued that specific issues relating to child marriage should have been addressed in a separate legislation.

There is room for improvement as the problems associated with child marriage requires substantial and comprehensive approaches to curb it. The Act could have borrowed some of the standards set out in the SADC Model law on child marriages to promote full implementation, hence some sentiments to the effect that the issues of child marriage would have been best provided for in a separate Act. This would have resulted in a more encompassing institutional framework and a necessary multi-sectoral approach. Nonetheless, parts of the legislation such as section 46 appear promising since it enables the responsible Minister to introduce regulations to provide for administrative implementation framework of the Act.

2.2 Potential Legal and Policy Gaps as Drivers for Child Marriages

Laws on their own do not transform people's circumstances unless there are deliberate coordinated efforts to implement them. The implementation and enforcement of laws on child marriage across Africa are associated with several common problems.[38] These include weak judicial systems, a lack of effective monitoring and enforcement mechanisms that could prevent

[36] Constitution of Zimbabwe, *Chapter 9:23 Criminal Law (Codification and Reform) Act 23*, 2004 <old.zimlii.org/zw/legislation/num-act/2004/23/Criminal%20Law%20%28Codification%20and%20Reform%29%20Act%20%5BChapter%209-23%5D.pdf> (accessed 8 December 2022).

[37] *S* v. *Ivhurinosara Ncube*, High Court of Zimbabwe (CRB M 225/10, REV 33 of 2010), ZWHHC 335 (25 September 2013).

[38] *See* B. Kombo *et al.* (eds.), 'A journey to equality: 10 years of the Protocol on the Rights of Women in Africa: Equality now', 201:3.; V. O. Ayeni, 'The impact of the African Charter and the Maputo Protocol in selected African states: Zimbabwe', 2016, p.281-296.; F. Banda, ''Blazing a trail: The African Protocol on women's rights comes into force', 50, *Journal of African Law,* 2006, p.72-84.

or sanction child marriage, a poor understanding of laws, a lack of adequate training and coordination between amongst government ministries, a lack of a clear delegation of responsibilities to specific authorities, a lack of guidelines on how to handle child marriage cases, and ad hoc responses.[39] Concerning the African continent, very few examples of prosecutions are mentioned within the literature.[40] It is also noteworthy, that in cases where existing laws have been reinforced, child marriage is conducted in secrecy. This has far-reaching implications for the accessibility of health care services for underage married children, forcing them to give birth without medical supervision and support.

Enacting a law that addresses child marriage allows the government to clarify its position around this controversial and sensitive issue. Whilst it may be premature to discuss the consistency of implementation at this stage, it is important to analyse whether the legislation has been framed with the necessary imperatives that support effective and consistent application. Notably, the Act is meant to consolidate and provide various laws pertaining to marriage in Zimbabwe. This immediately shows that child marriage is not the focus of this Act but is rather one of the issues dealt with amongst other marriage-related topics.

The law also fails to address the role of traditional justice systems as chiefs who will be appointed as customary marriage officers under the Act. A clear framework for technical support and training for traditional leaders should be in place. The impact of informal justice system on curbing child marriage cannot be undermined. The key consideration should be on what entails real community participation in fighting child marriages. Community participation in this case can therefore be equated with a local or bottom-up approach, and can be contrasted with state-driven, top-down or legalistic approaches. Sceptics would argue that several governments adopt laws initially to look good and to satisfy developmental aid donors and other powerful international actors rather than meeting the societal needs.[41] It is imperative for communities to have ownership of this law for improved attitudinal and practice reforms. Local courts should have jurisdiction to deal with cases involving child marriage within the limits of their ordinary jurisdiction in terms of the Customary Law and Local Courts Act [*Chapter 7:05*]. Child marriage remains prevalent in remote rural areas where there is limited access to information and infrastructure. The other ever-present challenge that remains is the necessity to raise awareness and promote acceptance of the recently enacted law, particularly in areas where child marriage is disproportionately often practised such as in rural areas. Thus, laws can often be seen as foreign or irrelevant concepts to remote rural populations. Thus, to improve implementation and ownership of this Act, the responsible minister should, in consultation with other relevant ministries, such as the Ministries of social welfare, health, child welfare and gender or women's affairs, set up committees of social welfare officers or any person involved in community work, such as chiefs or headmen, to anti child marriage champions. Section 9(1) of the Act makes every chief a marriage officer for a customary law marriage in the district in which they hold office. Section 9(2) provides that:

> No later than four months from the date of commencement of this Act, or from the date of investiture of any Chief, as the case may be, the Minister shall ensure that every chief is certified as competent to carry out the

[39] *Ibid.*

[40] C. Chikunda *et al*., 'The impact of *khomba* - a Shangaan cultural rite of passage - on the formal schooling of girls and on women's space in the Chikombedzi area in Zimbabwe, Indilinga', 5 (2), *African Journal of Indigenous Knowledge*, 2006.

[41] M. Kim *et al*., 'When Do Laws Matter? National Minimum-Age-of-Marriage Laws, Child Rights and Adolescent Fertility, 1989-2007'. 47(3), *Law & Society*, 2013, pp.589-619.

duties of a marriage officer for the purposes of solemnising marriages according to customary rites. Chiefs could even be prosecuted under s3 if they solemnise a marriage of underage persons or a person.[42]

Following the introduction of the Marriages Act, by January 2023, all chiefs should have received such training. This is an ambitious timeframe and will require that the Minister of Justice prioritises that effort. This training is key in detecting instances or likelihood of child marriage.

In 2019, a novel National Action Plan and Communication Strategy on Ending Child Marriage (2019-2021) was crafted. The plan was said to be an expression of the commitment by the government, civil society organisations, and development partners to work together to end child marriage.[43] A simple yet effective evaluation process should have been adopted to determine accomplishments and to inform future actions especially in light of the new legislation.

2.3 The Intersection Between of Gender, Culture, and Child Marriages – Conceptualising Non-Legal Drivers of Child Marriages.

Besides the gaps that exist in the legal and policy framework in Zimbabwe, child marriage must be understood as a practice that is ingrained in normative and structural arrangements of the society. In 2018, UNICEF recorded that one in every five children is married before reaching 18 years, with one in every three of these children being from Sub-Saharan Africa. [44] This is further supported by the Plan International report from 2019 that identifies the prevalence of child marriages as a worrying development in Africa.[45] In other sects of communities, child marriage has been normalised. Cultural, gender, and structural dynamics of society have a crucial impact on child marriage both as risk factors and as potential protective factors. This paper argues that, in addition to legal and policy gaps that facilitate child marriages, there are other factors that must be considered such as the intersections of poverty, lack of educational opportunities as well as norms which are gendered in their existence.

2.3.1 Cultural and Religious Norms Enabling Child Marriages

Culture is a source of identity for every community and plays a crucial role in the life of individuals and the community at large.[46] It represents customs, practices, and beliefs which provide a sense of belonging, identity, and continuity with past existing values.[47] Different cultures exist around the world and the diversity that exists among cultures is recognised and emphasised in the values of cultural relativism and specifically in the discourse on the relationship

[42] Constitution of Zimbabwe, *Chapter 7:05 Customary Law and Local Courts Act*, <www.zimlii.org/akn/zw/act/1990/2/eng@2016-12-31#:~:text=AN%20ACT%20to%20provide%20for,or%20incidental%20to%20the%20foregoing.> (accessed 8 December 2022).

[43] The National Action Plan, coordinated by the Ministry of Women Affairs, Community, Small and Medium Enterprises Development, was developed in consultation with several stakeholders.

[44] UNICEF, 'Child Marriage: Latest Trends and Future Prospects', July 2018, <data.unicef.org/resources/child-marriage-latest-trends-and-futureprospects/>, (accessed 9 December 2022).

[45] Plan International, '18+ Ending Child Marriage and Teen Pregnancy in Eastern and Southern Africa, Learning for Change', 20 August 20, < plan-international.org/publications/18-ending-child-marriage-and-teen-pregnancy/>, (accessed 9 December 2022).

[46] T. Kaime, (ed.), *The African Charter on the Rights and Welfare of the Child: A Socio-Legal Perspect*ive, (Pretoria University Law Press, 2009), p.32.

[47] N. Wadesango *et al.*, 'Violation of Women's Rights by Harmful Traditional Practices', 13:1, *The Anthropologist* (2017), pp.121–129.

between human rights and culture.[48] Consequently, within African societies contradictions prevail between the practical applicationof human rights standards and the promotion of customs and traditional practices. The discourse on the contradictions often results in a debate between the universality of human rights and cultural relativism.[49] The age of marriage for a girl, for example, is such an area of contradiction between human rights and culture that is highly contested. Equally controversial and disputed are the concepts of adulthood and childhood in Africa. While Article 21(2) of the ACRWC sets the minimum legal age of marriage at 18 years, there are cultural practices and religious beliefs in several African states that do not recognise the legal age of marriage, nor do they use age to determine a girl's level of maturity.[50]

In our exploratory investigation in the study, we engaged key informants to gather their views on the subject. It was apparent that child marriage is still upheld as part of certain communities' way of life especially from a religious point of view. This was corroborated by the advent of puberty among girls which was seen as the key trigger development for child marriages especially for girls who were then considered mature enough for marriage.[51] This is further supported by studies conducted in and on Tanzania that identified puberty as one of the main triggers of child marriages for girls.[52] In the context of Zimbabwe, key informants who included activists against child marriage, identified the Apostolic Sect which is mostly concentrated in the Manicaland province of Zimbabwe as the most prominent region where the practice continues to be prevalent. The religious factors were said to promote child marriages mostly due to the polygamous practice of the sect which promotes early marriages of underaged girls. Evidence showed that such apostolic sects are highly exclusive societies which are sheltered by norm enforcement among the followers making it difficult to access to victims. The limited access to such communities facilitates the perpetuation of the practice and sometimes makes it difficult for the law to take its course in punishing those committing or aiding child marriages. One key informant described apostolic sects as communities governed by their own rules and norms which are mostly contrary to the national laws especially concerning adolescent health and child marriages. The respondent further highlighted that there is a political dimension to the issue in which the state is reluctant to completely enforce the law because members of the Apostolic Sect are a key population of loyal voters whose values and norms need to be protected. It is difficult to conclusively confirm this argument but most activists shared similar sentiments through extrapolation. Anecdotal evidence shows rampant practice of child marriage in Manicaland especially in the apostolic sects, yet there is limited evidence of the national law being enforced to punish those aiding or committing child marriage.

The study also attempted to engage people who have married underage girls to establish their reasons behind such actions. Evidence showed that cultural norms driven by the need to satisfy

[48] *Ibid.*
[49] UNICEF, 'Early Marriage a Harmful Traditional Practice, A Statistical Exploration', October 2015, <data.unicef.org/resources/early-marriage-a-traditional-harmful-practice-a-statistical-exploration/>, (accessed 9 December 2022).
[50] C. Himonga, 'The Right of the Child to Participate in Decision Making - A Perspective from Zambia', in W. Ncube (ed.), *Law, Culture, Tradition and Children's Rights in Eastern and Southern Africa* (Ashgate Dartmouth, 1998) p. 100.
[51] African Union, 'The Effects of Traditional and Religious Practices of Child Marriage on Africa's Socio-Economic Development - A Review of Research, Reports and Toolkits from Africa', October 2015, <au.int/sites/default/files/documents/31018-doc-5465_ccmc_africa_report.pdf>, (accessed 9 December 2022).
[52] L. Stark, 'Poverty, Consent, and Choice in Early Marriage: Ethnographic Perspectives from Urban Tanzania', 54:6, *Marriage & Family Review*, (Taylor & Francis, 2018), pp. 565–81.

masculinity fantasies was a strong force. The desire to marry a virgin was highlighted as particularly significant in line with the notion of purity. There was a strong belief that younger girls who are just entering puberty were most likely to be pure and virgins, hence they would be the best candidates to satisfy masculine fantasies. This consequently promoted a belief system that is based on the idea that the purity of girls would be damaged or diminished if they were allowed to grow into adults prior to their marriage. This unwritten normative belief system directly influences and enables men as the main drivers and perpetrators of child marriage. Such positions were also supported by key informants who shed light on the topic through their experiences gathered as they worked in communities with high levels of child marriages. They indicated that men believe that marriage is meant to meet the expectations and fantasies of men.

Linked to the above, it emerged that men viewed underage girls as more submissive and generally amenable to go under cultural practices or rites. By extrapolation on the mentioned point, victims of child marriages were easy to manipulate and dominate which reinforces toxic patriarchal tendencies that portray girls and women as objects for manipulation. Girls and women were, therefore, relegated to the reproductive duty and being exposed for exploitation by men who viewed themselves as entitled to the control of girls and women. It can then be argued that child marriage becomes a manifestation of the sexual conquest perpetuated by toxic masculinities in Zimbabwe, concentrated in areas where child marriages is rampant. In one interview with an activist whose organisation has been working in the Chipinge area of Manicaland Province to eradicate child marriages, an exercise referred to as normative mapping has shed light on why men end up marrying underage girls. Their reasons showed that deprivation and limited exposure to external environments creates low self-esteem among men who then seek validation through marrying someone they can dominate, exploit, and fulfil a sense of power. In their analysis, this becomes reverse exploitation which starts from men being marginalised and exploited by the broader macro system. It is important to note that these toxic ideas and perceptions of masculinity and the notion of purity is deeply enshrined and oftentimes stems directly from religious beliefs. The broader macro environment in which people live influences how they make every day decisions including sexual relations.

2.3.2 Limited Educational Opportunities

The intersectionality of drivers of child marriages should be understood in their broader context to achieve a more nuanced picture. There is evidence that poor educational opportunities could be understood as both a driver and consequence of child marriage.[53]One key informant from an organisation dealing with survivors of child marriages elaborated that child marriages resulting in teenage pregnancies are the biggest drivers of school dropouts for girls. Contextualising this with the COVID-19 pandemic, there was an acceleration of incidences of teenage pregnancies in Zimbabwe. According to a report presented by Women Affairs Minister Mrs. Sithembiso Nyoni on the level of public service delivery related to sexual and gender-based violence during the COVID-19 pandemic in Parliament, Zimbabwe recorded, for instance, approximately 5 000 teenage pregnancies and about 2 000 child marriages between January and February 2021.Such high numbers reflect the rampant sexual exploitation that adolescents especially girls suffered during the COVID-19 lockdown. Interviews with key informants in the education sector confirmed that teenage pregnancies during COVID-19 led to school dropouts among girls despite the law providing for the reintegration of girls into the official school system.

[53] A. Karam, 2015), 'Faith-Inspired Initiatives to Tackle the Social Determinants of Child Marriage', 13:3, *The Review of Faith & International Affairs* (2015), pp.59–68.

The study highlights that once girl becomes pregnant; they be expected to get married. This was also explained as being perpetuated by family pressure that drives girls to enter marriages to avert bringing shame to the girl's family. These are additional normative systems which are contributing towards child marriage despite the existing legal and policy framework against such practices. The nexus between child marriage and poor education opportunities was also explained by our key informant in the education sector who described schools as protective factors. It was established that the more girls remain in schools, the more they are protected from teenage pregnancies and child marriage. In communities where child marriage is particularly prevalent, there is evidence that girls have an extremely low educational attainment level. The schools' system occupies the girls and provides an alternative life pathway outside of marriage.[54]

The law, especially in the context of Zimbabwe, is often poorly understood in rural areas and it is indisputable that it would become more effective to those who are aware of it and who can utilise it to advocate for their rights. People who have a substantial understanding of the law and are aware of its implications are mostly based in urban areas and rarely in rural ones. Such people are mostly based in urban areas and a few in rural areas who are enlightened. The gap that is created in rural communities due to lack of knowledge is quickly exploited in by cultural and religious norms. Rural communities find their norms as more relevant to their way of life than state laws. This was supported by a key informant who has been working in rural areas to sensitise rural communities on laws around child marriages. The key informant indicated that there is a general perception among people in the rural areas that the law serves the interests of the state while culture serves the interests of the people. This divide, therefore, implies that people are likely to believe in their cultural norms than they are likely to embrace law which they see as foreign and serving the state's interests. This has led to the perpetuation of harmful cultural practices such as child marriages despite the laws against it.

2.3.3 Vulnerability of Children Due to Poverty

Families that have children who become victims to child marriages are generally extremely poor in both absolute and relative forms. This section connects to the earlier explored normative factors that drive child marriages by contextualising how deprivation and pervasive poverty has also catalysed child marriage in Zimbabwe. In this view, girls are then regarded as economic objects their families. This is also linked closely to the payment of *roora/lobola* (bride price) and how this is inadvertently considered as a source to secure livelihoods for the overall survival of the family. In this study, KIIs corroborated that the marrying off girls is often for economic gains. Under such circumstances, parents of the victims become complicit in the commission of the practice and participate in the covering up against any possible prosecution and investigation.

KIIs who have collaborated with survivors of child marriages explained that the practice thrives on legacy referencing in which a mother who was a victim of child marriage would not see anything wrong about the practice and will likely have her girls enter into marriage while they are still underage. This creates generations upon generations of victims of child marriage.

[54] A. Biddlecom *et al*., 'Associations between Premarital Sex and Leaving School in Four Sub-Saharan African Countries', 39 (4), *Studies in Family Planning* (2008), pp. 337-350.

2.4 Best Standards to Curb Child Marriages

Legislative reforms alone may not lead to the desired change. Instead, a comprehensive approach is recommended. The SADC Model Law lays out concrete guidance around prevention of child marriage and betrothal and takes a multi-faceted approach. It provides that a person who is requested to, or is about to, solemnise a marriage, and suspects that one or both parties are children, must verify the age of the child by means of a birth certificate, identification card, or other official document that can reveal the identity and age of the child. The issue of birth registration remains problematic in Zimbabwe with most people not having personal identity documents including birth certificates. The need to make birth registration mandatory is, consequently, urgent. The law should provide for establishment and continuous training of child marriage prohibition officers, judicial officers, law enforcement officers, traditional leaders, religious authorities, other public officers and policy makers to raise awareness about the dangers and effects of child marriage and how to report them.

For the law to work, a clear collaborative framework for stakeholders in necessary. The Minister of Justice Legal and Parliamentary Affairs should immediately set out the regulations specific to section 3 of the Act to build necessary framework for awareness raising and preventive measures. The framework should involve and mobilise local committees to enable reporting of child marriages and, for instance, to establish community watch committees with the support of traditional leaders or religious authorities to prevent and respond to child marriages. The Model law also recommends the establishment of an anti-child marriage fund for purposes of eradicating child marriage, preventing child marriage, assisting children already in marriages, assisting victims of child marriages and supporting the general implementation of the measures towards this cause. This is very pertinent as fighting child marriages urgently requires more resources.

The law will only be effective if there is increased awareness among the local communities, traditional leaders, and comprehensive strategies to address the main drivers of child marriage such as poverty, gender inequality, and lack of security. Traditional and religious leaders ought to be given pronounced roles and responsibilities in curbing child marriages considering that some of the key causes are embedded in cultural and religious beliefs.

3 Conclusion

The enactment of the Marriages Act is a progressive step towards the elimination of child marriage in Zimbabwe. However, there is a lack of a strong framework to implement it in order to successfully curb the scourge of child marriage. The critical question that must be raised to design and implement this framework is: In what context does child marriage exist? This question looks at the political, economic, and social environment. This includes judicial systems that conduct criminal trials, investigations, tracking, monitoring, effective prosecutions, other constitutional systems that create a framework for administering justice and accountability processes, education, and religious and cultural norms.

5 The State of the Human Rights of Ethno-Cultural Minority Groups in Zimbabwe: Reflections on the Doma People of the Zambezi Valley

Kwashirai Zvokuomba, Itai Kabonga and Pachipano M. Chingozha*

Abstract

The promotion and advancement of the rights of ordinary people set out by the Declaration of Rights in Zimbabwe is enshrined in the Constitution of Zimbabwe Amendment (No. 20) Act, 2013. The role of the Declaration is the protection, implementation and enforcement of the rights of all human beings. Many aspects of human life are now legally or in principle protected by the Declaration despite many challenges, including alignment and operationalisation of the various statutes with the Constitution. The rights of minority groups have always been an aspect of human rights debates as evidenced by the contestations around the rights of other minorities elsewhere such as the Batwa commonly known as Bushmen people in the Kalahari Desert and the inhabitants of the Amazon rain forest. The study, therefore, assesses the rights of the Doma minority group in the Zambezi valley and, guided by a qualitative research framework and a human-rights-based-approach, brings to the fore new insights. For the fieldwork, purposive sampling was utilised to target informants and participants in Wards 1 and 11 which are the Doma domiciles. The data from respondents was complemented by the desk inquiry to sustain the main study argument that the Doma's way of life is devoid of enjoyment of fundamental human rights. This is highlighted by limited education services provided to them since there are fewer schools in the wards than in any other region of the country. The study further argues that limited schooling and low literacy levels has subsequent effects on being receptive of one's rights considering that a lack of knowledge affects, for instance, the participation in public life or the access to health care. The study concludes by arguing that the State, as the key duty bearer, ought to provide effective mechanisms and special policy positions on the Doma people that not only protect but promote Doma traditional way of life and involve relevant stakeholders in the movement.

Keywords: human rights, minority group, ethnicity, law, Zambezi valley, Doma people.

1 Introduction

The study interrogates the interplay of the Doma people's way of life and the fundamental human rights as enshrined in the Constitution of Zimbabwe of 2013. It poses the question whether the Doma people's form of civilisation is promoted and protected by new aspects of the Constitution which were absent in the 1979 Lancaster House Constitution. The answers to this research question arise from the Doma people's experiences and other field-based empirical evidence. Within this methodological context, the study highlights the nuances about contemporary human rights of ethno-cultural minorities in Zimbabwe from a human-rights-based approach. The findings inform not only the academic community but policy makers and other stakeholders as well as the Doma people themselves about basic human rights, accountability levels and decision-making. The promotion of human rights augurs well for those who have historically been neglected in mainstream socio-cultural, political and economic development. The research satisfies the main research question of how much the fundamental human rights and freedoms, as provided in the Zimbabwean Constitution of 2013, affect the lives of the Doma people who are a cultural minority group that practices a semi-

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foraging lifestyle in the Dande Forest. Therefore, the study examines the role and application of the Declaration of Rights amongst this ethno-cultural minority group to answer the following research questions: a) How are the Doma, as a minority group that follow a traditional way of life protected by the Declaration of Rights in the Constitution of Zimbabwe? b) How much does the Declaration of Rights in the Zimbabwean Constitution challenge the behaviour of the Doma as right holders? c) What can be done to promote and protect the rights of the Doma people as a minority group? The research article is structured as following: the first part introduces the study by providing a historicised background of the Doma. It further provides a theoretical framework, namely a human-rights-based-approach, which guided the whole investigation and the methodological directions as well as the field-based data generation modalities. The second part focuses on the presentation of gathered data and the discussion in which the major findings and arguments are presented.

2 Justification and Contextualisation of the Doma Study

The rationale for the study is based on the fact that few scholars have investigated the cultural, political and economic life of the Doma from a human-rights-based-approach. That is partly because the Doma are geographically located in an isolated area of the Zambezi valley which is difficult to navigate due to poor communication and the lack of public infrastructure including roads.[1] The semi-arid region of Zambezi is characterised by harsh climatic conditions, very high temperatures and is infested by tsetse flies. Such conditions effectively discourage researchers[2] which is why it is widely acknowledged that little has been written about the Doma as a minority group and their rich knowledge systems. In his book, *Guns and Spirit Mediums*, David Lan states that, "[the Doma people] are a small population and in keeping with their elusive and recalcitrant style they appear only occasionally in this book".[3] The lifestyle of the Doma people has been shrouded in mystery, racist mythology and in recent years, misconceptions.[4] Myths about the Doma exist because little is known about them through researchers and policy makers, hence, their stories have been told by travellers, hunters and tourists who had the capacity to transverse the bad terrain around the Zambezi valley. The media has equally given a limited account of the situation of the Doma culture and, where newspapers have done so, and where newspapers have done so, they depict them as primitive and over-emphasise the prevalence of ectrodactyly for economic gains.[5] The ectrodactyly phenomenon is a split-foot malformation which has been exaggerated in the case of the Doma people to reinforce the negative stereotypes about this minority group. The few studies that exist about the Doma did not focus on the Doma human rights but instead only on their traditional knowledge systems.[6] Thus, the study of the Doma people from a human-rights-based-approach is meant to be part of new body of legal anthropology studies in Zimbabwe on minority groups.

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[1] D. Lan, *Guns and rain: Guerillas and spirit mediums in Zimbabwe* (African Publishing Group, Harare, 1985).
[2] R.A.P Hasler, *Agriculture, Foraging and Wildlife Resource use in Africa* (Kigan Paul Publishers, London, 1996).
[3] Lan, *supra* note 1.
[4] E.M. Chiwome, Z. Mguni, and M. Furusa, *Indigenous Knowledge and Technology in Africa and Diaspora Communities* (Multi-Disciplinary Approaches National Council for Black Studies, California, 2000).
[5] C. Matema, 'Zimbabwe's CAMPFIRE public investments: Impact on education, adaption and preferences'. PhD Thesis (University of Cape Town, 2019).
[6] C. R. Cutshall, . *Kanyemba/Chapoto Ward: A socio-economic baseline survey of community households*, (Centre for Applied Social Sciences, University of Zimbabwe, Harare, 1990); C. Nhira, 'A socio-economic appraisal study of the Chapoto ward – Guruve District', working paper (University of Zimbabwe, 1989); S. T. Hachipola, 'A Survey in the Minority Language of Zimbabwe', (University of Zimbabwe Publications, 1998); Lan, *supra* note 1; Hasler, *supra* note 2; Chiwome *et al.*, *supra* note 4.

At the international level, Minorities Declaration of December 1992 grants the right to minorities to be protected by states, including the protection of their existence and their national or ethnic, cultural, religious and linguistic identity. At the national level, the Zimbabwean Constitution of 2013 is very clear on the rights of all groups as article 16 (1) states that "[t]he State and all institutions and agencies of government at every level must promote and preserve cultural values and practices which enhance the dignity well-being and equality of Zimbabweans"[7].

This should be read together with article 63 which elaborates the rights to language and culture, the use and preservation of an own language and the right to participation in the cultural life of choice. How these rights, including the right to education as provided in article 75 as well as the right to health care, are promoted by the State and other stakeholders remains to be seen. Thus, the goal of the study is to produce field-based empirical evidence and documentation on the state of human rights of the Doma several years after the implementation of the Declaration of Human Rights in the Constitution of the country. The study closely examines how the Doma peoples' human rights are promoted or abrogated.

3 The Doma in the Historical Context

The Doma qualify both as a minority and an indigenous group in Zimbabwe. The United Nations report acknowledges that there is no agreed international definition of what constitutes a minority group. However, the study adopts the 1977 definition of Francesco Capotorti which he gave as a UN Special Rapporteur as part of the UN Sub-Commission on the prevention of discrimination and protection of minorities:

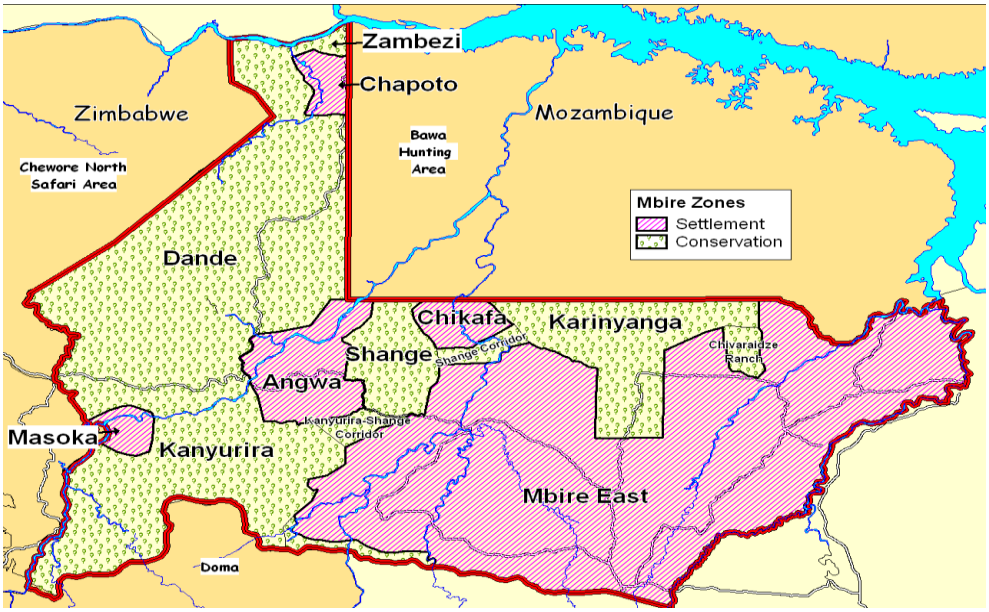
> A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members being nationals of a State possesses ethnic, religious and or linguistic characteristics different from those of the rest of the population and show, if only implicit, a sense of solidarity, directed towards preserving their culture, tradition, religion or language.[8]

Besides being a minority group, the Doma people also fit into an indigenous category, as defined by the FAO as, "[…] those who retain knowledge of their land and food resources rooted in historical continuity within their region of residence".[9] Another definition, which refers to the Doma as indigenous people, also states that, "communities…people…which, having been a historical continuity with pre-invasions and pre-colonial societies that have developed on their territories, consider themselves distinct from other sectors of societies now prevailing in those territories or parts of them".[10] Thus, oral history about the Doma makes them both a minority group and indigenous peoples of the Zambezi valley.[11] This relates to speculations about the origins of the Doma who are believed to originate from the same group of people as the Chikunda. It is unknown to historians and anthropologists at which point in time they separated from each other. Another speculation argues that the Doma could have come from Chicoa or Songo, an area around Kebera Bassa gorge in Mozambique, sometime in

[7] Government of Zimbabwe. *Constitution of Zimbabwe* (Harare, 2013). <constituteproject.org/constitution/Zimbabwe_2013.pdf> (accessed 16 January 2023). Article 16(1).
[8] United Nations,'Minority rights: International Standards and Guidance for Implementation'. HR/PUB/10/3, 2010, <ohchr.org/sites/default/files/Documents/Publications/MinorityRights_en.pdf> (accessed 16 January 2023).
[9] V. H. Kuhnlein B. Erasmus, and D. Sprigelski,*Indigenous Peoples Food Systems*, (FAO,Geneva, 2009).
[10] D. A. Posey(ed.), 'Cultural and Spiritual Values of Biodiversity', UN Environmental Programme, 1999, <unep.org/resources/publication/cultural-and-spiritual-values-biodiversity> (accessed 16 January 2023).
[11] A. Isaacman, 'Chikunda transfrontiersmen and transnational migrations in pre-colonial south central Africa, ca1850-1900'. *Zambezia XXV11 (11*), (2000).

history and moved to their present location well before the Chikunda moved to the Kanyemba area.[12] This narrative fits into many historian's accounts today which state that the Doma left Kabora Bassa gorge as they fled from Portuguese slave raiders who arrived to capture local populations to force them to work on their plantations. The third speculation claims that the Doma are the descendants of a sub-ethnic group of the Shona, namely the Korekore, who may have decided to live in isolation around the Chewore Mountain to avoid raids from the Chikunda, the Kololo, the Lozi and the Ndebele armies.[13] It is argued states that the Doma lineage was linked to a grand ancestor called Nyamapfeka.[14] Evidence indicates that the Doma might have been a low status group in this era of raids and counter raids who depended on the rouged terrain to live in an isolated and independent existence. This argument fits into contemporary cultural practices of the Doma, hence, the origins of the Doma people remains shrouded in mystery with no clear explanations. The issue has become even more complex due to inter-marriages with other groups through deepening complexities of ethnic identity.[15] The map of the Mbire district below shows the areas where the Doma people reside on the fringes of the Dande national parks.

Figure 1: Map of the Mbire district[16]



The Mbire district endowed with wildlife and located on the peripheries of the metropolitan areas has not been a candidate for legal anthropological studies. Thus, the study focuses on aspects of international human rights and their application at the local level in communities that usually only attract research on food security, disaster management and wildlife-human conflicts. Three communities, that is, Chapoto on the north and bordering with Zambia, Angwa on the general east and Masoka on the south western side are communities around Dande forest. Ethically, they are habited by the Kore-Kore, Chikunda, Karanga and the Doma. However, the Doma dwell on the border with the forest for easy navigation and pursuing their hunting lifestyle. See map above.

[12] *Ibid.*
[13] D. Beach, *The Shona and Zimbabwe 900-1850: An outline of Shona history*. (Heinemann, Londom, 1980).
[14] C. S. Lancaster, 'Ethnic identity, history and 'tribe' in the middle Zambezi valley' 1 (4) *American Ethnologist*. pp. 707-730; Nhira, *supra* note 6; Cutshall, *supra* note 6.
[15] Hasler, *supra* note 2.
[16] Matema, *supra* note 5.

4 Theoretical Framework

A human-rights-based approach (HRBA) aims to support better and more sustainable development outcomes by analysing and addressing inequalities, discriminatory practices and unjust power relations which are often at the heart of development problems. In this vein, the human-rights-based approach has been viewed as a central pillar of the United Nations work since its inception in 1945 as an organ that is believed to address the inadequacies of the League of Nations as it adopted the Charter on human rights. This was motivated by the fact that world leaders realised that humanity deserved better approaches to life as opposed to the horrendous effects of World War I and World War II that they had witnessed. The Human Rights Based Approach (HRBA) is a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed at promoting and protecting human rights. It seeks to analyse inequalities which lie at the centre or heart of all development problems that affect communities in order to address discriminatory practices and the unjust distribution of power. The inequalities inevitably impede development progress and often result in a group of people being left behind.

Under the HRBA, the contemplated plans, policies and processes of development are included in a system of rights and corresponding obligations established by international law. The HRBA also requires human rights principles to guide a nation's development cooperation and focus on developing the capacities of both duty bearers, to meet their obligations, and rights holders, to claim their rights. The human rights principles include transparency, individuality, equality, accountability, universality, participation and non-discrimination. There is, however, no universal formula for a HRBA but the UN agencies have agreed on a number of essential aspects that should be considered. These features, as agreed in 2003, indicate the following:

- ⇒ All programs of development cooperation, policies and technical assistance should further the realisation human rights as laid down in the UDHR and other international human rights instruments
- ⇒ Human rights standards contained in and principles derived from the UDHR and other international human rights instruments guide all development cooperation and programing processes
- ⇒ Development cooperation contributes to the fulfilment of duty bearer's obligations and/or of rights holders to claiming their rights[17]

The HRBA is one of the six guiding principles of the United Nations Sustainable Development Cooperation Framework and is also guided by the principle 'leave no one behind' (LNOB). This is the central and transformative promise of the 2030 Agenda for Sustainable Development Goals (SDG). It represents the unequivocal commitment of all UN member states to eradicate poverty in all its forms, end discrimination and exclusion, reduce inequalities and vulnerabilities that place people in a disadvantaged position and undermines the potential of individuals. The LNOB principle not only entails supporting the poorest of the poor but requires addressing discrimination and rising inequalities within countries at their root causes. A major cause that results in people being left in disadvantaged positions is discrimination, including gender-based discrimination, which leaves individuals, families and whole communities marginalised and excluded.

[17] United Nations Sustainable Development Group, Human Rights Based Approach (2023), available at https://unsdg.un.org/2030-agenda/universal-values/human rights based approach (accessed 02 May 2023).

5 Methodology

The study utilised a qualitative approach to understand the state of human rights of the Doma people in Zimbabwe. A qualitative approach was used because it enabled the researchers to capture the realities of the state of human rights from the perspective of the Doma people themselves.[18] As argued, a qualitative approach allows the use of multiple data collection methods.[19] We found this useful to acquire a deeper understanding of the state of human rights of the Doma people through the use of in-depth interviews and a desktop review of relevant literature. Purposive sampling, defined as a sampling approach in which the researcher has a direct control over the elements included in the study[20], was utilised to select the respondents. For this study, we wanted indigenous Doma people with extensive knowledge of the people's way of life, therefore, purposive sampling was particularly valuable as it allowed the inclusion of respondents with rich information that were able to answer the research questions. In total, we sampled 20 indigenous Doma people and eight key informants for the study. Even the literature we reviewed was purposively sampled. Only the literature focusing on the state of human rights of the Doma people, and their way of life was included in the study.

Data was collected using in-depth interviews to answer the research questions and further clarifications were obtained through face-to-face interviews with key stakeholders. These data collection tools and techniques were appropriate for the study as they allowed for researcher probes and follow-up questions.[21] A total of 20 in-depth interviews were conducted with Doma people to understand how the 2013 Constitution has been guaranteeing the human rights of the Doma people in reality. The interviews were conducted in Shona to be accommodating to the language kills off the Doma. The interviews lasted not more than 40 minutes, with a few exceptions lasting up to an hour. Besides the interviews with the Doma people themselves, eight key informant interviews were also conducted to buttress the data emanating from the Doma people. These key informants included councillors from the two wards, a chief, a nurse, a police officer, a teacher, a social welfare officer and a representative from the Mbire Rural District Council. Their views were considered important for unravelling how the 2013 Constitution promotes or undermines the human rights of the Doma people. We also conducted a desktop study to complement primary data collected through the interviews. The desktop study was carried out in form of a literature review as it ensured a contextual understanding of the way of life of the Doma people. Though we worked with a guide who helped us navigate during our fieldwork, we further obtained the active consent of all research participants which was provided verbally due to illiteracy issues. There was no coercion to participate in the study and the participants had the option to refuse participation or terminate and withdraw it at any given point without any negative implications. We guaranteed anonymity of the data through the use of non-identifying marks of the collected data as suggested in the literature.[22] We did not share our field notes and recordings with people not involved in the study, thus guaranteeing confidentiality. Data for this study was analysed through a thematic analysis which can be

[18] D. Eyisi, 'The usefulness of qualitative and quantitative approaches and methods in researching problems solving ability in science education curriculum'. 7(15) *Journal of Education and practice*, (2016) pp. 91-100.
[19] *Ibid*.; M. S. Rahman, 'The advantages and disadvantages of using qualitative and quantitative approaches and methods in language "testing and assessment" research: A literature review'. 6(19) *Journal of Education and Learning*, (2017), pp. 102-112.
[20] L. A. Palinkas, *et al*. 'Purposeful sampling for qualitative data collection and analysis in mixed method implementation research', 42(5) *Adm Policy Ment Health*, (2015), pp. 533-544.
[21] R. Rivas, and M. Gibson-Light, 'Exploring culture through in-depth interviews: is it useful to ask people about what they think, mean and do?',57 *Cinta Moebio*, (2016), pp. 316-329.
[22] A. Surmiak, 'Confidentiality in qualitative research involving vulnerable participants: Researcher's perspectives forum', 19(3) *Qualitative social research*, (2018), pp. 1-26.

understood as a process of identifying patterns and themes in qualitative data.[23] After transcribing of the data, we went through the transcripts to identify emerging themes which are presented below.

6 Data Presentation and Discussion of Findings

In this last part of the research document, we present the research findings and provide an analysis which allows for cross referencing with other scholars and the HRBA. Since the field engagements were within the qualitative research framework, data is presented and analysed thematically, hence, the following themes are represented below: human rights and the Doma culture; Doma traditional/ancestral land, food security and livelihoods; the Doma language, school services and availability of health systems. Therefore, the central themes exemplify that despite the introduction of the new Constitution in 2013 the Doma remain geographically isolated and disadvantaged in terms of protection and enjoyment of their basic human rights compared to other citizens. The attainment of basic rights, such as the right to food, education, health, maintaining and retaining cultural practices, remains largely an idealistic goal among the Doma people.

6.1 Lack of Claim to Ancestral Land

Historically, the Doma are the indigenous people of the area designated as Dande Game Park under the Parks and Wildlife Authority today. [24] This was enacted during the colonial era and, for the Doma community, the process of passing the law disregarded the fact that this was their area of domicile. An interview with a representative of the Mbire Rural District Council, which is the local government for the area, indicated that the Doma people have been in the Dande area prior to the Mtapa invasion era but have partly lost total control of their land through the establishment of the non-hunting area in 1952 which was enforced under the above act As an indigenous minority group, the Doma do not have a claim to indigenous land since that right is presently reserved for the Government of Zimbabwe.. As such, they are restricted to the fringes of the game park which gives them limited opportunities to hunt. Under the Parks and Wildlife Act, anyone who engages in hunting without the authority of the government is considered a poacher and is liable for prosecution and may be arrested or shot on sight by armed park rangers as authorised by the Act. Respondent 1 said:

> Yes the Doma's way of life is centred on hunting and gathering such that we do hide and seek with them in the forest such that at times the discretion lies with the ranger to shoot or not. We know this is their way of life but it contradicts the wildlife conservation approach held by governments worldwide.[25]

The anti-poaching activities, despite the efforts to involve the Doma in wildlife conservation under the Campfire programme, remains a hindrance to the expression of the Doma culture. Respondent 2:

> Hunting and gathering is a way of life of the Doma. Whereas the rest of us go to the shops to buy groceries and other life necessities, the Doma get into the forest to acquire their basics, thus for the Doma the forest is a 'supermarket', a pharmacy and a place to worship for them.[26]

[23] M. Maguire and B. Delahunt, 'Doing a thematic analysis: A practical step by step guide for learning and teaching scholars', 3 *All Ireland Journal of Teaching in Higher Education*, (2017), pp. 3351-33514.
[24] The Parks and Wildlife Act [Chapter 20:14].
[25] Interview with the Parks Ranger, June 2022.
[26] Interview with the Ward Councilor, June 2022.

While section 66 of the Constitution states that every Zimbabwean citizen has the right to move freely within Zimbabwe and reside in any part of the country, this fundamental human right is disregarded for the Doma due to the requirements of the Parks and Wildlife Act. The understanding and assumption derived from the constitutional provision indicates that the Doma people's rights should be given special protection by the provision of special privileges. The case of the Doma people ought to be understood in line with provisions of the International Covenant on Civil and Political Rights and the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. Those are the blueprints for the UN systems concerning the standards that should be followed by all member states on handling minorities. Said standards provide a guideline for crafting appropriate laws and mechanisms to protect minorities. Thus, the argument presented in this section is that the Doma, as a minority group whose livelihoods are dependent on hunting and gathering, deserve special mechanisms that cater to their culture and way of life. Having access to their ancestral land is also in line with Article 4 (1) of the United Nations Minorities Declaration which says:

> States shall take measures to create favorable conditions to enable persons belong to minorities to express their characteristics to develop their culture, language, religion, tradition and customs.[27]

It is, therefore, up to the State to establish mechanisms to promote the Doma's way of life on the basis of special arrangements. As previously argued, Doma people's life in the forest is anchored on hunting and gathering. In the Chapoto area, they live on the fringes of the forest on the western side of the Mwazamutanda River while the main Shona groups, the Korekore-Shona and the Chikunda live a village lifestyle on the eastern side of the river. We were told, by research participants and a key informant from the police, that the Doma are sometimes arrested for poaching especially when their hunting goes beyond hunting for meat:

> It is now a criminal offence to hunt in those mountains. Our ancestors used to hunt in those mountains and surrounding areas without being harassed by anyone. We believe that those mountains are part of us and they are being taken away from us. Hunting and gathering is 'us'. This is what we know and has historically practiced. Our hunting areas have all been made parks and they are out of bounds from us".[28]

At international level, the Aborigines managed to get legal representation and took the Government of Australia to court and won recognition and went on to create a political party for the purpose of representing their interests in parliament.[29] The indigenous Amazonians also contested the depletion of the forest through the Brazilian judiciary system from the stand point of international and national law.[30] In the African region, the Ogiek people of Kenya who were displaced from their ancestral land during the colonial era deployed international human rights law to fight for their rights to ancestral land.[31] They had lived in the Mau Forest in the Ri valley as forest dwellers for time immemorial but were subjected to forced evictions. Deploying both the national law and the African Charter on Human and Peoples Rights, they contested their eviction and the African Court on Human and People's Rights (ACHPR) allowed for the return

[27] United Nations Declaration.
[28] Interview with a Doma community leader, June 2022.
[29] H. Gobbett, 'Indigenous parliamentarians, federal and state: A quick guide'. Research paper series 2017-18, *Parliament of Australia,* 2017, <parlinfo.aph.gov.au/parlInfo/download/library/prspub/3923594/upload_binary/3923594.pdf;fileType=application/pdf> (accessed 16 January 2023).
[30] B. R. O'Donnell, 'Indigenous tribes in the Brazilian Amazon: Finding a balance between sustainability and economic development', University Honors Program Theses, 361 (Georgia Southern University, 2018).
[31] D. A. Ochien'g,.'The rights to land of indigenous people in Kenya: A case study of the Ogiek community and the conflict of articles potrayed in the constitution of Kenya',. Undergraduate Thesis. (Strathmore University, Law School, 2017).

of the Ogiek to the Mau Forest in a 2017 ruling.[32] It is the research's primary question whether the Doma people in the Zambezi valley would be able to gather themselves and take the Government of Zimbabwe to court or be assisted by an individual outside their group or a civic organisation.

Due to these legal restrictions to accessing their traditional hunting and gathering lands in the Dande Game Park, some advocate for the integration into villages and the attempt to adjust to the mainstream village lifestyle has evolved into a struggle for survival. As opposed to a hunting and gathering lifestyle, integrated village life requires people to join the monetary lifestyle in which services are purchased from the market. This has led many of the relocated Doma to resort to offering their labour in other people's fields and in other manual labour jobs. Cases of exploitation of cheap labour were reported where, for instance, people were working a full day shift weeding in the field for a bunch of bananas. The mainstream communities that hire the Doma people for menial jobs accuse them of not being skilled in those jobs as justification for exploitation. The lack of skills is due to the fact that the original Doma culture has less crop cultivation and animal husbandry since their villages were located on the fringes of the forest that are easily reachable by wild animals. Based on the data above, we are of the view that the food insecurity rampant amongst the Doma people is because of disturbances of their livelihood. In concurrence[33]pp 5 submitted that "a recent government action designating the area as a game reserve have left the Doma vulnerable as food has become scarce." Currently, they are being forced to adopt agriculture which is not their livelihood speciality as established by Kanengoni [34]and emphasized by the United Nations which argues they are[35] restricted to fishing on a small stretch of the Zambezi River. On many occasions, they have gotten into trouble and been accused of poaching by the Zimbabwe Parks and Wildlife Management Authority. Population pressure from mainstream villagers was also found to be pushing the Doma away from the small traditional land that they possessed. Thus, the question whether the Doma are protected by the Declaration of the Rights in the Constitution of Zimbabwe remains unanswered.

6.2 The Right to Maintain a Culture of Their Own

The extensive field engagements revealed a key aspect of the Doma people as represented by how outsiders view them. A common view amongst the local Shona Korekore and Chikunda people in Mbire is that the Doma people are backward, ignorant and uncivilised. This revelation was not a surprise as our field visit exposed us to the activities of many churches and non-profit organisations meant to ensure the enlightenment of the Doma people. Our findings suggest that churches are geared to 'redeem' the Doma people from their ignorance and ensure that they hear the word of God and bring 'light' to them. This is against the background of the Doma people being viewed as 'trapped in the life of backwardness'.[36] During our fieldwork, we were informed about various churches coming to the Doma communities in an attempt to spread the word of God. These conversion attempts aim to assimilate the Doma into Christianity which is corroborated by one key informant who said:

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[32] M. Parvathi, 'The uncomfortable balance between a minority and a people: The global/local disconnect', 24(1) *International Journal on minority group rights*. (2017), pp.254-272.
[33] T. Kanengoni, 'Doma Community Faces Challenges as Nature Reserve Designation Restricts Hunting', *Global Press Journal*, (2017).
[34] *Ibid.*
[35] United Nations, *supra* note 8.
[36] The NewsDay, 'Relief for the Doma people', *The NewsDay Zimbabwe*, 2014. <newsday.co.zw/2014/06/21/relief-doma-people> (accessed 16 January 2023).

> The people [Doma] believes in the worship of ancestors. The dead are key in the religious structure of the Doma people. However, with the flooding of religious group who come to materially assist the people and spread the word of the God, there is encouragement to abandoned this and believe in Jesus.[37]

The Doma people equally live semi-nomadic but build semi-permanent huts on the fringes of Dande Gave Reserve along the banks of Mwazamutanda River near Kanyemba centre as well as in Masoka and Angwa Bridge. A life of foraging attracts stereotypical views from other non-Doma people, including the media which circulates negative misconceptions in newspaper articles. A review of documents and newspaper journals revealed that the Doma are sometimes presented as 'forest dwellers' 'mysterious people of the Zambezi valley' 'people of no toes'[38]. Based on these misrepresentations of the Doma way of life, they have been regarded as second class people and are persistently excluded from central planning for service provision and are less recognised as a stand-alone cultural society. This and many other forms of discrimination were noted in the Doma world despite the constitutional provisions. For instance, section 6 only recognises 16 official languages excluding Doma's native tongue. Furthermore, section 16 states that:

> (1) The State and all institutions and agencies of government at every level must promote and preserve cultural values and practices which enhance their dignity, well-being and equality of Zimbabweans".[39]

Our field-based evidence pointed to the lack of mechanisms established by the government for the preservation and promotion of the Doma culture. Section 63 provides that every citizen has the right to not only speak but maintain and promote their language and culture. By not officially recognising the Doma language, the State failed to fulfil its obligation of promoting and protecting its citizens' languages and cultures. A human rights-based approach, both at a local and international level according to Broberg and Sano [40] , puts a lot of emphasis on the obligation of the State, as a key duty bearer, to provide a conducive environment for minorities and the ordinary citizens to ensure the enjoyment of their cultural rights. While the Doma people are not forced into adopting and adapting to other cultural practices, there is an indirect cohesion described by Bellamy[41] as cultural hegemony which forces them into submission or withdrawing into the forest and live a life far away from other people's influences. We argue and share Gramsci view[42] that the cultural hegemonic traps are a violation of the Doma's human rights which are not only enshrined in the Constitution of Zimbabwe but other regional and international legal provisions converge as well.[43] Article 1 (1) of the International Covenant on Economic, Social and Cultural Rights states that States shall protect the existence and national or ethnic, cultural, religious and linguistic identities within their respective territories and shall encourage conditions for the promotion of that identity. While Zimbabwe is a signatory to the UNDRIP and other international treaties, field-based evidence in the Zambezi valley shows a lack of application of specific measures to protect the Doma language and culture. Hence, the Domahood is at the risk of extinction. The assumption is that the rights of minority groups

[37] Interview with a Doma villager, June 2022.
[38] The NewsDay, *supra* note 36.
[39] Constitution of Zimbabwe, *supra* note 7.
[40] M. Broberg and H. Sano, 'Strengths and weakness in a human rights based approach to international development: An analysis of the rights based approach to development assistance based on practical experiences', 22(5) *The International Journal of Human Rights*, (2017), pp.664-680.
[41] A. Gramsci, *Pre-Prison Writings*. In R. Bellamy (ed.) (Cambridge University Press, Cambridge, 1994).
[42] *Ibid.*
[43] United Nations Development Programme (2017).

ought to be protected on a practical level. Tied to this discussion, about language and cultural rights, is the right to education which is discussed in the next paragraphs.

6.3 The Doma's Right to Education and Health from a Human Rights Perspective

While we started empirical data collection under the impression that we would engage an interpreter of the Doma language, we learnt that all the Doma understood the Shona and Chikunda languages, which are spoken especially in Kanyemba, efficiently. They would, however, converse in their native language when they were by themselves. There are three primary schools which are supposed to be centres for learning including the Chapoto primary school in Kanyemba rural centre which is near the Zambezi River near the borders to Zambia and Mozambique. This school is within the community of the Korekore-Shana and Chikunda people where the dominant language used in the school is Shona. The Doma people are located at least 18 kilometres away on the western side of a big river as mentioned earlier. During the rainy season, the river cannot be crossed by children. Thus, the distance and geographical barriers, namely the river, determine whether Doma children may go to school or not. Doma children also frequently face challenges in schools, for instance with their school uniforms, due to the prevalence of high poverty levels. This is compounded by the language dilemma considering that the school curriculum does not include their unrecognised language. The same applies to Doma people in the Masoka area on the general southeaster side of the Dande Game Park. Again, there exists a river barrier between the Doma villages and the school. The Angwa River is a permanent obstacle which makes it dangerous for school-aged children. The curriculum is another crucial factor due to the disconnect to the Doma life as it fails, for instance, to take the lack of affordability of school uniforms and tuition fees into account. These factors contribute to the Doma children's high drop-out rates in the school system. Similar circumstances were noted at the Angwa primary school on the northeast side of the forest. Few children attending up to grade seven, highest primary education level is Zimbabwe. Angwa secondary school, which is on the other side of the forest, is located too far away from the habitat of the Doma. Based on these observations, the Doma children are unable to utilise the educational facilities and their parents provide instead ethno-education and training in the forest. That is based on hunting, identifying non-poisonous tubers for consumption, poisoned arrow hunting, the tracking of animals, fire making and salt production from particular salty soils.

The field-based evidence analysed above ought to be understood in relation to the section 75 (1) of the Zimbabwean constitution according to which every citizen and permanent resident of the country has the fundamental right to basic education as well as adult education.[44] The same section also states that the State must take reasonable steps and measures to achieve the progressive realisation of the right to education.

The Doma face similar challenges in terms of health service availability. Clinics are either too far away or are not staffed with professionals. Consequently, the Doma people do not rely on modern health services but rather on their traditional and ethno-medicines systems. In the few instances when the Doma visit the poorly equipped health delivery systems, their sick relative already deteriorated to critical stages and, in most cases, dies on arrival at the clinics. Such cases resulted in negative perceptions of hospitals and clinics as places of medical and health care. The clinics are viewed as places of death and despair. Respondent 6:

[44] Constitution of Zimbabwe, *supra* note 7.

> What benefit does it give to our people when on those few cases visit the clinic and lose their beloved one? Thus, the clinic really work or it quickens one's death?[45]

The question is what that means in terms of the Doma people's human rights as enshrined in the Constitution. The non-availability of basic services for the Doma as a minority group qualifies to be described as a discriminatory practice despite section 56 of the Constitution stating that all persons are equal before the law and must not be discriminated against. Further, sections 75 stipulates the rights of all citizens to education. Evidence in the Doma communities highlights the lack of these service especially for Doma people who are geographically located far away from the schools and clinics. The section below presents data about the state of the health delivery system for the Doma people.

6.4 Doma Ethno-Medicine versus Clinics: Access to Public Health Services in Dande

Empirical evidence from the Zambezi valley about the Doma pointed to the similarities in circumstances between the educational and health care systems. Interviews with key informants showed that medical clinics are geographically located at the same sites as educational centres, that is, in Chapoto at the Kanyemba service centre, at Masoka community centre as well as at the Angwa Bridge. It is at these centres that schools, clinics as well some grocery shops are sited. As already alluded to, these community centres are far away from the Doma people and even the few who chose to be villagers are still a considerable distance away from them. More so, the study established that physical barriers of rivers between the Doma and the medical centres contribute to the inaccessibility of these services. The other observation, made by the research team in terms of Doma people's rights to health delivery services, was the scarcity of medical supplies at the clinics as well as the unavailability of trained medical staff. In the few instances when a Doma person decides to seek out medical treatment from the clinic, he or she does not get adequate services. A case was reported, by a health worker at the Masoka clinic, in which one of the Doma members who was bitten by a snake was brought to the clinic when his condition was already deteriorating after they initially attempted to use home remedies. Upon arrival at the clinic, the staff was unable to provide any anti-venom or an ambulance for further treatment at the Guruve hospital which is more than 100 kilometres away along a dust road in extremely poor condition. When the patient passed away at the clinic, the responsibility of carrying the dead body back home was imposed on the family who did not have any means except the use of a make-shift stretcher bed with which they carried the body on their shoulders. Respondent 8 said that:

> These are the case we all know here that they discourage the Doma people from relying on modern medicine and clinic services. They feel that the clinics are places for death and grief hence, they disregard them.[46]

This scenario that the research team was exposed to exemplifies the real-life experiences of the Doma people despite the provisions of section 76 (1) which states that:

> Every citizen and permanent resident of Zimbabwe has the right to have access to basic health care including reproductive health care services… and that the state must take reasonable legislative and measures to achieve the goal […].[47]

[45] Interview with the Doma village head, June 2022.
[46] Interview, Medical health worker June 2022
[47] Constitution of Zimbabwe, *supra* note 7.

The state of the Doma people's human rights seemed to be failing to meet the acceptable standard, both at a national and international level. When a marginalised community fails to benefit from the services provided by the State, it means that, there is a need for a revision of the way the services are provided to establish strategies and mechanisms that enable all citizens in a constituency to access said services.

6.5 Upholding the Principle of Non-discrimination

Through the human-rights-based lens, the study also highlights that the Doma people experience varying levels of discrimination both directly and indirectly. This is, for instance, reflected in the way they are viewed by their neighbours but also in the way they are treated on the basis of their illiteracy and living in a different civilisation. The study established that the non-Doma communities around the Zambezi valley regard them as backward, barbaric and uncivilised tree or forest dwellers who must be integrated in the mainstream lifestyle. The same perceptions are also held by many in the private corporates, the hunting and safari companies, as well as in non-governmental organisations that operate in the same area. This is exacerbated the way the media portrays them in both print and digital media. These institutions contribute to the construction of a stereotypical view and perspective towards the Doma people, which is also reflective of the current governmental approach towards them which includes institutionalised forms of discrimination. The Constitution of Zimbabwe clearly states that in section 56 hat no persons shall be subjected under discriminatory behaviour while the International Covenant on Civil and Political Rights article 26 states that all persons are to be equal before the law and should not be discriminated on the basis of language, social origin, class, race or ethnicity.[48] Thus, attempts at integrating the Doma people in mainstream village lifestyle may interfere with Article 1 of the same international law which says that all people have the right to self-determination and are free to determine their political status and pursue freely their economic and cultural development.[49]

7 Human Rights Challenges Amongst Minorities

Our field-based evidence concurs with the argument that the unclear definition of who qualifies as a minority remains a central issue in the human rights discourse.[50] The decision to not establish a concise definition may be ignored or delayed for political reasons. The case of the Doma language being excluded from the curriculum fits that pattern, hence, it is uncertain whether the Doma language will be recognised in the near future. Scholars such as Papoutsi[51] and Parvathi[52] similarly argue that state expenditures towards minorities become political issues when job security of elected politicians in their respective offices largely depends on prioritising the interests of the majority. Within this context, the study argues that there appears to be some lack of international moral authority and of capacity to be present in individual parts of the nation to supervise the implementation of the best practices. International rules may not be self-executing especially with boundaries of states. More so, not all UN members states are signatories to treaties and conventions, hence, they do not have obligations to adhere to the international human rights standards as provided in the statutes since "[…] it is up to the State

[48] International Covenant on Civil and Political Rights.
[49] International Covenant on Civil and Political Rights.
[50] E. Papoutsi, 'Minorities under international law: How protected they are?' 2(1) *Journal of social welfare and human rights.* (2014), pp.305-345.
[51] Parvathi, *supra* note 32.
[52] Papoutsi, *supra* note 50.

itself opinion and interest to decide about minority's future […]".[53] Thus, Lennox[54] argues that international bodies either do not have the capacity to police nation states or and deliberately leave the responsibility with said states. In line with the above argument is the observation that of lack of knowledge of their basic rights is common among the Doma people. They have very limited knowledge about their rights which places them in a particularly vulnerable position since they are dependent on donors. More so, civic society organisations that operate in the Doma communities were found to be only interested in the provision of humanitarian food aid and seemed to not have any mandate towards human rights. The other complicating factor concerning the human rights of the Doma is also linked to what Lennox[55] regards as a western bias in two fronts. The first bias originates from international law being too focused on individualistic rights while the Doma people ought to be approached as a group or community with collective rights. Secondly, international human rights law tends to consider minorities according to their western definitions, meaning that minority groups generally consist of a majority of migrants. Thus, there is a separation of minority groups and indigenous groups. The Doma are, however, both indigenous and a minority and their human rights should be considered combined.

8 Conclusion

The study has reflected on the human rights of the Doma people of the Zambezi valley, who are an indigenous minority group, premised on the fact that since 2013, the new Constitution provides for the protection of the rights of minorities. The research, through an in-depth literature review and documentary inquiry, provides basic information on the Doma people in context to the constitutional protection under relevant sections. We further deployed a qualitative research framework to generate and collect field-based empirical evidence guided by the human rights based approached to establish the following sub-themes: Doma people's rights to language and culture, rights to ancestral land, a form of civilisation and non-discriminatory lifestyle, rights to education, health and equal access to services. While the study could not provide an analysis of all areas of the Doma life, it brought to the fore critical aspects of their life from the human rights perspective which may encourage further research on the topic. This is particularly crucial since the human-rights-based approach creates a social science-law nexus which risks being marginalised by mainstream research.

[53] *Ibid.*
[54] C. Lennox, 'Human Rights, Minority Rights,Non-Discrimination and Pluralism: A Mapping Study of Intersections for Practitioners'., *Global Center for Pluralism*, (2018).
[55] Lennox, *supra* note 54.

6 Contributions of Local Authorities to the Realisation of Human Rights in Zimbabwe: The Case of Bindura Rural District Council (BRDC) and the Right to Health Care

Lawrence Mhandara and Ashton Murwira*

Abstract

The paper examines the contributions of rural district councils towards the realisation of the right to health care in Zimbabwe. Conventional literature has predominantly focused on the contributions of the central government and challenges it has faced in fulfilling the right to health care. However, little is known about the obligations that local authorities as the agencies of the central government have concerning the realisation of this right. The paper aims to fill this gap by focusing on the extent at which BRDC has respected, protected, and fulfilled the right to health care among the rural people in Bindura Ward 16. A mixed methodology was adopted for the study based on a human rights approach. Data emerging from a literature review, in-depth interviews and a survey, demonstrate that the majority of the rural people are aware of health care issues but have little knowledge on the right and the obligations that local authorities have. Despite the limited knowledge, the findings show that the BRDC has played a complementary role to the central government through the construction of the Chiveso clinic, management of the infrastructure, and roads leading to the health point. The central government has provided financial resources, solar power, medicine, and personnel for the clinic. These contributions are worth celebrating as they indicate the milestones that both central and local authorities have achieved with regard to the right to health care in Bindura. Respondents noted that the BRDC has, to some extent, not been effective in contributing towards this right. For example, people still walk long distances to access health points, poor road networks, and critical drugs are scarce. Such factors compromise the quality and accessibility of health care that people are entitled to. The challenges faced by the BRDC cannot be separated from the general macro-economic challenges of the central government. This paper exemplifies that there is need for additional funding towards the BRDC for it to effectively contribute towards the right to health care. Instead, the rural people of Bindura need awareness campaigns concerning the right to health care in order to improve public accountability.

1 Introduction

The 21st century is characterised with inequalities between developed and less developed countries. Moreover, economic disparities are also prevalent within individual countries regardless of their development statuses. Indeed, troubling inequalities continue to define the development trajectory and the associated challenges of exclusion and discrimination remain in most societies a key obstacle that restricts human potential. In the context of these ongoing challenges, an emergent philosophy is that integrating human rights approaches in service delivery has the potential to steer the world towards the collective aspirations of dignified human existence. Among the rights, included under the expanding human rights framework, is the right to health. Experts, such as London avers that the right to health is "both an essential requirement for the realization of health for all … and a *sine qua non* for a world based on social justice".[1] There is no contestation on the importance of the right as it is now

* The authors are human rights professionals and researchers active in Zimbabwe.

[1] L. London, 'What Is a Human-Rights Based Approach to Health and Does It Matter?', 10:1 *Health and Human Right* (2008) p.66.

widely recognised in key international human rights instruments.[2] In all the instruments, the right to health is acknowledged as an all-encompassing right that includes both health care and the underlying determinants of health such as access to safe water and adequate sanitation among others.[3]

As signatory to the international human rights law instruments, Zimbabwe has given effect to these international instruments by entrenching explicit provisions in its Constitution (Amendment No.20) that guarantees the right to health as an inclusive right. The country has a strong legal framework protecting socio-economic, civil and political rights. Among the rights clustered under the former category is the right to health care. The right to health is highlighted in Section 29 of the Constitution relating to 'National Objectives' and further emphasised and expounded under Section 76 as one of the fundamental rights.

As the nation is poised to celebrate a decade since the adoption of the Constitution, it is worth to evaluate the extent to which local authorities, in particular the Bindura Rural District Council (BRDC), have contributed or are contributing towards the realisation of human rights. Despite its importance, there is a tendency to consider health care a privilege. The Government and its agencies appear to place less emphasis on the right, leaving non-governmental organisations and the foreign aid community with the task to provide services. Yet these organisations do not have the primary responsibility to do so according to the Constitution. In addition, a human rights approach is lacking in scholarly research on public health in Zimbabwe.[4] In the few studies that have attempted to focus on the right to health, local authorities have not been studied as much as the central government.[5] It is, therefore, necessary to examine whether the policies, plans, programs and projects of local governments support a rights-based approach to health care. In the absence of an empirical inquiry, the exact contributions of local authorities towards the right to health care, 10 years after the historic promulgation of the Constitution, shall remain the subject of conjecture. Since this study is focusing on a local authority, it is obligatory to clarify the obligations at that level of government. From the onset, it has to be stated that the rights-based framework does not clearly delineate the responsibility of local authorities toward the realisation of human rights. These obligations apply primarily to States who are the subjects of international law.

However, borrowing from London and Krennerich's interpretations,[6] we reason that there is a prominent pattern in which responsibility falls on local authorities. Local authorities are

[2] *See*, for instance, the Universal Declaration of Human Rights, International Covenant on Economic and Social Rights and The African Charter on Human and People's Rights.

[3] *See* Committee on Economic, Social and Cultural Rights, General Comment No. 14 cited in Centre for Health and Human Rights 2013; OHCHR, 'Fact Sheet No. 31: The Right to Health', 2008, <ohchr.org/sites/default/files/Documents/Publications/Factsheet31.pdf> (accessed 12 December 2022); E. D. Kinney, 'The International Human Right to Health: What does this mean to our Nation and the World?', 34 *Indian Law Review* (2001), pp. 1457-1475.

[4] A. Chikanda, 'Skilled Health Professionals Migration and its Impact on Health Delivery in Zimbabwe', 32: 4 *Journal of Ethnic and Migration Studies* (2006), pp. 667-680; S. Shamu. *et al.*, 'Who Benefits From Public Health Financing in Zimbabwe? Towards Universal Health Coverage', 12: 9 *Global Public Health* 12 (2017) pp. 1169-1182; W. Zeng. *et al.*, 'Utilization of Health Care and Burden of Out-of-Pocket Health Expenditure in Zimbabwe: Results from a National Household Survey', 4:4 *Health Systems & Reform* (2018), pp. 300-312; K. K. Kidia, 'The Future of Health in Zimbabwe', 11: 1 *Global Health Action* (2018) pp. 1-4.

[5] Labour and Economic Development Research Institute, 2020.

[6] M. Krennerich, 'The Human Right to Health: The Fundamentals of a complex Right', in S. Klotz, H. Bielefeldt, M. Schmidhuber and A. Frewe (eds.) *Health care as a Human Rights Issue*: *Normative Profile, Conflicts and Implementation* (Beilefeld:Verlag, 2017), pp.23-54.; London, *supra* note 1, p. 68.

critical components of the central government (the State) and Zimbabwe is no exception. Therefore, anybody, institution or individual directed, controlled or acting on behalf of the State effectively becomes the instrument through which the State upholds the right to health. Those actors, should, consequently, be involved in the respect, protection and fulfilment of the right. Indeed, Section 45(1) of the Constitution supports this interpretation. The provision states that the Declaration of Rights is binding for governmental agencies at every level. It is thus possible for this study to generate new knowledge and policy recommendations on the contributions of local authorities to the realisation of the right to health. The research achieved this through a case study of the BRDC in Mashonaland Central Province.

The major question answered in the study is to what extent local authorities have, in particular the BRDC, fulfilled their obligations as defined in the Constitution, to respect, protect and fulfil the right to health care among citizens under their jurisdictions in Zimbabwe. The sub-research questions were as follows:

- To what extent are public health care facilities and services available to people in the BRDC area?
- How readily and freely accessible are the facilities and services to all the people under the BRDC without discrimination?
- Is information about these facilities and services easily accessible?
- Does the quality of facilities and services meet international and national standards (for instance, trained medical personnel and certified drugs)?

2 Literature Review and Conceptual Framework

To fully implement the right to health, an unambiguous definition is required that can provide policy makers with clear markers in the practical application as well as benchmarking progress, stagnation or failure to fulfil the right to health.

2.1 Definition of the Right to Health

A brief review of the existing body of literature shows that there is convergence on the meaning of the right to health care. Scholarly works on the right largely draw from international legal documents, in particular, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and related treaties on the right. For example, Hunt defines the right to health as "a shorthand for the right of everyone to the enjoyment of the highest attainable standard of physical and mental health as provided in Article 12 of the ICESCR".[7] The broad implication of this definition is that States, as duty bearers, ought to have comprehensive and all-encompassing approaches to respect, protect, and fulfil the right. The aim is to satisfy the requirement to ensure that their citizens as the right holders, are not deprived of the best attainable health facilities and care achievable within their jurisdictions. The right is comprehensive and all-encompassing in the practical sense that the existential condition of being healthy connotes complete physical and mental well-being and not just the absence of diseases. Prior to unpacking the content of the right, it is appropriate to briefly examine the development of the right in the *corpus* of international law. This entails an examination of the key instruments and the interpretation of the right which yielded its extant core elements.

[7] P. Hunt, 'Interpreting the International Right to Health in a Human Rights-based Approach to Health', 18:2 *Health and Human Rights* (2016) p. 111.

2.2 Interpretation of the Right: Its Core Elements

Gleaned from the international instruments and literature in the preceding sections is the fact that the right to health is widely acknowledged as a binding human right. Yet, there are ongoing debates on what elements constitute this right. Bielefeldt *et al*. note that the right to health frequently evokes sceptical reactions and they, consequently, highlight some of those critical voices.[8]The first is that a right to health cannot be universal since health infrastructure is expensive and dependent on the availability of resources. Scarcity of resources in some States can hamper the development of a minimum health infrastructure. The right to health then becomes nothing but a hollow promise.[9] The second is a radical claim. Based on a comparison of civil and political rights, critics posit that since the right to health requires expensive infrastructural investments in health care, it imposes positive duties upon the State such as the obligation to fulfil the right to equality rather than respect and protection. However, this dichotomisation of the right, indeed of all economic, social, and cultural rights (ESCR), against civil and political rights has not been exhausted. The current state of the debate has challenged this conceptualisation. London, for example, argues for the indivisibility of the ESCRs from the civil and political rights arguing that the dichotomisation is artificial and unsustainable.[10]

The dispute over the interpretation of the right is not resolved by the composite sources of the law. A general and conclusive interpretation of the right is thus never easy. Nonetheless, the premise of departure is the Committee on Economic, Social and Cultural Rights (CESCR) and the comments from the UN Committee on Economic, Social and Cultural Rights, established in 1988 both of which guide the interpretation and structure of the right.[11] The comments guide the interpretation of the right as a human right. “The right to health is a fundamental part of our human rights and of our understanding of a life in dignity”.[12] In a summative way, the right refers to the following core elements:[13]

a) Inclusivity: According to WHO, the right to health extends beyond access to health care and related facilities. It also contains a range of factors and underlying determinants identified by the Committee. These include safe drinking water and adequate sanitation; safe food; adequate nutrition and housing; healthy working and environmental conditions; health-related education and information; and gender equality.
b) Freedom of choice with respect to one’s health and body as well as freedom from interference with decisions on one’s health. This element underscores the importance of individual agency. London comments that “agency is critical to a human rights approach. In order to address conditions that create vulnerability, a human rights approach must seek to give voice to those who are vulnerable and enable them

[8] H. Bielefeldt *et al.,* ‘Health Care in the Spectrum of Human Rights: An Introduction’, in S. Klotz, H. Bielefeldt, M. Schmidhuber and A. Frewe (eds.), *Health care as a Human Rights Issue*: *Normative Profile, Conflicts and Implementation* (Beilefeld:Verlag, 2017), p. 23.
[9] *Ibid*, p. 23.
[10] London, *supra* note 1, p. 67.
[11] C. Ngwenya, ‘The Recognition of Access to Health Care as a Human Right in South Africa: Is It Enough?’ 5: 1 *Health and Human Rights* (2000), p. 27.
[12] OHCHR, *supra* note 3, p. 1.
[13] Nunes, R., *Health Care as a Universal Right: Sustainability in Global Health* (Routledge, New York, 2022.) p.7.; London, *supra* note 1, p. 68; Krennerich, *supra* note 6, p. 30; OHCHR, *supra* note 3, p. 3.

decision-making scope to change their conditions of vulnerability".[14] Thus, individuals, groups, and communities whose rights have been or are likely to be violated have choices and capabilities, and a human rights-based approach enables them to exercise this agency. In addition, citizens must enjoy the freedom from non-consensual treatment such as medical experiments and degrading treatment.[15]

c) Entitlements: This relates to conditions established or maintained to enable people to lead a healthy life. The entitlements include equality and accessibility to the highest attainable standard of health; the right to prevention, control and treatment of diseases; access to essential medicines; the provision of health-related education; and the participation of people in health-related decision-making at all levels. Entitlements also extend to access to safe water and adequate sanitation, and an adequate supply of safe food, nutrition, and housing. To give effect to the entitlements, the UN Committee for ESCR uses the categories of availability, accessibility, acceptability, and quality in order to substantiate the right.[16]

Availability refers to the provision of functioning health care facilities and medical care. However, the actual conditions of these are dependent on many factors such as infrastructure and economic resources.

Access to health care services must be delivered on the basis of non-discrimination, economic affordability – including among the poor and socially disadvantaged groups; and information on all health-related issues.

Acceptability requires respect of medical ethics and standards when providing medical facilities and care.

In terms of quality, medical services should be of appropriate and adequate quality. For example, be reflected in the availability of trained personnel, drugs and facilities that are comparable to the current medical standard.

The above elements show that the right has a structure that allows one to measure its realisation.[17] In other words, the core elements defined in the instruments, together with the obligations of States, provides a conceptual framework for this study to compare progress concerning the implementation of the right in Zimbabwe.

The realisation of the right in the aforementioned dimensions is dependent on States respecting their obligations and budgeting for the provision of health care services.

2.3 State Obligations

In its General Comment No.3 of 1991, the Committee pronounced that the notion of progressive realisation in accordance with maximum available resources set out in Article 2(1) ICESC, "should not be misinterpreted as depriving the obligation of all meaningful content […] the phrase must be read in the light of the overall objective, indeed the *raison*

[14] London, *supra* note 1, p. 67.
[15] OHCHR, *supra* note 3, p. 3.
[16] UN Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health*, E/C.12/2000/4, 11th August 2000, para. 12.
[17] M. Da Silva, 'The International Right to Health Care: A Legal and Moral Defence', 39: 343 *Michigan Journal of International Law* (2018), p. 347.

d'etre, of the Covenant which is to establish clear obligations for States parties in respect of the full realisation of the rights in question."[18] The general rule, applicable to all human rights, is that any right provided for in international law is binding on all States and their agencies.[19] With respect to the right to health, the substantive obligations of States are three-fold and these are extracted from the core elements of the right:

a) Obligations to Respect – States are precluded from undertaking any action that jeopardize the enjoyment of the right. This includes any action that obstructs availability, accessibility, acceptability, and quality, to the effect that people's health is endangered.
b) Obligations to Protect – The obligations to protect are not prohibitions but rather requirements to act (positive duty). For instance, a State must not fail to regulate and control the training of medical personnel carried out by private institutions.
c) Obligations to Fulfil – The State obligation here relates to creating the prerequisites for the realisation of the right to health through respective statutes (new laws or amendments of existing ones), institutions and procedures as well as through State provisions in the form of money, goods, or services. London asserts the importance of recognising the indivisibility of civil and political rights and socio-economic rights as he urges states to spend substantial effort and resources on developing health care policies.[20] Commenting on these obligations, Bielefeldt *et al.* surmise that:

> [t]he right to health, as in other types of human rights, is internally differentiated. On one hand it implies an obligation to respect and on the other [the obligation to] fulfill. This makes the distinction between the right to health and civil and protection rights simplistic and unsustainable. The right to right is linked to both negative and positive duties… In the context of human rights, freedom and equality are two closely interwoven principles. Neither can exist without the other. Without a due account of equal implementation, freedom would end up as the privilege of the happy few, and without the spirit of freedom, equality could easily be mistaken for sameness, uniformity or homogeneity.[21]

The ICESCR and the CESCR's interpretation of the Covenant define several procedural obligations which ought to guide states in the domestic concretisation process of the substantive obligations. These are as follows:[22]

a) The participation of the population in all health-related decision making must be ensured at all levels. This means that states should provide for a mechanism that allows for participation in political decisions relating to the right to health taken at both the community and national levels.
b) The adoption of domestic laws must be advanced to specify the minimum core right and corresponding duties at the national level. Article 2(1) ICESCR refers, in particular, to the adoption of legislative measures to achieve the progressive realisation of the right to health. The parliament is explicitly obligated to create such an enabling legislation.
c) States need to pay particular attention to the health needs of vulnerable and marginalised peoples. This could imply an obligation for the agents of the State to

[18] A. Müller, 'The Minimum Core Approach to the Right to Health: Progress and Remaining Challenges,' in S. Klotz, H. Bielefeldt, M. Schmidhuber and A. Frewe (eds). *Health care as a Human Rights Issue*: *Normative Profile, Conflicts and Implementation* (Beilefeld: Verlag, 2017) p. 57.
[19] Krennerich, *supra* note 6, p. 33.
[20] London, *supra* note 1, p. 69.
[21] Bielefeldt *et al*., *supra* note 8, p. 24.
[22] Müller, *supra* note 18, p. 76.

consult on the health priorities and primary health care needs of these groups prior to formulating and implementing decisions.

d) Decisions about the scope of health care services need to be transparent and backed by credible data from health professionals and experts.
e) The provision of effective remedies of the alleged violations of the minimum core of the right to health. This obligation implies that states should provide judicial and administrative remedies within a democratic framework of separation of powers. The remedies may come in various forms but a human rights-based approach to promote the right to health usually emphasises the following aspects:[23]

- Adversarial approaches such as holding the government and its agents accountable. This includes activities such as public critiques to litigation.
- Proactive development of policies and programs so that health care related objectives can be operationalised in ways that are consistent with human rights. This approach includes mechanisms to allow rights holders to incorporate their input to policy formulation.
- In cases of violations, there ought to be enough remedies to redress violations. In the case of Zimbabwe, the judiciary and Chapter 12 commissions such as the Zimbabwe Human Rights Commission may be particularly valuable in securing redress of violations.
- The use of human rights frameworks to mobilise civil society action to achieve the realisation of the right to health.[24]

2.4 Conceptual Framework

The conceptual model proposed in this paper merges and builds on the provisions of international instruments, interpretations by treaty bodies, and commentaries from the research bodies introduced in the preceding sections. In order for the BRDC to contribute meaningfully to the realisation of Section 76 of the Constitution relating to health care, enabling factors must favourably converge. These factors are summarised in the research questions presented in the introductory section of the paper. In particular, variables under investigation are availability; accessibility; acceptability and quality. These variables are dependent on the State and its agencies (in the case of the study of the BRDC) implementing its constitutional obligations that are derived from international instruments. The interrelation of the dependent variables (entitlements) and the independent variables (State obligations) contributes to the realisation of the right. This framework was the basis upon which the field research findings were analysed and discussed.

2.5 The Right to Health in Zimbabwe: The Research Gap

The right to health is relevant to all states considering that every State has ratified at least one international human rights treaty recognising the right to health. Moreover, States have committed themselves to protecting this right through international declarations, domestic legislation, policies, and during international conferences.[25] As already noted in the introduction, Zimbabwe has developed a strong legal framework protecting socio-economic and political rights. However, research and a relevant body of literature on the right to health in Zimbabwe continues to be disappointingly scarce. This is, most probably, a direct

[23] London, *supra* note 1, p. 70.
[24] *Ibid.*
[25] OHCHR, *supra* note 3, p. 1.

consequence of the decreasing importance of ESCR in research agendas, especially in comparison to civil and political rights.

The dominant voice in research has tended to approach health issues from a policy perspective, with a tendency towards challenges and prospects of recovery of the health sector and health care issues. Scholarly work on public health research confirms this observation. A few examples will suffice to demonstrate the point. One piece has investigated the magnitude of migration of health professionals from Zimbabwe, the causes of such movements, and the associated impacts on health care delivery.[26] Others have explored beneficiaries of public health financing and expose the lack of universal health coverage.[27] Recently, Kidia attempted to broaden of knowledge on public health issues by tackling the health reform debate in the post-2017 period with key policy recommendations centred on repairing relations with the international community, strengthening the health work force, and community engagement.[28] Zeng *et al.* have also added their voices in literature by revisiting the utilisation of health care services and health care expenditure patterns among ordinary citizens.[29] Equally, Nhapi has analysed the health policy administration.[30] The work applies social work tools to examine the socioeconomic barriers to health care among vulnerable groups. The common threads adjoining these scholarly works are the lack of interest in the rights-based approach to public health and the obsession and fascination with the obligations of the central government.

There are few exceptions with regard to research on the rights-based approach to health care. One such is the longitudinal research, covering the period of 1980 to 2018, undertaken by the Labour and Economic Development Institute of Zimbabwe in 2020. The research explores the struggles of the State in fulfilling its international and national obligations towards the right to health. The scope of the study is limited to the duties and responsibilities of the central government. The agents of the central government, including the regional and local tiers of government that exercise devolved and decentralised functions are excluded from the study. The proposed research aspires to plug this lacuna in scholarship by recognising the agentic role of local authorities in fulfilling the rights of citizens at that level of governance.

This study focused on a local authority, making it necessary to clarify the obligations at that level of government. The rights-based framework does not clearly delineate the responsibility of local authorities toward the realisation of human rights since human rights obligations appear to apply primarily to states as the main subjects of international law. Therefore, anybody, institution or individual directed, controlled or acting on behalf of the State, should be involved in the respect, protection and fulfilment of the right.

Indeed, local authorities are agencies at the centre of action with a clearly defined and constitutionally entrenched duty to advance and protect human rights. Section 44 of the Constitution explicitly states that "[…] every institution and agencies of the government at every level must *respect, protect, promote and fulfil* the rights and freedoms set out in Chapter 4." Understanding the role of local authorities from this legal perspective necessitated this inquiry. The study seeks to enhance the understanding of the actors who are duty bearers on the right to health care and encourage a better understanding of the contributions of local

[26] Chikanda, *supra* note 4, pp. 667-680.
[27] Shamu, *supra* note 4, pp. 1169-1182.
[28] Kidia, *supra* note 4, pp. 1-4.
[29] Zeng *et al.*, *supra* note 4, pp. 300-312.
[30] G. T. Nhapi,'Socioeconomic Barriers to Universal Health Coverage in Zimbabwe: Present Issues and Pathways Toward Progress', 35:1 *Journal of Developing Societies* (2019), pp.153-174.

authorities to the realisation of the objectives of Chapter 4 of the Constitution. These are tiers of the government that are considered to be outside and beyond the traditional realms of decision-making processes. Yet, there is unjustifiable to ignore their agency and significance for the full realisation of the right to health care.

3 Research Methodology

The study triangulated quantitative and qualitative research methods. In order to understand the contributions of local authorities for the advancement of the right to health care, the research design utilised a case study of one local authority, the BRDC.

3.1 Target Population and Sampling Procedure

The research was conducted in Bindura rural. The BRDC has a total adult population of 124.160 (18 years and above) in 21 wards.[31] The target population for the survey was 26 randomly selected respondents from ward 16, which has a total population of 9550 people. The rural council clinic in the ward is Chiveso. The ward was selected based on a random selection procedure. In addition, key-informants included health administrators and officers, village health workers, select public servants, community leaders, women, youth and men who were purposively selected. To preserve the anonymity of the respondents they will hereinafter be referred to through numerical description such as Participant 1, 2 etc.

Respondents who are rights holders (citizens) were randomly selected to enhance representativeness. Random selection of respondents allows for every right holder to have a chance to participate in the study. The sampling procedure was two-staged with an initial selection of households in ward 16 followed by the selection of interviewees in the selected households. One interviewee was selected in each household. In cases where there was more than one adult per household, simple random selection of a respondent was done after assigning numbers to all the potential interviewees. The key informants were known in advance and, therefore, purposively selected by virtue of the offices they occupy in the BRDC political and administrative structure.

3.2 Data Collection Methods and Analysis

Secondary sources were used to review relevant literature on human rights instruments and the right to health as a prelude to field research. The reviewed literature helped refine the research by taking contextual information, emerging issues, debates, and methods on human rights research into account. The literature review also helped in the development of the conceptual framework used to analyse the findings of the study. Quantitative data was collected through a survey. The survey gathered data on the availability of public health care facilities and services. These include hospitals, clinics, or other health-related buildings as well as services such as trained medical and professional personnel, and essential drugs. A structured questionnaire was administered to gather quantitative data. Data on the accessibility of services and facilities; and the quality of said factors rendered by the BRDC were gathered through interviews with citizens from randomly selected households. An open-ended interview guide was used to collect qualitative data.

[31] ZimStats 2012 survey.

Statistical analysis was utilised for the analysis of quantitative data. Thematic analysis was applied in the analysis of qualitative data. Combining the two methods is appropriate for the mixed methodology that the study adopted.

4 Findings and Discussion

The ensuing section presents the findings in thematic form. The findings from the interviews are reinforced with literature from documentary review.

4.1 Defining the Right to Health Care

Respondents had varying definitions for the right to health care. Most of the interviewees acknowledged that rights are found in the Constitution but had little to no knowledge on what this specifically entails. From this view, respondents chose to define health care without linking it to the right. In response to the question of how the participants would define health care, the following answers were provided:

> Participant 1 said: "Health care a system that is put in place by local authorities to serve health needs of the people in a particular jurisdiction, the system must be accessible and meeting the set standards by World Health Organisations".
>
> Participant 2 noted that: "It is a situation when a patient receives treatment and care at health point of choice."
>
> Participant 3 understood it as: "The presence of a medical facility accessible to all people in a given ward (school teacher). I associate it with free health that we received in the first decade of independence."
>
> Participant 4 noted that: "This is when our children under five receive immunization at schools and nearby clinics or hospitals."
>
> Participant 5 articulated that: "Health care is associated to the COVID-19 vaccines that were given to the people by the government and local clinics."

The recurring themes from the responses are that health care is the presence of a medical facility, treatment of patients, and the vaccination of people by the government. It is clear that respondents held the belief that the government is the key actor concerning any health care related topic. Local authorities as well as private and missionary health facilities were not mentioned except by the health officer. The health officer brings a dimension of linking services to WHO standards and the question of accessibility. From the findings, the study conceptualises health care as the presence of medical facilities, personnel, funds, and information that is required by people in a reasonable distance within a ward. Health care can be provided by the central and local government as well as by private and church related institutions. This paper narrows the discussion to the local authorities as they are agencies of the central government charged with the same health care responsibility.

4.2 Role of the BRDC in the realisation of the Right to Health Care

It was important to unpack the views of the respondents on the role that the BRDC has concerning the right to health care. Results from the survey showed the following:

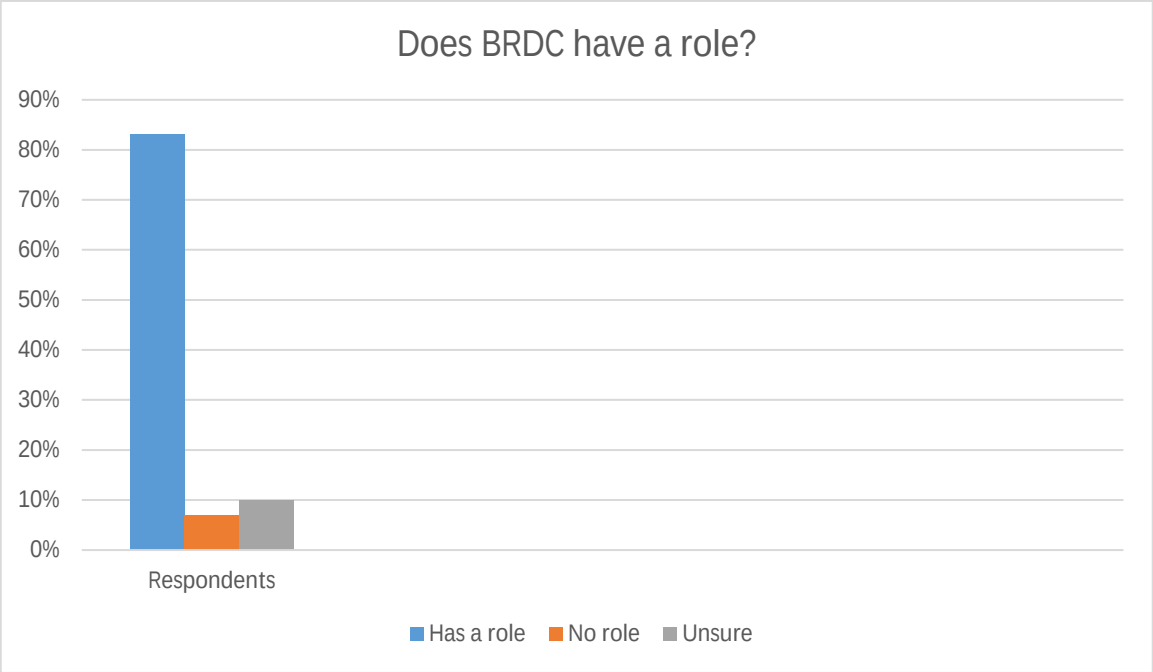

Figure A: Role of BRDC towards the realization of the right to health care

From a qualitative perspective, respondents had this to say:

> Council has clinics in some of the rural wards where we stay (Participant 6).
>
> Give the elderly free medication like BP drugs (Participant 1).
>
> Conduct health campaigns in schools and at shops about immunization (Participant 4).
>
> They are present in times of pandemics like COVID-19 where they had tents vaccinating the people (Participant 4).
>
> My wife is employed as a nurse at BRDC's clinic (Participant 2).
>
> All local authorities, BRDC included, complement central government's provision of health care. This is becoming more pronounced in devolution system that the government has been following. BRDC runs clinics that fall under their jurisdiction (Participant 5).

The responses show that people have an understanding of the role that the BRDC has in the context of health care. This is consistent with the data from the quantitative survey. Participant 3 brought in the devolution dimension which has made it possible for the BRDC to play a more visible role in health care. However, most of the interviewees did not tie the role to the right as provided for in the Constitution. This confirms the findings from the survey that people have an understanding of health care and not the right to health care (see figure A below). In short, they acknowledge that the BRDC plays a role through medical infrastructure, vaccines and employment of staff. On the employment aspect, Participant 6 noted that rural council clinics salaries are met by the central government as RDCs have small budgets that can enable them to cater for all the expenses. However, part of the responses provided explain the role of BRDC towards the realisation of the right.

Figure B below shows the levels of the right to health care as provided for in the Constitution. Participants were asked whether they know about the existence of the right as provided for in

the Constitution. 88.9 per cent said no, while 6.1 per cent said yes and 5 per cent were unsure. The findings are consistent in that the few people who are knowledgeable about rights as enshrined in the Constitution are administrators, and other selected professionals. The majority, 88.9 per cent who were not familiar with the constitutional right to health care, consisted of people who are not working within the health care sector or in related administrations. This may possibly explain why there is lack of public accountability for the delivery of health care.

4.3 Effectiveness of the BRDC in Contributing to the Realisation of the Right to Health Care

The study sought to assess the effectiveness of BRDC in advancing the right to health care from the respondents. The following issues emerged:

> We only see posters at shopping centres on immunization dates and messages around preventing HIV/AIDS. The posters will be in English and Shona (Participant 6).
>
> Normally village health workers move around our ward announcing outbreaks of diseases affecting children and the dates for immunization (Participant 2).
>
> BRDC complements central government efforts in the health sector. In fact, their effectiveness mirrors that of the ministry or central government. For example, access to health care is free to children under five and adults above 65. Where people pay they can pay between usd$1 or usd$5 for services offered. The fees are meant to cover for costs running a health point. It is also critical to note that rural council clinics receive funding to boost their contribution towards health care through the Results Based Funding model where money is allocated based on performance ratings and needs per clinic (Participant 1).
>
> They are not, these days they open late and can start lunch anytime (Participant 4).
>
> The workers appear less motivated and however, drugs are sometimes available depending on the dispatches that would have been made by NATPHARM which is run by the government (Participant 3).
>
> Health points are not close to us, as such BRDC is not effective. The issue of long distance tends to discriminate access to health in particular by people living with disabilities and the elderly who may not have transport (Participants 3 and 4).

There are mixed feelings on the effectiveness of BRDC in promoting the right to health care. Some of the respondents believe that it is playing an effective role in ensuring information dissemination and immunisation of children while others noted that the health personnel appear to be compromising the effectiveness of the BRDC. Participant 4 implied that the BRDC is not effective because people travel for unreasonable distances to have access to health care services. Long distance indirectly leads to discrimination in form of inaccessibility to medical facilities since younger generations and those with access to motor vehicles and scotch carts are at an advantage while the older generations suffer due to a lack of resources and insufficient support systems. This issue resonates with the need to ensure that health facilities must be closer to people for the right to be fully enjoyed by everyone.

The study also aimed to answer the question from a quantitative perspective as it asked participants to rank their perceptions on the effectiveness of the BRDC against set variables that ensure the right to health care. It can be noted that the BRDC performance lies in the average in its contribution to the right to health care. The council has poorly performed in terms of availability of drugs, reasonable access of the clinic, and quality of services. The council has performed above average to near best in the fields of non-discrimination, dissemination of information in an understandable language, and professionalism among staff

members. The study argues that effectiveness can only be measured by looking at the totality of the performance of the BRDC in all the areas stipulated above. No single factor can be used to make a conclusive assessment since a variety of variables are critical and interrelated. Thus, the survey points to an average performance which is close to the mixed reactions from the in-depth interviewees conducted. The study sought to assess the challenges that may prevent the full contribution of the BRDC to the right to health care and the following emerged.

4.4 Challenges Inhibiting BRDC Contribution to the Right to Health Care

The central goal of the study was to understand the factors that could prevent the BRDC from ensuring the full realisation of the right to health care. The qualitative responses were as follows:

> Brain drain at local and national level. Some of the health personnel are leaving rural wards to the towns and cities and others are flocking to greener pastures in neighboring countries and the United Kingdom (Participant 3).
>
> Poor road networks that connect villagers to the clinics. Some of the roads are in a poor state that makes accessibility of ambulances to ferry patients difficult or in some cases it delays the delivery of medicine (Participant 3).
>
> Macro-economic environment. An unstable macro-economic environment affects the budgetary allocations which have a bearing on the quality of services offered by local authorities (Participant 6).
>
> Shortage of essential drugs and delays in dispatch from NATPHARM (Participant 1).
>
> Lack of vehicles that can be used in effective door to door or road show health advocacy campaigns (Participant 4).

Generally, the respondents have attributed the poor performance of the BRDC to the national economy. The macro-economic environment plays a critical part for most of the variables needed for the right to health care to be respected, protected and fulfilled by the BRDC. The study tried to tackle the question from a quantitative perspective and the following emerged:

Factors Affecting BRDC's Contribution to the Right to Health Care

Inhibiting factors	**Yes**	**No**	**Not Sure**	**Total**
Macro-economic issues	75%	20%	5%	100%
Management of BRDC	11%	85%	4%	100%
Budget	90%	10%	0%	100%
Health personnel	40%	45%	15%	100%
Health care information	6%	90%	4%	100%
Rights-centred health care administration	4%	30%	66%	100%
Corruption	91%	3%	6%	100%

Figure B: Factors Impeding the Right to Health Care by BRDC

From the results, we can note that budgetary issues and macro-economic issues affect the functionality of the BRDC in promoting access to health care. The same finding emerged from the in-depth interviews. Corruption is also key concern that was noted by most participants. The tendency to engage in corruption can also be tied to poor working conditions

or low performance of the economy. An interesting factor is the rights-centred health administration to which few people said 'yes'. This can be explained by the fact that most of the people are not aware of what it is and the 66 per cent figure of 'not sure' confirms this observation. Other factors that are believed to have an impact on health care include health care information, management of the BRDC and health personnel. Additional barriers stated by the respondents in the survey, but not listed on the table, are brain drain and low remuneration. The two can be tied to the performance of the national economy.

4.5 How Can These Challenges Be Mitigated?

The following issues were suggested by the respondents to mitigate the challenges faced by the BRDC in complying with its duties to respect, protect and fulfill the right to health care. Most of the participants argued that the BRDC should create various funding models through Private-Public-Partnerships. This would enable them to limit their over-reliance and dependency on the government and donors. Participant 2 articulated that "community projects like food-for-work were handy in the maintenance of roads that connect clinics to the main roads which ambulances and medical delivery trucks would use". Accordingly, food-for-work programs or other community-led projects need to be resuscitated. There is a need to improve the macro-economic stability which has a huge impact on the performance of the BRDC, as emphasised by most of the participants. Attached to this "is the improvement of working conditions and recruitment of more nurses per rural clinic. Most rural clinics have four nurses that are provided for by the central government through the ministry of health" (Participant 6). There is a need to build more clinics within the rural wards (Participant 1). This suggestion could help to reduce the distance travelled by patients within the rural wards run by the BRDC.

5 Conclusion and Recommendations

The discussed literature and evidence arising from the in-depth interviews and the survey point to the fact that local authorities have a vital role to play towards realisation of the right to health care. The case of the BRDC shows that it is one of the agents that complements the central government's primary responsibility to respect, protect and fulfill this right. There are mixed perceptions on the contributions of the BRDC. The downside of it has been explained by the performance of the national economy, unfavourable working conditions, low remuneration, corruption, and lack of essential drugs. The study notes that the full contribution of the BRDC to the realisation of the right to health care is possible through addressing these multiple variables as they are interrelated. The study, consequently, proposes the following recommendations:

1. The Ministry of Health and Child Care in collaboration with the Ministry of Local Government and Public Works should conduct capacity building workshops for the health and the BRDC personnel on a rights-centred approach in health administration. This emerges from the results that only a few respondents had substantial knowledge about this.

2. Non-governmental organisations in the health sector, human rights and the World Health Organisation should conduct awareness campaigns among the broader population who are not part of the health care workforce on the right to healthcare, the obligations of the state and the BRDC. This enables a rights culture that people can use to hold authorities accountable for the provision of health care.

3. The Ministry of Finance and Economic Development should raise more funding for the construction of clinics in rural wards to reduce distances between people and health care centres. This will also address indirect discrimination against the elderly and people living with disabilities who may not be able to walk long distances for treatment.

4. The Ministry of Health and Child Care and the Ministry of Local Authorities and Public Works should recruit more nurses and other health officers for rural council clinics.

7 The Future of Corporal Punishment in the Family Home and Other Similar Settings in Zimbabwe

Nkosana Maphosa, Idaishe Grace Zhou and Gladys Paidamoyo Mungwari*

> […] Recognising that the child occupies a unique and privileged position in the African society and that for the full harmonious development of his personality, the child should grow up in a family environment in an atmosphere of happiness, love and understanding;
> Recognising that the child, due to the needs of his physical and mental development, requires particular care with regard to health, physical, mental, moral and social development, and requires legal protection in conditions of freedom, dignity and security […].

Abstract

The central argument is that corporal punishment is irreconcilable with children's rights as enumerated in international, regional and national normative standards. The research takes a cue from tipping-point contemporary legal developments that have led to the abolition of the practice in criminal justice and education systems. Moreover, corporal punishment is a hard case since it implicates complex, convoluted, and polarised non-juridical considerations. Germane to the study is the instructive and progressive architecture of the United Nations Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child and the burgeoning constitutional provisions on children's rights under the 2013 Zimbabwean Constitution. In the main, the authors deploy a qualitative doctrinal research methodology to conclude that the prevalence of corporal punishment in the home, care facilities and other settings is incompatible with the tenor of the Constitution and international law.

1 Introduction

The advent of children's rights is revolutionary since it has ignited a broader paradigmatic social, economic, political and cultural shift. The jurisprudence in *S v. Ndlovu, S v. Banda, S v. Chakamoga,*[1] *Bhila v. The Master of the High Court and Others,*[2] *Hale v. Hale*[3] and several

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* The authors are human rights professionals and researchers active in Zimbabwe.

[1] *See S* v. *Banda*, ZAFSHC 114, (2015); *S* v. *Chakamoga,* HH 47-16, (2016) The appellate court per Charehwa J, relying on S 81(3) of the 2013 Zimbabwean Constitution emphatically reasoned that: "More specifically, the specific obligation placed on the courts, and the High Court in particular, by s 81(3) made me consider that it may be high time that the courts has a serious relook at the sentencing regime for sexual offences so that the message is clearly sent that the courts, in the discharge of their protective mandate for young persons, find that it is totally unacceptable to sexually exploit young persons. This is especially pertinent for offences committed against those young victims aged between 12 and 16 who were directly or impliedly assumed to have "consented" to the sexual violations […]".

[2] *See Bhila v. The Master of the High Court and Others,* ZWHHC 549 (2015). The case is the hallmark for the constitutionalisation of administration of estates and succession laws in Zimbabwe mainly via the equality provision (S 56).

[3] *See Hale* v. *Hale*, HH 271-14. The case fleshes the right to be heard and what breadth of the best interests of the child principle. Per Tsanga J, "In any event it would also seem to me that this issue regarding the children's schooling cannot be dealt with satisfactorily without hearing the views of the children themselves, especially the two older children who are already at the boarding school in question. I say this because a particularly noteworthy aspect of *the new Constitution is that it grants both parents' and children rights…Yet all these rights that undoubtedly impact on parents now have to be balanced against those which our Constitution also gives to children. This is even more so where parents as in this case, are not in agreement as to what is the best interest for the child. Constitutionally, as of right, children are no more at the margins and periphery of decisions affecting them. They have effectively have a right to be part of those decisions*" (pp.8-9). Emphasis added.

investigations conducted by human rights bodies support this view.[4] The premier human rights institution in Zimbabwe has acknowledged the existence and utility of children's rights in an open and democratic polity.[5] Secondly, it notes that the Constitution "calls for a change of perspective as it describes children as holders of a range of human rights".[6] Third, it ties the landmark constitutional developments to the broader global human rights movement. Fourth, it illuminates the view that children's rights impose obligations, both direct and indirect, on parents, the family and the State.[7] Consequently, cognizant of these germane legal developments as pinnacled by the United Nations Convention on the Rights of the Child and the African Charter on the Welfare and Rights of the Child in Africa, we evaluate whether corporal punishment in the home, care institutions and other similar settings is compatible with the human-rights based approach in the burgeoning laws. The answer is arguably non-affirmative. Nevertheless, we note the discernible contradictions and paradoxes involved in a subject such as the one under review in this study. In the foregoing, the definition of corporal or physical punishment is essential. The United Nations Committee on the Rights of the Child, which oversees the Convention on the Rights of the Child, has defined it as "any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light." According to the Committee, this mostly involves hitting smacking, slapping or spanking children with a hand or using tools such as whips, sticks, belts, shoes or wooden spoons. It can, however, also involve, kicking, shaking, scratching, pinching, biting, pulling hair, boxing ears, throwing children or forcing them to stay in uncomfortable positions as well as burning, scalding or forced ingestion. While the study does not rely on primary empirical data, it nevertheless analyses existing studies to better understand the current state of corporal punishment and the future of the practice.[8]

2 Background and Context

Globally, an estimated 732 million children, which translates to 1 in every 2 children between the ages of 6-17 years, live in countries in which corporal punishment is not fully prohibited.[9] In 2021, studies by various scholars showed that Africa and Central America have a 70 per cent prevalence of corporal punishment in schools, while in the Eastern Mediterranean and South East Asian regions, the prevalence stood at 60 per cent. The lowest prevalence was found in the Western Pacific region where the lifetime and past year rates were 25 per cent.[10] Those high rates are found in both secondary and primary schools. Globally, corporal punishment remains a controversial disciplinary method. Although such physical punishment is prohibited in many Western countries, it is still used in various parts of the world especially in the Global South. Historically, an increase in juvenile crime has been followed by calls for the reinstatement of corporal punishment in those regions where it had been prohibited. Opponents of corporal punishment, however, argue that it is inhumane and that juvenile corporal punishment risks

[4] For a ZHRC investigation pertaining to participation of children in political activities *see* ZHRC/CI/0069/17 and an investigation on barring learning from writing examinations *see* ZHRC/CI/226/2019.
[5] *See* A. Moyo, *ZHRC Practitioners Training Manual on Constitutional Rights of Specific Groups of People* Vol. 2 (Zimbabwe Human Rights Commission, 2020) p.43.
[6] *Ibid.*
[7] *Ibid.*
[8] Pathshala, 'Research Methodology, Module IV: Socio-Legal Research' <epgp.inflibnet.ac.in/epgpdata/uploads/epgp_content/law/09._research_methodology/04._socio-legal_research/et/8151_et_et.pdf> (accessed 11 January 2023). pp.26-28.
[9] World Health Organization, 'Corporal Punishment and Health', 2021, <who.int/news-room/fact-sheets/detail/corporal-punishment-and-health> (accessed 30 August 2022).
[10] *Ibid.*

reinforcing the delinquent behaviour of those who receive it.[11] In Zimbabwe, corporal punishment remains legal although the contexts in which it is used have been limited. Corporal punishment is no longer allowed in schools as a method of discipline[12] and neither is its use in the criminal justice system.[13] The prohibition of corporal punishment in schools has been met with mixed reactions, for instance, with a student teachers' union calling for the return of corporal punishment in schools in order to stop increasing rates of teenage delinquency and crime.[14]

In the home and other similar private settings, where corporal punishment is still legally allowed, corporal punishment remains a point of contestation. While there is growing evidence that corporal punishment is harmful to the development of children, many parents and caregivers remain committed to the idea that it is necessary for the development of children. In the home, the distinction between private and public enables the subjugation of vulnerable groups, and children are treated with paternalism and subordination, thus limiting their enjoyment of their rights.[15]

2.1 Theoretical Underpinnings of Corporal Punishment

The logic behind children needing to be punished in order for them to develop into respectable adults is rooted in the punishment theory of deterrence. As a theoretical concept, deterrence was first articulated in the 17th and 18th centuries and is based on the idea of a rational person. Deterrence theory states that if punishment is well-suited for the harm that was done, then a rational person would weigh the potential benefits and losses before engaging in rule-breaking. If the loss or punishment is greater than the joy they gain from breaking the rule, then they would follow the classical deterrence theory which entails three concepts: severity, certainty and celerity or swiftness. If a punishment had all three components, then a person would likely not break the rules and would, therefore, be deterred from committing a similar offence in the future. Other people would also be deterred from offending in a similar manner when they witness the punishment as they would not want to suffer the same fate. [16]

Regarding corporal punishment, the pain and humiliation of the punishment was thought to be enough to prevent people from committing similar offences in the future. In fact, that is one of the main reasons given by parents for why they continue to use the practice: they want to correct their children and turn them into respectable, law-abiding adults.[17] Even so, research on criminality, where deterrence has been tested, shows that deterrence is not effective in reducing

[11] *Ibid.*
[12] Government of Zimbabwe, *Education Amendment Act [Chapter 25:04]*, 2020, <mopse.co.zw/sites/default/files/public/downloads/EDUCATION%20AMENDMENT%20ACT%2C%202019%20%5B%20Act%2015-2019%5D.pdf> (accessed 11 January 2023).
[13] *S* v. *Chokuramba*, CCZ 10/19 ZWCC 10 (2019).
[14] T. Muchabaiwa, 'Student Teachers want corporal punishment back', *Newsday*, 2022, <newsday.co.zw/2022/04/student-teachers-want-corporal-punishment-back/> (accessed 11 January 2023).
[15] S. Tamale, *Decolonization and Afro-Feminism*, (Daraja Press Ottawa, 2020) pp. 328-329; B. Schmueli, 'What Has Feminism Got To Do With Children's Rights: A Case Study of a Ban on Corporal Punishment', 22, *Wisconsin Women's Law Journal* (2007), p. 185.
[16] J. Abramovaite *et al*., 'Classical deterrence theory revisited: An empirical analysis of Police Force Areas in England and Wales', *European Journal of Criminology*, (2022); D. S. Nagin, Deterrence in the Twenty-First Century, 42(1) *Crime and Justice*, (2013) pp. 199-263.
[17] P. Gwirayi, 'Functions Served by Corporal Punishment: Adolescent Perspectives', 21:1. Journal of Psychology in Africa (2011) pp. 122-123.

recidivism.[18] Another point of contention is that deterrence is based on the theory of a rational adult person. Children are still developing and often lack the rational qualities that adults have and so harming them physically will not have the desired effect because their ability to rationalise is compromised.

2.2 The Rationale for the Continued Use of Corporal Punishment

Proponents of corporal punishment argue that it is a necessary part of discipline in the home that is culturally appropriate. Most parents believe that it is a way to steer children towards the right path and that a ban on corporal punishment would promote bad behaviour because parents would no longer have a primary method of control.[19] A common argument is, consequently, that parents and guardians would lose control over children win the absence of corporal punishment.[20] In addition to losing control, parents believe that corporal punishment reduces bad behaviour in children in the short term and long term. Studies, however, provide contrary evidence, proving that for short-term results, it is unclear if corporal punishment is effective.[21] For long-term behaviour change, empirical data also does not support the effectiveness of this method of parenting. Where children change their behaviour, it is because they associate negative experiences with it, but the children would not have internalised why they should behave appropriately.[22]

It is noteworthy, that even opponents of corporal punishment urge the public to take possible adverse consequences into consideration when arguing for a total ban. Such laws could, for instance, lead to arrests of parents for minor violations, such as isolated spankings that do not result in injury. This could then disturb the life of children and put their psychological wellbeing in jeopardy due to feelings of guilt.[23] While Zimbabwean law allows for parents and guardians to raise children according to the morals and religion of their choosing; it nevertheless provides a qualifier in the form of children's rights. [24] This implies that "parents should not prejudice the rights to which their children are entitled under the Constitution including the right to education,

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[18] B.C. Watson et al., 'Different approaches to measuring specific deterrence: some examples from speeding offender management', Prodeedings of the 2010 Australasian Sorad Safety Research (2010) p. 7.
[19] G. D. Gwenzi *et al*., 'The prevailing social attitudes towards child discipline in Zimbabwe', 11:5 *African Journal of Social Work*, (2021) p. 217.
[20] *ibid* pp. 213-221.
[21] T. Hecker *et al*., 'Corporal Punishment and Children's Externalizing Problems: A Cross-Sectional Study of Tanzanian Primary School Aged Children', 38 *Child Abuse and Neglect* (2013) pp. 884-894.
[22] *Ibid*.
[23] B. Wood, 'A Report from New Zealand: four years post law change', 2016 <epochnz.org.nz/images/stories/media-ol/ResearchAndOtherPapers/Violence_free_childhoods_September_2016.pdf> (accessed 7 September 2022).
[24] Section 60(3) of the Constitution provides that "parents and guardians of minor children have the right to determine, in accordance with their beliefs, the moral and religious upbringing of their children, *provided they do not prejudice the rights to which their children are entitled under this Constitution, including their rights to education, health, safety and welfare*." Emphasis added. The Zimbabwe Human Rights Commission (ZHRC) in 'ZHRC Practitioners' Manual On Constitutional Rights' (Vol.1,p.62) has summarized the scope and content of S 60 as follows: "(a) the freedom to choose one's religious or other beliefs without direct and indirect pressure from the State, individuals or other sources. This suggests that religious entities may not bar people from leaving their fold and converting to other religions; (b) the right to declare one's faith or religious beliefs openly and without fear of victimization means that every person has the right to profess or express their religious beliefs in public and the State or any other person or entity should not compel members of a particular religion to worship in private; (c) it entails the right to express one's religious beliefs by worship and/or to practice them by teaching and dissemination; (d) it entails the right to assemble to practice religious or other observances with other members of the same religion (sic) or other community."

health, safety and welfare".[25] Notwithstanding, many Christians who constitute the majority of Zimbabwean parents, believe they not only have a right to use corporal punishment on their children, but that they contemporaneously have a duty to do so. Adherents often rely on the Proverbs 13:24's 'spare the rod, spoil the child' rhetoric which has often been used to justify the use of corporal punishment on children as it is believed that failing to beat children will result in unruly children who eventually become criminals as adults.[26] Thus, corporal punishment becomes a site of struggle for children's rights promotion. Sloth-Nielsen[27] quoting Freeman[28] postulates that "the case that children have rights has to a large extent been won: the burden now shifts to monitoring how well governments honour the pledges in their national laws and carry out their international obligations".[29] Our contention is that corporal punishment in the home and other similar settings is irreconcilable with children's rights. We note, however, that this position could generate debate. On one hand, there is the uncontested view that children are physically and economically vulnerable and powerless. This implies their inability to overcome their disadvantaged status merely by fully exercising the rights granted to them.[30]

2.3 Rationale for Ending Corporal Punishment

Perhaps the most common argument for the abolishment of corporal punishment is the lack of clear direction between reasonable chastisement and child abuse. Acts of corporal punishment have the potential to escalate to incidents that cause injury or death. In many incidents where parents were arrested for child abuse, the parent had intended to discipline the child. In Zimbabwe, of the 19 child deaths in the first nine months of 2022 that have been reported by the Herald, four of the ten who died at the hands of their parents were killed during the administration of corporal punishment.[31] Nevertheless, the general sentiment appears to be that children are entitled to equal protection under the law, including in the privacy of the homes in which they reside. When corporal punishment is legal, parents and guardians are more likely to believe that it is an acceptable practice. Consequently, making the practice illegal can encourage parents and guardians to seek alternative forms of disciplining children in their care.[32] Additionally, it can encourage governments to provide resources and education for the purpose of eliminating corporal punishment in all environments. The Children's Amendment Act, 2023

[25] ZHRC, *supra* note 4, p. 62. A conspectus of core international instruments on freedom of conscience include Article 18 of UDHR, Article 18 of the ICCPR, Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Article 14 of the CRC, Article 9 of the ACRWC, Article 8 of the African Charter on Human and People's Rights (ACHPR), Article 12 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CRMW).

[26] J. Becker, 'Corporal Punishment: Legal Reform as a Route to Changing Norms', 85, *Social Research: An International Quarterly*, (2018) p.255; Gwenzi, *supra* note 19, pp. 213-221.

[27] J. Sloth-Nielsen, 'Chicken soup or chainsaws: some implications of the constitutionalisation of children's rights in South Africa' in U Kilkenny and L. Lundy (eds.), *Children's Rights* (Routledge, London, 2017).

[28] M. D. A. Freeman, 'The Limits of Children's Rights',in M. Freeman P. E. Veerman (eds.), *The Ideologies of Children's Rights* (Brill, Leiden,1992). pp. 29-46.

[29] Sloth-Nielsen, *supra* note 27, p.6.

[30] *Ibid*., p.7.

[31] The Herald, 'Man kills daughter (5), dumps body along highway', 2022, <herald.co.zw/man-kills-daughter-5-dumps-body-along-highway/> (accessed 8 September 2022); The Herald, 'Missing girl (11) found murdered', 2022, <herald.co.zw/missing-girl-11-found-murdered/> (accessed 10 August 2022); The Herald, 'Crimes of passion involving women up', 2022, <herald.co.zw/crimes-of-passion-involving-women-up/> (accessed 15 June 2022).

[32] M. A. Strauss, 'Prevalence, Societal Causes, and Trends in Corporal Punishment by Parents in World Perspective', 73 *Law and Contemporary Problems*, (2010), pp. 22-23.

(No. 8 of 2023) is an example of this. Section 49B states that the government will ensure the promotion of positive and non-violent forms of discipline.[33]

Another reason cited for the abolishment of corporal punishment is psychological in nature. It recognises that although moderate corporal punishment is not meant to cause injury to the child it nonetheless causes pain.[34] Corporal punishment from parents is unique since an assumption that the parents love and care for their children can be inferred.[35] As corporal punishment uses violence, however mild, it can create the connection, in the minds of children that love and violent behaviour go hand in hand. Numerous studies have made the connection between men who were physically punished as children becoming adults who use violence with their partners and children.[36]

The contention is that any form of physical violence can hurt children. In addition to direct physical harm, including death, they can also suffer emotional harm. It can also result in long-term physical diseases that are caused by prolonged stress and worry.[37] With corporal punishment, it is not only the physical strike that is harmful but the anticipation regarding when the next strike will hit their body.[38] If the home is a place where pain occurs, children also learn that family and home is not a safe place. Corporal punishment leaves lasting lessons that violence is a method of achieving one's goals. In order for children to conform to the behaviour their parents want, they use violence on their children and that can raise them to adults who believe that this is the way to convince others to do what they desire. Numerous studies have demonstrated that people who experienced violence as a child go on to perpetuate violence as an adult.[39]

[33] Children's Amendment Act, 2023 (No. 8 of 2023) https://www.jsc.org.zw/upload/Gazette/Act%20No.%208%20of%202023%20Children's%20Amendment.pdf <www.veritaszim.net/node/5375#:~:text=Among%20other%20definitions%2C%20the%20definition,at%20risk%20of%20being%20unlawfully> (accessed 1 June 2023)

[34] Convention Against Torture Initiative, 'Positive Discipline and Alternatives to Corporal Punishment of Children', <endcorporalpunishment.org/wp-content/uploads/2021/04/CTI-Tool-10-Positive-Discipline-2021-ENG-draft6_FINAL.pdf> (accessed 2 September 2022).

[35] A. Moyo, '(Il)limitable and Non-Derobagle Rights, Judicially Sanctioned Whipping and the Future of Punishment in All Setting in Zimbabwe', in Raoul Wallenberg Institute, *Final Papers of the 2017 National Symposium on the Promise of the Declaration of Rights under the Constitution of Zimbabwe*, 2017, <old.zimlii.org/zw/blog/Final%20Papers%20of%20the%202017%20National%20Symposium.pdf> (accessed 8 September 2022), pp.18-37.

[36] E. Fulu *et al.*, 'Pathways between childhood trauma, intimate partner violence, and harsh parenting: findings from the UN Multi-country Study on Men and Violence in Asia and the Pacific', 5(5) Lancet *Global Health*, (2017) pp. e512-e522.

[37] P. Mahlangu *et al.*, 'Prevalence and Factors Associated with Experience of Corporal Punishment in Public Schools in South Africa', 16(8) *PLoS ONE* (2021), pp. 1-15.

[38] Moyo, *supra* note 35.

[39] P. Romito, *A Deafening Silence: Hidden Violence against Women and Children*. (The Policy Press, Great Britain, 2008). p. 25.

3 Constitutionalisation of Children's Rights and Corporal Punishment: Children, the Rod and the Law[40]

The Constitution of Zimbabwe Amendment (No.20) Act, 2013[41] champions children's rights.[42] It presents the judiciary in particular with an opportunity to advance children's rights[43] and protect minors from all forms of violence. In that sense, the Constitution recognises the need to address both contemporary and antecedent forms of violence. The current work falls in the continuum of similar scholarship on children's rights which tries to evaluate the contribution of the 2013 Constitution to achieve an egalitarian, free and just society.[44] Magaya and Fambasayi for example conceptualise the 2013 Zimbabwean Constitution as a catalyst for the realisation of children's rights. In their audit of evolving children's rights jurisprudence, they take a more nuanced view and a historical and evaluative methodology. They embark on a constitutional exegesis to look back at the former Constitution of Zimbabwe to examine the jurisprudence and gain a deeper understanding of the 2013 Constitution. In relation to the current project, their work supports the idea that the 2013 Zimbabwean Constitution could serve as a liberating and protective device for children who find themselves being subjected to or threatened by violence, impunity and any inhibiting environment. Therefore, having surveyed the Court's performance in a myriad of areas such as the administration of estates and succession, judicial corporal punishment *inter alia*, they conclude with brevity that Zimbabwe is making promising progress in the development of children's rights, due in part to the 2013 Constitution.[45]

The above-cited authors concur with Moyo who not only sees enormous potential in the 2013 Zimbabwean Constitution; but also observes that both child law and children's rights are nascent expressions in Zimbabwe.[46] Moyo contrasts the 2013 Constitution, which provides children with protection, provision, and participation rights with its predecessor, which protected customary laws from constitutional provisions, allowing traditional norms that violate children's rights to continue.[47]

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[40] Adapted from D. Benatar, 'The child, the rod and the law' in R. Keightley *Children's Rights* (Juta, 1996) p. 197.

[41] Subsequently referred to as the 2013 Constitution.

[42] *See Mudzuru and Another* v. *Minister of Justice*, CCZ 12/2015.

[43] *See Dzvova v. Minister of Education Sports and Culture and Others*, ZWSC 26 (2007) (freedom of religion and conscience under section 19(1) of the Lancaster House Constitution); *Bhila v. Master of the High Court*, *supra* note 2; *S v. FM* (A Juvenile), ZWHHC 112 (2015); *S v. Banda*, *supra note* 4*; S v. Chakamoga*, *supra note* 1; *S v. Chokuramba*, *supra* note 13.

[44] A Moyo, 'The Judiciary and Children's Rights in Zimbabwe', in J Tsabora (eds.), *The Judiciary and the Zimbabwean Constitution* (University of Zimbabwe Press, 2022) pp.228-250; B.Mushowe, 'A ray of hope for the outlawing of corporal punishment in Zimbabwe: A review of recent developments', *The Zimbabwe Electronic Law Journal* (2018), <old.zimlii.org/zw/journal/2018-zelj-01/%5Bnode%3Afield_jpubdate%3Acustom%3AY/ray-hope-outlawing-corporal-punishment> (accessed 12 January 2023).; The Herald, 'Ban on corporal punishment opens new era for children', 2015, <herald.co.zw/ban-on-corporal-punishment-opens-new-era-for-children/> (accessed 12 January 2023).; A. Moyo, 'The Legal Status of Children's Rights', in A Moyo, *Selected Aspects of the 2013 Zimbabwean Constitution and the Declaration of Rights* (2nd Edition, 2022), pp.243-286 <staging.rwi.hemsida.eu/wp-content/uploads/2022/09/RWI-HR-Anthology-FINAL2-1.pdf> (accessed 12 January 2023).

[45] I. Magaya and R, Fambasayi, 'Giant leaps or baby steps? A preliminary review of the development of children's rights jurisprudence in Zimbabwe', *De Jure Law Journal*, (2021), <scielo.org.za/pdf/dejure/v54n1/02.pdf> p. 34.

[46] Moyo, *supra* note 44, p.228.

[47] *Ibid*. Emphasis added. p. 228.

The post-*Chokuramba* period has seen a surge in the interest on the legality of corporal punishment in other settings. Nevertheless, these calls are not in themselves new since various institutions have previously implored Zimbabwe to outlaw the practice. For instance, "in 1998, the Human Rights Committee emphasized to Zimbabwe that corporal punishment is incompatible with the International Covenant on Civil and Political Rights".[48] Also, the Government of Zimbabwe responded affirmatively to the results of the first cycle of the Universal Periodic Review in 2011 which urged the country to outlaw corporal punishment in all settings.[49] Now that the Constitutional Court has outlawed judicially sanctioned corporal punishment, the main objective of this paper is to demonstrate why all forms of corporal punishment should be outlawed in all settings. The main argument is that a liberal and purposive construction of the 2013 Zimbabwe Constitution will have the effect of outlawing corporal punishment in the home, alternative care settings, day care institutions and foster homes alike. With respect to the latter, recent studies seem to suggest that some parents are in support of corporal punishment.[50]

Corporal punishment has a long genealogy in constitutional adjudication in Zimbabwe.[51] Recent analyses straddle abolitionist and relativist constructions of the law on corporal punishment.[52] Nevertheless, the central contention is that corporal punishment is irreconcilable with the elaborate rights of children under the 2013 Constitution.[53] The Constitution provides no carve out probably indicative of the drafters' intention to engender a society free from violence. Moreover, the international agreements that Zimbabwe is party to arguably demonstrate that corporal punishment cannot pass muster. The Constitutional Court of Zimbabwe concurs partially with the ongoing discourse when it comes to deploying certain rights, especially right to dignity, to judicially imposed corporal punishment.[54] Magaya and Fambasayi evaluate the evolving children's rights jurisprudence in Zimbabwe. [55]

The test to determine if an impugned law, conduct or custom should still subsist in a constitutional democracy would largely depend on whether it can co-exist with dignity as a constitutional value. Before, the Court was the legality of the extant practice of corporal punishment under adjectival law. The Court found the right to dignity (and as a principle) was instructive. It explained that:

> Human dignity… is a special status which attaches to a person because he or she is a human being […] Human dignity is therefore inherent in every person all the time regardless of circumstances or status of the person... Human dignity is not created by the State by law; the law can only recognise the inherence of human dignity in a person and provide for equal respect and protection of it.[56]

However, it is pertinent, before proceeding to illuminate the holding and reasoning of the Court, to provide a crisp background to the constitutional matter. As noted above, the matter was brought to the Constitutional Court via the section 175 of the Constitution route where the Constitutional should confirm preliminary constitutional findings made by the High Court. The

[48] S. Owen, 'Briefing on Zimbabwe for the Committee on the Rights of the Child', *End All Corporal Punishment of Children*, June 2015, visited on 13 July 2023 p. 4.
[49] *Ibid*. p. 4.
[50] Gwenzi, supra note 26, p 218.
[51] Veritas, 'Court Watch 6/2019 Corporal Punishment: When the Beating Had to Stop', (2019), <veritaszim.net/node/3507> (accessed 12 January 2023).
[52] Moyo s*upra* note 44.
[53] *Ibid.*
[54] *S v. Chokuramba, supra* note 13*; S v C* (A Juvenile).
[55] Magaya and Fambasayi, *supra* note 45.
[56] *S* v. *Chokuramba, supra* note 13, p 19.

pertinent facts are that a juvenile of fifteen years, who had been convicted of rape in the Magistrate's Court, was sentenced to corporal punishment. This meant that he was to be subjected to three strokes based on Section 353 of the CPEA and as fleshed out in the Regulations.[57] Furthermore, the court a quo concluded that it was inconceivable to justify the administration of corporal punishment without violating the inherent dignity of the juvenile. In unequivocal words, the High Court found that Section 353 was incompatible with the spirit of Chapter 4 of the Constitution, in particular Section 53 as read with 52(a) and 51 of the 2013 Zimbabwean Constitution.

Despite the progressive ruling of the High Court, it suffices to note that judicially sanctioned corporal punishment has a long genealogy in constitutional practice. In the late 1980s, it was found to be inconsistent with the then s 15(1) of the maiden Constitution of Zimbabwe (Lancaster House Constitution), and by the Supreme Court, in *S v A Juvenile*.[58] Although the latter case was decided under the auspices of the former Constitution, it matters still that Zimbabwean courts have consistently maintained that corporal punishment stood in sharp contradistinction with the ideals and values of a progressive and civilized society. Notwithstanding, the differences between the *Chokuramba* and *S v A Juvenile* decisions is mainly that the legislature effected a constitutional amendment which overturned the judgment of the Supreme Court. In essence, the end result of the reforms was that they defied court decisions, and by doing so, undermined tenets of judicial independence and the rule of law.

Accordingly, the limited judicial review powers sanctioned by Section 15(3) (b) of the now defunct Lancaster House Constitution, meant that corporal punishment remained extant. Despite the controversial architecture of Section 15 (3) (b), cited above in relation to the powers of the judiciary, it appears now, by virtue of *Chokuramba*, that the constitutional morality has been revolutionised. In the opinion of the Court, in the absence of any constitutional prohibition or limitation of its powers, it is empowered to test either executive or legislative conduct for compliance with the Constitution. In other terms, in the pre-2013 constitutional era, courts were unable to contest judicially sanctioned corporal punishment as unconstitutional since the amended Constitution made it permissible. Moreover, the holding of the Court, was that in the absence of a provision such as Section 15(3) (b) of the Lancaster House Constitution, the Court was empowered to determine whether the conduct of the President or Parliament were compliant with the constitutional intent. Further, the Court appeared to reemphasise that its powers are directly derivable from the Constitution which created it.

According to the Court, the determination of whether or not corporal punishment still had a place in Zimbabwean society could be answered by asking one broad question which has two components. The core question was whether moderate corporal punishment violated the inherent human dignity of juveniles as protected under the Constitution. The sub-questions hinged on the epistemological formulations of the terms "inhuman punishment" and "degrading punishment". One preliminary observation is that the ancillary questions are derived from the constitutional right to inherent dignity enumerated in the Constitution. The court reasoned that dignity is a supreme, foundational value and right which permeates the whole constitutional enterprise. Furthermore, a distinction was made between dignity in the general sense and inherent human dignity in juridical terms. The latter is innate and therefore different from its counterpart which is narrower in scope. Furthermore, the Court held that the test ought to be objective in that extra-legal factors are irrelevant in the constitutional adjudication of corporal punishment. In essence, this connotes that the lived political, social, cultural, religious and other

[57] *S v A Juvenile* 1989 (2) ZLR 61 (S).
[58] *Ibid.*

personal experiences and innuendos of judges should not cascade into the adjudication process. The constitutional morality, which is itself fluid and dynamic and deeply rooted in the Constitution, should drive the interpretation exercise instead. Arguably, the reasoning of the Court aligns with the Dworkinian Herculean model for judges who possesses superb adjudicative and lawyering skills, patience, acumen, foresight, objectivity and impartiality. This could also imply that there is no law beyond the law.

3.1 Limitation of Rights and Corporal Punishment

The general rule is that all rights in the Declaration of Rights can be limited.[59] If the limitation or the infringement is found to be reasonable and justifiable then it is constitutional.[60] Section 86 of the 2013 Constitution sets out the test for determining whether a limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The limitation process involved a two-legged approach:

> in cases where there is direct application of the Constitution, the court considers two issues. The first is whether a right in the Bill of Rights has been limited or infringed. If the answer to the first inquiry is that a right has been limited or infringed, then the court moves on to the second issue: is the limitation reasonable and justifiable?"[61]

Accordingly, Section 86 captures the notions of acceptability of limitations to human rights such as the conditions of legality, legitimacy and necessity.[62] Olivier De Schutter succinctly explains the limitation of human rights as follows:

> [R]ights of an absolute character are the exception. In general, limitations may be imposed on human rights, provided three conditions are satisfied. First, any interference with a right should be prescribed by law (condition of legality). Second, it must be justified by the pursuance of a legitimate aim (condition of legitimacy). Third, the interference must be limited to what is necessary for the fulfilment of that aim, which means that it must be appropriate to pursuing the objective, and that it may not go beyond what is required in order effectively to achieve that aim-or, at a minimum, that all the interests involved should be carefully balanced against one another (condition of proportionality)".[63]

Consequently, under the Section 86 inquiry, the question would be whether corporal punishment is a justifiable and reasonable limitation of rights such as the right to personal security in Sections 52 (right to personal liberty), 53 (freedom from torture or cruel, inhuman or degrading treatment or punishment), 56 (equality and non-discrimination) and 60 (freedom of conscience) of the Constitution. Section 241(2) (a) of the Criminal Law (Codification and Reform) Act 2004, for instance, enunciates that "a parent or guardian shall have authority to administer moderate corporal punishment for disciplinary purposes upon his or her minor child or ward".[64] Subparagraph (6) states that:

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[59] In South Africa a provision (S 28(2) similar to S 81 of the 2013 Zimbabwean Constitution has been used to limit children's rights. *See Sonderup v Tondelli and Another* SA 1171 (CC) (2001), *De Reuck* v. *Director of Public Prosecutions and Others*, CCT5/03, (2003) *S v M* (Centre for Child Law as Amicus Curiae) CCT 53/06, (2007).

[60] S. Human, 'The Theory of Children's Rights', in T. Boezaart (ed.) *Child Law in South Africa* (Juta2018) p.261.

[61] *Ibid*, p. 274.

[62] *See generally*, O. De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (3rd Edition), (Cambridge, 2019), pp.344-386.

[63] *Ibid.* p. 652.

[64] Criminal Law (Codification and Reform) Act 2004, Section 241 (2) (a), p. 124.

> In deciding whether or not any corporal punishment administered upon a minor person is moderate for the purposes of this section, a court shall take into account the following factors, in addition to any others that are relevant in the particular case: (a) the nature of the punishment and any instrument used to administer it; and (b) the degree of force with which the punishment was administered; and (c) the reason for the administration of the punishment; and (d) the age, physical condition and sex of the minor person upon whom it was administered; and (e) any social attitudes towards the discipline of children which are prevalent in the community among whom the minor person was living when the punishment was administered upon the minor person.[65]

Thus, we are called to question the impugned provision in light of the above constitutional provision. Section 86(3) is beyond the scope of the study to the extent that the *Chokuramba* Court has already dealt with it in the context of corporal punishment. The contention is that Section 241 will not pass muster given the discussion below. Also, we draw comparative constitutional law inspiration by virtue of Section 46 (1) (e) of the 2013 Zimbabwean Constitution, from jurisprudential developments in South Africa, a common law jurisdiction, where courts outlawed corporal punishment via the Section 36 (limitation clause) route which is the Zimbabwean equivalent of S 86 of the Constitution.[66] The argument is that corporal punishment should be outlawed in the home. Specifically, there is no reasonable connection between its use and purpose. The examination of the legality of reasonable chastisement culminates into collateral issues. The practice affects the development of children, and its impact can only be seen in the long run. Section 86 is meritorious in that it involves a balancing exercise, one that leans in favour of child protection. There appears to be no cogent explanation from the State as to why the practice should still subsist except for the public opinion which the court is not bound by. In the context of Section 46 the judiciary is provided with a platform to develop common and customary law progressively.

4 International Framework: Convention on the Rights of the Child and African Charter on the Rights and Welfare of the Child

The CRC is an international treaty which entered into force on 2 September 1990 and Zimbabwe is a signatory.[67] The Convention is an amalgam of civil and political rights and economic, social, and cultural rights, which is unconventional in the human rights sphere.[68] Article 1 circumscribes the definition of the "child" to "every human being below the age of eighteen years unless, under the law applicable to the child, the majority is attained earlier." Within the CRC are obligations by State Parties to create an enabling legal environment in the spirit of children's rights, including protection of rights irrespective of their status and other criteria.

Overall, the key feature of the CRC is that it captures the Four Ps of provision, protection, participation and prevention rights in the Convention.[69] Provision rights denote "rights that children have to be provided with services to realise their basic needs; examples are the right to the highest attainable standard of health, the right to social insurance and the right to education".[70] Moreover, protection and prevention rights refer to "rights aimed at protecting

[65] *Ibid*, Section 241, (6).
[66] *Freedom of Religion South Africa* v. *Minister of Justice and Constitutional Development and Others*, CCT320/17, ZACC 34, (2017).
[67] The Law of the Treaties apply.
[68] P. Mahery, 'The United Nations Convention on the Rights of the Child: Maintaining its Value in International and South African Child Law', in T. Boezaart (ed.), *Child Law in South Africa* (Juta, 2016), p.311.
[69] *Ibid*, p.314.
[70] *Ibid.*, p.314.; *See* UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989United Nationas Treaty Series vol 1577 Articles 24, 26 and 28.

children from harmful and violent acts or practices and preventing children from being subjected to such acts and practices, for example a child's right to privacy and to be protected against unlawful interference in his or her private life".[71] The central argument is that children should be protected from harmful acts especially economic, sexual and any other exploitation. Participation rights refer to rights that allow children to participate in decisions affecting them. Examples are the child's right to express his views in all matters affecting him or her and the right to freedom of expression.[72] Scholars such as Moore et al. have proposed *perception* as the fifth "p" which denotes a consideration of the impact that human perception has on the rights and lives of children.[73] Furthermore, the CRC contains four general principles which are fundamental to its implementation. These are non-discrimination in Article 2; the best interests of the child in Article 3; the right to life survival and development in Article 6; and respect for the views of the child in Article 12 of the Convention respectfully. The Committee established under the Convention has occasionally applied these canons in specific contexts.[74] Specifically, General Comment 8 calls for the protection of children from corporal punishment and other forms of degrading punishment.[75] Prohibiting all corporal punishment asserts children's equal right to full respect for their human dignity and physical integrity.

The African Charter on the Rights and Welfare of the Child (African Children's Charter, ACRWC) is an African legal instrument on children's rights which was adopted in 1990 and came into force in 1999.[76] To date, it has been ratified by 49 African countries, with Zimbabwe among them. Drawing inspiration from the CRC, the ACRWC emphasizes the rights of the child and requires states to protect children from inhuman or degrading treatment while in the care of a parent or guardian.[77] The Charter also requires that in the act of disciplining a child, the child should be treated with humanity and with respect to the inherent dignity of the child.[78] In 2011, the African Committee of Experts on the Rights and Welfare of the Child issued a statement on violence against children, highlighting corporal punishment as one of the issues that should be addressed by governments. In the statement, not only did the experts rely on legal reasoning, but also included the harms which come from experiencing violence as young person. Those include trauma, challenges to their education, and increased risk for perpetuating violence themselves, as children and as adults.[79] It is in that spirit of recognizing the harms of corporal punishment that the ACRWC recommended that the government abolish corporal punishment in all settings and instead adopt methods of positive discipline.[80]

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[71] *Ibid*, Article 16.
[72] *Ibid*, Articles 12 and 13.
[73] S. Moore, L. Melchior and J. Davis, 'Me and the 5 P's: Negotiating rights-based critical disabilities studies and social inclusion', 16(2) *International Journal of Children's Rights*, 2008, p.249.
[74] UN Committee on the Rights of the Child (CRC), *General Comment No. 3, HIV/AIDS and the Right of the Child*, CRC/GC/2003/3, (2003) CRC, *General comment No. 4 (2003): Adolescent Health and Development in the Context of the Convention on the Rights of the Child*, CRC/GS/2003/4 (2003); CRC, *General Comment 7 Implementing Child Rights in Early Childhood*, CRC/C/GC/7/Rev1, (2006); CRC, *General Comment 12: The Right of the Child to be Heard*, CRC/C/GC/12, (2009).
[75] CRC, *General Comment 8 (2006) The Rights of the Child to Protection from Corporal Punishment and other Cruel and Degrading Punishment*, CRC/C/GC/8, (2008).
[76] African Union, *African Charter on the Rights and Welfare of the Child, 1990/1999* Accessed from < https://au.int/en/treaties/african-charter-rights-and-welfare-child>
[77] *Ibid*, Article 16 (1).
[78] *Ibid*, Article 11 (5); Article 20
[79] African Committee of Experts on the Rights and Welfare of the Child, 'Statement on Violence Against Children". 2011, Accessed from <http://endcorporalpunishment.org/wp-content/uploads/key-docs/ACERWC-statement-on-VAC-2011-EN.pdf> accessed 19 July 2023. pp. 2-3
[80] African Committee of Experts on the Rights and Welfare of the Child. 'Concluding Observations and Recommendations by the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) in the Republic of Zimbabwe Report on the Statuts of Implementation of the African Charter on the Rights and

5 Conclusion

The study sought to demonstrate that corporal punishment in the home and other similar situations violates children's rights as contained in leading international standards. The point of departure was that the legal protection of children's rights marked a massive departure from archaic approaches that regarded children as objects of parental control. The adoption of the Constitution which elaborately enlists children' rights specifically and human rights broadly is the hallmark of progress as it calls for equality, dignity, justice and freedom. The grand norm creates a world of possibilities coupled with discernible contradictions and paradoxes which it tries to resolve. Nevertheless, corporal punishment presents a compelling challenge in that it implicates moral and religious norms whose status is determinable by resorting to the Constitution and international law. Suitable interventions should be considered in light of the legal commitments that Zimbabwe has made. Having noted that the country has outlawed corporal punishment in the criminal justice and educational systems, the call to action is that the deployment of the canons of child law especially the best interests the child, non-discrimination, life and development principles equally demand that the practice is repugnant and cannot pass constitutional muster. In the main, an intentional reading, for example, of the CRC and the African Children's Charter, arguably demonstrates that corporal punishment in the home violates children's rights. While the study relied on other rights than the right to dignity which is an elusive and all-encompassing right, the conclusion is that there are less restrictive means to achieve the same goals which corporal punishment serves to achieve. To that end, we argued that such punishment is disproportionate and therefore unnecessary in an open and democratic society that is founded on the values espoused in section 3 of the 2013 Constitution. And for that reason, we recommend the following non-exhaustive interventions:

5.1 Recommendations for the Government

- Ensure that domestic child law is compliant with international normative standards. This can be achieved through domestication of the CRC and the African Children's Charter.
- Adopt and implement a clear and comprehensive National Policy on Corporal Punishment. The policy should contain a comprehensive and up-to-date assessment and analysis of the extent, nature, causes and consequences of violence especially corporal punishment against children as a basis for further policy and programmes. This should include constant evaluations of the effectiveness of existing programmes and approaches; ongoing research on the socio-economic costs of violence against children; services, such as hotlines that allow children to report cases of violence against them and the maintenance of official records on child deaths, disaggregated by cause. A protective environment for children requires an effective monitoring system that records the incidence and nature of child abuses and allows for informed and strategic responses.
- Ensure that adequate resources are available to implement laws. This process would involve detailed budget analysis and agreed implementation strategies across sectors.
- Adopt participatory approaches to ensure that children are involved in legal reforms and development of legal frameworks on corporal punishment. Promoting child participation and strengthening children's own resilience.

Welfare of the Child.' 2018 Accessed from < https://www.acerwc.africa/sites/default/files/2022-06/Concluding_Observations_Zimbabwe.pdf> .accessed 19 July 2023. p. 8

5.2 Recommendations for the Zimbabwe Human Rights Commission and Other Stakeholders

- Ensure that information on the impact of corporal punishment on children is widely disseminated and, more particularly, that the CRC is available in the sixteen local languages. This can be achieved through public speeches on corporal punishment and child protection; public debates on television and radio; articles for newspapers on corporal punishment; public events to celebrate 20 November, International Children's Day, and through drawing attention to corporal punishment. Public information campaigns should involve religious, traditional, community, and peer education involving parents and children.

5.3 Recommendations for the Public

- Social development programmes designed to help children and adolescents develop social skills, manage anger, resolve conflicts and develop a moral perspective;
- Prevention of offending to ensure that those who come forward because they fear they may resort to corporal punishment are offered counselling and treatment programmes. The availability of such programmes should be widely promoted;
- Training in positive parenting practices and family therapy programmes for general, long-term prevention.

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The seven research papers contained herein are the final, peer reviewed papers from the 2022 National Symposium on Ten Years of the Declaration of Human Rights in the Zimbabwean Constitution, held at Cresta Lodge, Harare, Zimbabwe, on 31 October and 1 November 2022, under the Zimbabwe Human Rights Capacity Development Programme (hereinafter 'Zimbabwe Programme').

The national symposium is an annual event under the Zimbabwe Programme. It is co-organised by RWI together with its Zimbabwean partner institutions, and is a forum where research funded and conducted during the year is packaged and presented before an audience representing diverse sectors of Zimbabwean society, thereby allowing the presenters and participants to in plenary engage in vibrant discussions around the topics at hand and together deliberate on the way forward with regard to critical human rights reform issues. The feedback and experiences shared during the national symposium also aid and feed into the preparation of final papers for publication and dissemination.

With that said, it is RWI's sincere wish that the reader finds these papers thought-provoking and informative as well as an eventual source of inspiration towards furthering the provisions contained in the 2013 Constitution of Zimbabwe and its comprehensive Declaration of Rights.