16 Standing, Access to Justice and Human Rights in Zimbabwe

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1 Introduction

There has been a significant paradigm shift, especially in light of the broad provisions of section 85(1) of the Constitution, towards the liberalisation of *locus standi* in Zimbabwe. The liberalisation of standing allows a wide range of persons who can demonstrate an infringement of their rights or those of others to approach the courts for relief. It is intended to enhance access to justice by individuals and groups without the knowledge and resources to vindicate their rights in the courts. To this end, the drafters of the Declaration of Rights acknowledged that restrictive standing provisions defeat the idea behind conferring entitlements upon the poor and the marginalised. The majority of the people intended to benefit from the state's social provisioning programmes often do not have the resources, the knowledge and the legal space to drag powerful states, transnational corporations or rich individuals to court in the event that a violation of their rights occurs. To address this problem, section 85(1) of the Constitution allows not only persons acting in their own interests but also any person acting on behalf of another person who cannot act for themselves, any person acting as a member, or in the interests, of a group or class of persons, any person acting in the public interest and any association acting in the interests of its members to launch court proceedings against alleged violators of the rights in the Declaration of Rights.

This chapter focuses on standing, access to justice and the human rights in Zimbabwe. It is composed of nine parts of which this introduction is the first. The second part of the chapter discusses, in some detail, the meaning of access to justice and delimits the reach of the research by confining the term to mean access to courts as the primary dispute resolution forum. This entails an inquiry into the scope of constitutional provisions governing access to courts and the right to a fair hearing. It is shown that the right of access to court, which forms part of the more general right to a fair hearing under the Constitution, is an essential ingredient of access to justice and the rule of law in all modern democracies. The term 'court' is interpreted in its narrow sense to include formal courts where provisions regulating standing have some relevance.

In the third part, the chapter briefly explains the scope of the standing provisions of the Lancaster House Constitution and the extent to which they limited access to justice and the rule of law. The fourth part critically analyses the scope of section 85 of the Constitution, its limitations, strengths and implications for access to justice.

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The liberalisation of standing, particularly the constitutionalisation of public interest litigation, represents a major shift from restrictive standing rules and evidences an intention to widen the pool of citizens who exercise the right of access to court in this country. It is argued that the drafters of the Constitution should have realised that insisting that the person who institutes proceedings be the one whose rights have been directly and immediately adversely affected would have hindered public interest litigation by non-governmental organisations, pressure groups and other interested persons.

Our Constitution abolishes the 'dirty hands doctrine', a concept in terms of which a litigant lacks standing if he is alleging that the statute in terms of which they are charged is unconstitutional. Their hands are said to be 'dirty', and the common law historically required them to comply with the impugned legislation first before they challenged it. The fifth part is devoted to a discussion of this doctrine and the positive changes brought by the current Constitution. In the sixth part, the chapter describes the constitutional provisions regulating the formulation of rules of all domestic courts. These provisions lay out principles which should guide the formulation and content of all court rules. This part discusses the extent to which the applicable principles promote access to justice and the rule of law in Zimbabwe. Referral by lower courts of constitutional issues, which arise in the course of litigation, to the Constitutional Court is discussed in the seventh part of the paper. It is argued that the conditions governing referral of constitutional issues that arise during court proceedings are stringent and are seemingly inconsistent with the spirit and purpose behind the broad standing provisions entrenched in the Constitution. This is particularly so because whether or not the Court hearing the matter gives a litigant leave to take up the matter with the Constitutional Court, the litigant ordinarily has the right of direct access to the Constitutional Court.

Intersections and overlaps between standing, access to justice and human rights are explored in the eighth part of the chapter. It is argued that a liberal approach to standing requires courts to place substantial value on the merits of the claim and underlines the centrality of the rule of law by ensuring that unlawful decisions are challenged by ordinary citizens and straightened by the courts. When a court refuses to entertain a matter on the basis that the petitioner does not have standing in terms of the applicable rules, the same court is essentially both neglecting its duty to assess the validity or constitutionality of the impugned conduct or legislation and undermining the rule of law. The final part of the chapter concludes the discussion by making some remarks on the future of access to justice and the rule of law in Zimbabwe, especially in light of the provisions governing standing and other related matters.

2 Access to Justice (a Fair Hearing) as Access to an Impartial Court

The notion of standing is based on the existence of a right, whether *prima facie* or certain. Where a litigant is wrongly before the courts and lacks a clear or sufficient interest in the matter, courts usually dismiss the matter and emphasise that the

appropriate person appear before them.[1] The right of access to court is constitutionally protected as part of the broad right to a fair hearing. Section 69(1)–(3) of the Constitution is framed in the following terms:

> (1) Every person accused of an offence has the right to a fair and public trial within a reasonable time before an independent and impartial court.
> (2) In the determination of civil rights and obligations, every person has a right to a fair, speedy and public hearing within a reasonable time before an independent and impartial court, tribunal or other forum established by law.
> (3) Every person has the right of access to the courts, or to some other tribunal or forum established by law for the resolution of any dispute.

The phrase 'right to a fair trial' consists of a number of component rights including but not limited to the right to a speedy hearing, legal representation, cross-examination, the presumption of innocence and pre-trial disclosure.[2] It is patent that the first two subsections outline the key components of the right of access to court, which is meant to give effect to the broad notion of access to justice. Section 69(1) of the Constitution captures the key components of the right to a fair hearing in criminal trials, and section 69(2) broadly describes the right to a fair hearing in civil proceedings. Notably, the component rights of a fair trial foster equality and enable litigants to present their side of the story in impartial courts or tribunals. The principle of equality becomes the core of the structure of fairness and lies at the heart of modern civil and criminal processes. The right to a fair hearing is as ancient as the trial process itself, stretching over the centuries and underlining the need for justice for all and equality before the law. It is aimed at promoting the administration of justice and securing the rule of law.[3]

The right to a 'fair trial' is treated as overlapping with the overarching right to a "fair and public hearing by a competent, independent and impartial tribunal established by law".[4] It implies that all persons should have inherent access to the courts and tribunals, including access to effective remedies and reparations.[5] Fairness of the hearing goes beyond the requirement of independence and impartiality of the judges and entails the absence of any direct or indirect influence, pressure or intimidation or intrusion from whatever side and for whatever cause.[6] The public character of

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[1] *See generally* I. Currie and J. de Waal, *The Bill of Rights Handbook*, 6th edition (2013).
[2] *See* R. Clayton and H. Tomlinson, *Human Rights Law* (2000) pp. 589–590. Treehsel clarifies fair trial rights into two components: a general one which applies to the general proceedings and specific rights involving the rights of the accused. *See* S. Treehsel, *Human Rights in Criminal Proceedings* (2005) p. 85.
[3] *See generally* UN Human Rights Committee (HRC), General Comment No. 32, Article 14, 'Right to equality before courts and tribunals and to fair trial', CCPR/C/GC/32 (23 August 2007).
[4] In the case of *Goktan v. France*, 33402/92, Judge Loucaides stated that "I believe that the right to a fair hearing/trial is not confined to procedural safeguards but extends to the judicial determination itself of the case. Indeed, it would have been absurd for the Convention to secure proper procedures for the determination of a right or a criminal charge and at the same time leave the litigant or accused unprotected as far as the result of such a determination is concerned. Such an approach would allow a fair procedure to end up in an arbitrary or evidently unjustified result."
[5] *See* further Counter-terrorism Implementation Taskforce, *Basic Human Rights Reference Guide: The Right to a Fair Trial and Due Process in the Context of Countering Terrorism*, 2014, p. 14, para. 9.
[6] W. Kalin and J. Kunzli, *The Law of International Human Rights Protection* (2011) pp. 453–454.

hearings and of the pronouncement of judgements is therefore one of the core guarantees of the right to a fair trial and implies that court proceedings should be conducted orally and in a hearing to which the public has access.

The right to a fair hearing implies in particular that tribunals and other decision-making authorities must refrain from any act that could influence the outcome of the proceedings to the detriment of any of the parties to court proceedings.[7] In general, fair trial guarantees are not only concerned with the outcome of judicial proceedings but rather the process by which the outcome is achieved.[8] There are structural rules regarding the organisation of domestic court systems. Securing the right of access to court and to a fair hearing can require a high level of investment in the court system, and many states often fail to fulfil their obligations because of serious structural problems. It should be noted, however, that human rights law does not seek to impose a particular type of court system on states but rather the implementation of the principle that there should be a separation of powers between the executive, the legislature and the judiciary.[9]

Fairness, justice and the rule of law all have substantive and procedural dimensions. They suppose an inherent need to comply with the procedural and substantive requirements of the law in order to ensure that justice is delivered to individuals and communities [10] In general, it is an essential element of a fair trial that litigants be treated fairly and in accordance with lawful procedures, not only during the trial itself, but also from the moment they first come into contact with law enforcement agencies. If lawful procedures are violated at any stage in the process, not only does the adversely affected litigant have a civil remedy against the responsible authorities, but the violation very often affects the validity of subsequent stages. This aspect of procedural justice is often referred to as procedural fairness and seeks to ensure that the state and the court comply with the procedural requirements of the rule of law. The procedural element of the rule of law requires state and non-state actors to function in a manner that is consistent with the applicable rules of procedure in any given case. Finally, the right to a fair hearing includes the right of equal access to courts and equality of arms before decision-making forums. These elements are pursued in turn.

[7] J. Burchel, *Principles of Criminal Law*, 3rd edition (2005) p. 19.
[8] S. Shah, 'Detention and Trial', in D. Moeckli, S. *Shah*, and S. Sivakumaran (eds.), *International Human Rights Law,* 2nd edition (2014) p. 270.
[9] *Ibid.*, p. 270.
[10] S *v. Sonday & Anor*, 1995 (1) SA 497 (C) at 507C, where Thring J held that "[t]he concept of a 'fair trial', including a fair appeal, embraces fairness, not only to the accused or the appellant, as the case may be, but also, in a criminal case, to society as a whole, which usually has a real interest in the outcome of the case". *See also Taylor v. Minister of Education and Anor*, 1996 (2) ZLR 772.

2.1 *Equal Access to Courts*

The right to access to courts is essential for constitutional democracy and the rule of law.[11] Its significance lies in the fact that it outlaws past practices of ousting the court's jurisdiction to enquire into the legal validity of certain laws or conduct. A fundamental principle of the rule of law is that anyone may challenge the legality of any law or conduct.[12] In order for this entitlement to be meaningful, alleged illegalities must be justiciable by an entity that is separate and independent from the alleged perpetrator of the illegality.[13] Access to court and the rule of law both seek to promote the peaceful institutional resolution of disputes and to prevent the violence and arbitrariness that results from people taking matters into their own hands.[14] Thus not only is the right of access to court a bulwark against vigilantism, but also a rule against self-help and an axis upon which the rule of law rests. Unless there are good reasons (self-defence or necessity for instance), no one should be permitted to take the law into their own hands.[15] Thus this is intended to ensure that individuals do not resort to the law of the jungle.[16] The threshold enquiry which must be met to access the right is that there must be a dispute capable of resolution by law, and once this is present factors such as independence, access, impartiality as well as fairness are triggered.[17]

Even though not explicitly provided for in fair hearing provisions, all human rights bodies, whether international or domestic, have confirmed that guaranteeing access to courts is an essential step on the journey to determining the parties' rights and obligations in a lawsuit. This implies that all persons must have an equal opportunity to have their constitutional rights and obligations determined by a court of law in the event of a dispute. The Human Rights Committee has stated that access to the administration of justice must be effectively guaranteed in all cases to ensure that no individual is deprived, in procedural and substantive terms, of their right to claim justice.[18]

Ensuring equal access to courts and tribunals involves substantial activity on the part of states.[19] They must ensure that judicial systems are organised so that all individuals who may find themselves in their territory or subject to their jurisdiction

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[11] *Road Accident Fund v. Mdeyide*, 2011 (2) SA 26 (CC) [1] and [64]; *De Beer NO v. North-Central Local Council and South-Central Local Council*, 2002 (1) SA 429 (CC) [11]; *Bernstein v Bester NO*, 1996 (2) SA 751 (CC) [105].

[12] *De Lange v. Smuts NO*, 1998 (3) SA 785 (CC) [46]-[47].

[13] *Road Accident Fund v. Mdeyide*, *supra* note 11, para 1.

[14] In *Chief Lesapo v. North West Agricultural Bank*, 2000 (1) SA 409 (CC) paras. 11–12, 18 and 22, the Court stressed the need for "institutionalising the resolution of disputes, and preventing remedies being sought through self-help".

[15] I. Currie and J. De Waal, *The New Constitutional and Administrative Law*, volume 1 (2001) p. 407.

[16] Resolution of legal disputes has to be by fair, independent and impartial institutions so as to prevent individuals from resorting to self-help

[17] In *Telcordia Technologies Inc v. Telkom SA Ltd*, 2007 (3) SA 266 (SCA), the Court held that this was a waiver of the right to a public hearing and that the waiver was acceptable and valid, unless contrary to some other constitutional principle or otherwise *contra bonos mores*.

[18] General Comment No. 32, para. 9.

[19] Shah, *supra* note 8, p. 273.

can access the courts.[20] It is important to note that access to courts and tribunals can be severely troubled if no legal assistance is available or only available at a prohibitively sky-rocketing cost. Thus, states may only restrict access to courts where such restrictions are based on law, can be justified on objective and reasonable grounds, and not discriminatory.[21]

2.2 *Equality of Arms and Treatment without Discrimination*

The right to equality before the courts also includes protection of equality of arms and treatment without discrimination. Equality of arms means that all parties should be provided with the same procedural rights unless there is an objective and reasonable justification not to do so and there is no significant disadvantage to either party.[22] The principle of equality of arms is of ancient origin.[23] Early trials took the forms of battles wherein the accused and the accuser fought in armour and rode on horses with batons and fought to death.[24] The contest ended with the death of one contestant, at which point justice would have been served.[25] The rules of combat ensured that neither party enjoyed advantage in terms of arms and armaments.[26]

The principle of equality of arms has roots both in common law and civil law traditions.[27] It is an expression of the natural law principle '*audi alteram partem*' which was first formulated by St. Augustine.[28] The principle involves striking a "fair balance between the parties, in order that each party has a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-a-vis his opponent".[29] The essence of the guarantee is that each side should be given the opportunity to challenge all the arguments put forward by the other side.[30] Indeed, the principle forms part of international human rights principles.[31] It is particularly relevant in the adversarial tradition which manifests itself as an interest based system. The system demands that there must be balance and equality between the players, and in a criminal trial the accused should be assisted to present his case in such a manner that he is not disadvantaged in relation to the prosecution

[20] General Comment No. 32, para. 9.
[21] General Comment No. 32, para. 9.
[22] Shah, *supra* note 8, p. 274.
[23] S. Bufford, 'Center of Main Interest, International Insolvency Case Venue, and Equality of Arms: The Eurofood Decision of the European Court of Justice', 27 *North-western Journal of International Law and Business* (2007) p. 351, at p. 395.
[24] J. S. Silver, 'Equality of Arms and the Adversarial Process: A New Constitutional Right, *Wisconsin Law Review* (1990) p. 1007.
[25] *Ibid.*
[26] *Ibid.*
[27] J. D. Jackson, 'The Effects of Human Rights on Criminal Evidentiary Process: Towards Convergence, Divergence or Realignment?', 68:5 *Modern Law Review* (2005) p. 737, at p. 751.
[28] A, Patrick, *Human Rights Practice* (2001) p. 145.
[29] *See generally* C. J. M. Safferling, *Towards a International Criminal Procedure* (2001) p. 256 and K. Lenarts '"In the Union We Trust": Trust- Enhancing Principles of Community Law', 41:2 *Common Market Law Review* (2004) p. 317, at p. 329.
[30] General Comment No. 32, para. 13.
[31] Article 14 of the ICCPR, Article 10 of the UDHR, C. Safferling, *International Criminal Procedure* (2012) p. 265.

'Equality of arms' is a concrete right that forms part of the residual fair trial right.[32]As Robertson and Merills points out, the 'equality of arms' principle in criminal trials represents those procedural mechanisms with which the vast inequality in power between the state and the accused is sought to be addressed.[33] The use of the principle in the criminal sphere may have unfortunate consequences if the 'equality' notion is taken too literally: the tendency would be to think that an accused should not be entitled to any procedural or evidential privileges to which the prosecution is not entitled, even though those privileges might well have been created to seek to 'equalise' the forces between prosecution and defence in the first place.[34]

2.3 *An Illimitable and Non-Derogable Right at the Domestic Level*

Unlike in other jurisdictions, the Zimbabwean Constitution clearly stipulates in no uncertain terms that no law may limit the right of access to an impartial court and to a fair hearing.[35] Such a provision is quite laudable given that the aim of the right of access to court is to ensure the proper administration of justice. Thus, in order for the state to commit itself to a society founded on the recognition of human rights, there is need to value and respect the aforementioned right to a fair trial.[36] This must be demonstrated by the state in everything that it does, including the way in which hearings are conducted.[37] Given the importance of justice and fair treatment in the constitutional scheme, the gross unfairness as well as injustice which arises as a result of the absence of a fair hearing carries no less weight.[38] This right may not be derogated from even during an emergency. The identification of this right as non-derogable implies that its suspension cannot directly assist in the objective of protecting the life of the nation, access to justice and the rule of law.[39]

The Zimbabwean Constitution expressly stipulates that no law may limit the right to a fair trial and no person may violate this right.[40] This right is also non-derogable in terms of section 87(4)(b) of the Constitution. In theory, the inclusion of this right to a fair trial under a list of illimitable and non-derogable rights entrenches the nation's commitment to due process rights such as the presumption of innocence and the right to a public hearing that is not arbitrary. The Human Rights Committee has previously reiterated that "deviating from fundamental principles of fair trial, including

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[32] S. Stravos, *The Guarantees for Accussed Persons under Article 6 of the European Convention and a Comparison with Other Instruments* (1993) p. 43.
[33] A. H. Robertson and J. G. Merills, *Human Rights in Europe: Study of the European Convention on Human Rights*, 3rd edition (1993). Some educative cases on 'equality of arms' include *Unterpertinger v. Austria,* (1986)13 EHPR 434 and *Kostovski v. Netherlands*, (1989) 12 EHRR 175.
[34] In *S v. Van de Merwe*, 1998 (1) SACR 194 (O), fairness of treatment of the subject was regarded as a question of the fairness of the trial that occurred subsequently.
[35] Section 86(3)(e) of the Constitution.
[36] *See*, for instance, *S v. Sebejan & Others*, 1997 (8) BCLR 1086 (W).
[37] I. Currie and J. De Waal, *The Bill of Rights Hand book*, 6th edition (2013) p. 165.
[38] This is in line with the principles of transparency, accountability and openness that inform our Constitution and its entrenchment of democracy and the rule of rule.
[39] For example, there is no additional protection of the life of the nation to be gained from suspending the right to a fair trial, this is so particularly because derogating from this right only leads to arbitrariness and defeats the entire process of proper administration of justice in a nation.
[40] Section 86(3)(e) of the Constitution.

the presumption of innocence, is prohibited at all times",[41] thereby underlining the centrality of this right in modern democracies.

The right to a fair trial and its illimitability and non-derogability underline the social importance of the right to equality in the context of access to an impartial court or tribunal. As stipulated by the Human Rights Committee, the "right to equality before courts and tribunals, in general terms, guarantees … equal access and equality of arms, and ensures that the parties to the proceedings in question are treated without any discrimination". Access to justice must be guaranteed to all in all circumstances, even during emergencies, in order to ensure that no one, not even a foreign national, is denied their right to claim justice and, where their claim is accepted by the court, to an effective remedy. Against this background, it is patent that the inclusion of section 86(3)(e) in the Constitution was meant to ensure that individuals' right of access to court is not systematically frustrated by legislative provisions or conduct which runs counter to the very idea of equality before the law. There is, in the right to a fair trial, an inherent prohibition of discrimination with regards to access to courts regardless of how heinous the crime one is charged with might be. Accordingly, even the most vile persons in our society have due process rights and are entitled to demand that the process by which their guilt or innocence is ascertained be procedurally and substantively fair. These principles underscore the centrality of access to justice and the rule of law.

3 Standing under the Lancaster House Constitution

Under the Lancaster House Constitution (LHC), only persons directly affected or about to be affected by infringements of rights were entitled to approach the courts for relief. The idea that 'any person acting in their own interests' is entitled to approach the local courts for relief was concretised by the provisions of the now defunct Lancaster House Constitution. Section 24(1) thereof provided as follows:

If any person alleges that the Declaration of Rights has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may, subject to the provisions of subsection (3), apply to the Supreme Court for redress.

Section 24(1) of the LHC was designed to promote direct access to the then apex court (the Supreme Court) by any person who alleged that their personal rights had been infringed. Under the LHC, only persons negatively affected by the impugned conduct could institute court proceedings against alleged violators of rights. Thus, a person could not have *locus standi* unless they were able to demonstrate that a provision of the Declaration of Rights had been contravened in respect of

[41] UN Human Rights Committee (HRC), CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency, CCPR/C/21/Rev.1/Add.11, (2001), para. 11.

themselves.[42] When seeking direct access to the Supreme Court, a litigant had to demonstrate that their right(s) had been violated by the impugned law or conduct.[43] It would not suffice that the interests of the person seeking direct access to the Supreme Court had been infringed.[44] The LHC codified a restrictive approach to standing and prevented civil society organisations, pressure groups and political parties from seeking justice on behalf of marginalised groups. In *United Parties v. Minister of Justice, Legal and Parliamentary Affairs and Others*,[45] the applicant, a political party, sought to challenge the constitutionality of certain provisions of the Electoral Act[46] on the basis that they violated the right to freedom of expression as protected in section 20 of the LHC. The relevant provisions of the Act conferred on constituency registrars the right to object to the registration of voters and to refrain from taking any action relating to objections lodged by the electorate (within the period of 30 days before the polling date) concerning the retention of their names on the voters' roll. The Court held that the political party had no legal standing to challenge the provisions of the Electoral Act. Gubbay CJ (as he then was) held that:

> section 24(1) [of the LHC] affords the applicant *locus standi in judicio* to seek redress for a contravention of the Declaration of Rights *only in relation to itself* (the exception being where a person is detained). It has no right to do so either on behalf of the general public or anyone else. The applicant must be able to show a likelihood of itself being affected by the law impugned before it can invoke a constitutional right to invalidate that law.[47]

The Court observed that the provisions in question impacted on the rights and interests of 'claimants' and 'voters'. It relied on the definitions of the words 'claimant' and 'voter' in the Electoral Act. Section 3 thereof defined a claimant as a person "(a) who has completed a claim form; or (b) has submitted a written application in terms of section 24(2)". The same section defined a voter as "a person who is entitled to vote and is registered in the voters roll". Relying on a literal reading of these provisions, the Court held as follows:

> When regard is had to the meaning of "claimant", it becomes apparent ... that the applicant, as a political party, does not come within the purview of section 25(1). It does not complete a claim form, nor is it registered on the voters' roll. The applicant is not a person even liable to be affected by the opinion of the constituency registrar, or by the mandatory inaction of that official. Precisely the same line of reasoning is applicable to section 26(5). The applicant is not touched by this

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[42] *See In Re Wood v. Hansard*, 1995 (2) SA 191 (ZS) at p. 195. *See also Chairman of the Public Service Commission and Others v. Zimbabwe Teachers Association and Others*, 1996 (9) BCLR 1189 (ZS), at p. 1199 where Gubbay CJ held that "legal rights and interests do not exist in vacuo. They must vest in legal persons who can petition the courts for their enforcement or enjoyment. When a person petitions for the enforcement or enjoyment of a legal right or interest, the court must, of necessity, enquire into the nature of the right or interest claimed in order to determine whether, and when, the entitlement to the enjoyment of such right or interest, if any, is due."

[43] G. Linington, 'Developing a New Bill of Rights for Zimbabwe: Some Issues to Consider', in N. Kersting (ed.), *Constitution in Transition: Academic Inputs for a New Constitution in Zimbabwe* (2009) p. 52.

[44] *See Mhandirwe v. Minister of State*, 1986 1 ZLR 1 (S) where Baron JA stated that "section 24(1) provides access to the final court in the land. The issue will always be whether there has been an infringement of an individual's rights or freedoms, and frequently will involve the liberty of the individual".

[45] 1998 (2) BCLR 224 (ZS).

[46] Electoral Act, Chapter 2:01 of the Laws of Zimbabwe.

[47] *United Parties v. Minister of Justice*, at p. 227.

> provision. The objection must be that of a voter. The applicant is not entitled to vote and is not registered on a voter's roll. It is a political association whose members, though not necessarily all of them, are voters. It is they, if voters, not the applicant itself, who are given the right of objection.[48]

The Court held in its final analysis that "the applicant is not entitled under section 24(1) of the Constitution to carry the torch for claimants and voters generally".[49] For these reasons the Court held that the applicant did not have *locus standi* to proceed under section 24(1) of the LHC. This restrictive reading of the applicable provisions has been correctly criticised, with some scholars arguing that since "the applicant alleged a contravention affecting the public (with him being a member thereof)", they were entitled "to mount a constitutional challenge on the basis of his rights having been contravened. It is not self-evident that where a person is being affected as part of a … group, he has not been affected personally".[50] It would also appear that even if the Court was right in refusing the applicant (a political party) standing, it should have seized the opportunity and clarified "the important issue of 'public interest' litigation then recognised in other jurisdictions". As Madhuku later argued, "[n]o better situation can present itself for a pronouncement on 'public interest' litigation in defence of constitutional rights than where a political party, on behalf of members of the public generally, challenges electoral legislation in the way the *United Parties* did".[51] Strict adherence to the idea that only persons who are directly affected by the impugned conduct approach the courts for relief severely limits access to justice, the enjoyment of constitutional rights and the rule of law. In the *United Parties* case, the restrictive reading of provisions governing standing prevented the Court from deciding on the constitutionality of the impugned provisions and therefore constituted a limitation to the application of the substantive element of the rule of law.

Regardless of the restricted nature of standing provisions under the LHC, the Supreme Court later developed some flexibility in human rights litigation and expanded its capacity to hear cases that were brought before it in the public interest. *In Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General and Others*,[52] a human rights organisation brought an application to prevent the execution of certain prisoners on death row on the basis that the sentences had been rendered unconstitutional by virtue of the lengthy delay in carrying them out. One of the questions to be determined by the Court was whether the organisation had *locus standi* to act on behalf of the prisoners. The Court observed that the organisation's "avowed objects" were "to uphold human rights, including the most fundamental right of all, the right to life", and that it was "intimately concerned with the protection and preservation of the rights and freedoms granted to persons in Zimbabwe by the

[48] *Ibid.*, at p. 228.
[49] *Ibid.*, at p. 229.
[50] L. Madhuku, 'Constitutional Interpretation and the Supreme Court as a Political Actor: Some Comments on *United Parties v Minister of Justice, Legal and Parliamentary Affairs*', 10:1 *Legal Forum* (1998) p. 48, at p. 52.
[51] *Ibid.*, p. 53.
[52] 1993 (1) ZLR 242 (S).

Constitution".[53] Gubbay CJ, for the Court, held that "it would be wrong ... for this court to fetter itself by pedantically circumscribing the class of persons who may approach it for relief to the condemned prisoners themselves; especially as they are not only indigent but, by reason of their confinement, would have experienced practical difficulty in timeously obtaining interim relief from this court".[54] Unfortunately, progressive court decisions constituted exceptions to the widespread denial of *locus standi* at the time they were decided. They laid the groundwork for access to court and justice by indigent individuals or groups without the legal knowledge and fiscal space to institute court proceedings.

However, later cases would restrict access to justice and the rule of law by preventing the leading opposition candidate from mounting constitutional challenges against laws governing presidential elections. In *Tsvangirai v. Registrar General of Elections*,[55] the applicant argued that the Electoral Act (Modification) Notice,[56] published three days before the 2002 presidential election by the president (the laws restricted postal voting to only members of the uniformed forces), violated his rights to protection of law and freedom of expression as envisaged by the LHC. In his dissent, Sandura JA took a different route and underscored the fact the he would have given the applicant standing in order to promote human rights, access to justice and the rule of law.[57] To this end, he made the following remarks:

> Quite clearly, the entitlement of every person to the protection of the law, which is proclaimed in section 18(1) of the Lancaster House Constitution, embraces the right to require the legislature … to pass laws, which are consistent with the Constitution. If, therefore, the legislature passes a law, which is inconsistent with the Declaration of Rights, any person who is adversely affected by such a law has the locus standi to challenge the constitutionality of that law by bringing an application directly to this court in terms of section 24(1) of the Constitution. Thus, in the present case, the applicant had the right to demand that the presidential election be conducted in terms of the Electoral Law passed by parliament as required by section 28(4) of the Constitution. In the circumstances, he had the right to approach this Court directly in terms of section 24(1) of the Constitution and had the locus standi to file the application.[58]

The majority's decision in this case has been largely criticised for both denying a candidate in the election the right to challenge laws which directly affected the manner in which the election was conducted and fleshing out a very narrow approach

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[53] *Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General*, 1993 4 SA 239 (ZS), at 246H.

[54] *Ibid.*, at 246H-247A. It is arguable that since section 24(1) of the LHC afforded to 'any other person' the right to approach a court on behalf of detained persons, it was not even necessary for the Court to indicate its preparedness to broaden the number of persons entitled to approach the courts on behalf of prisoners. *See* G. Feltoe, 'The Standing of Human Rights Organisations and Individuals to Bring or be Parties to Legal Cases Involving Issues of Human Rights', 7:2 *Legal Forum* (1995) p. 12.

[55] (76/02) 2002 ZWSC 20 (4 April 2002).

[56] Statutory Instrument 41D of 2002.

[57] For comparative academic scholarship, *see* G. N. Okeke, 'Re-examining the Role of *Locus Standi* in the Nigerian Legal Jurisprudence', 6 *Journal of Politics and Law* (2013) p. 209, at p. 210, where the author argues that provisions governing standing should not be used as an overly-restrictive weapon for "narrowing the road to litigation".

[58] *Tsvangirai v. Registrar General of Elections*, (76/02) 2002 ZWSC 20.

to standing.[59] In the case of *Capitol Radio (Pvt) Ltd v. Broadcasting Authority of Zimbabwe*,[60] the Court denied the applicant access to court on the ground that it was not licensed in terms of the relevant Act.[61] The Court failed to protect the applicant's rights which were allegedly being violated by the Broadcasting Services Act. In the view of the Court, the applicant had to submit to the impugned legislation before challenging its unconstitutionality. This approach violated the rule of law and access to justice in that if the legislation were to be found to be unconstitutional, the Court would have denied the litigant a remedy where, in fact, one existed. Chiduza and Makiwane, after making extensive analysis of key cases that were decided before the adoption of the current Constitution, make the following findings:

> The narrow interpretation of the rules of standing adopted by the judiciary became an impediment to human rights litigation in Zimbabwe. It limited litigants' right to access courts for the protection of their fundamental rights and freedoms. In an effort to improve human rights litigation and access to justice, the new constitutional dispensation in Zimbabwe, with great influence from the South African legal system, has adopted a more liberal approach to standing.[62]

These remarks provide a useful background against which to analyse the various ways in which the new Constitution has enhanced access to court or justice, human rights and the rule of law in Zimbabwe.

4 Standing under the New Constitution

The current Constitution follows the South African model and broadens the number of persons who are entitled to bring rights or interests-based claims for determination by the local courts. These include any person acting in their own interests; any person acting on behalf of another person who cannot act for themselves; any person acting as a member, or in the interests, of a group or class of persons; any person acting in the public interest; and any association acting in the interest of its members. The stipulated categories of persons may approach a court alleging that a fundamental right or freedom protected in the Constitution has been, is being or is likely to be infringed by the impugned law or conduct. This section discusses in detail the standing of each person, the circumstances under which each of these groups can vindicate human rights and the extent to which the Constitution liberalises *locus standi* to enhance access to justice by marginalised groups.

[59] A. De Bourbon, 'Human Rights litigation in Zimbabwe: Past, Present and the Future', 3:2 *African Human Rights Law Journal* (2003) p. 195, at p. 201.
[60] 2003 ZWSC 65 (2003).
[61] Broadcasting Services Act, Chapter 12:06 of the Laws of Zimbabwe.
[62] L. Chiduza and P. Makiwane, 'Strengthening *Locus Standi* in Human Rights Litigation in the New Zimbabwean Constitution', 19 *Potchefstroom Electronic Law Journal* (2016) p. 1, at p. 9.

4.1 *Any Person Acting in Their Own Interests – Lessons from the Lancaster House Constitution*

The idea that persons acting in their own interest are entitled to approach the courts for relief mirrors the common law principle that only persons who are directly affected by the matter to be considered by the court have a right to seek a remedy before it. However, it has been suggested that the term 'interest' is 'wide enough' and includes, for example, instances where a trustee seeks to maintain the value of the property.[63] An argument can be made that the term 'acting in their own interest' has a wider meaning under the Constitution than it had at common law. This view has support from the majority decision in *Ferreira v. Levin NO & Others*.[64] The majority of the South African Constitutional Court denied Ackermann J's claim that the interest referred to must relate to the vindication of the constitutional rights of the applicant and no other person.[65] Chaskalson P, as he then was, emphasised that the Court would adopt a broader interpretation of the term 'sufficient interest' and indicated that the person bringing the claim should not necessarily be the person whose rights have been infringed.[66] He insisted that "[t]his would be consistent with the mandate given to [the] Court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled".[67] The application for relief need not relate to the constitutional rights of the plaintiff but may relate to the constitutional rights of other persons.[68]

Historically, courts generally appear to have followed a restrictive approach to standing, especially before the adoption of the LHC. In *Zimbabwe Teachers Association & Others v. Minister of Education*,[69] Ebrahim J reviewed earlier decisions where the issue of *locus standi* had been determined. In coming to the conclusion that the association had *locus standi*, the judge held that the association's membership was about 42 per cent of the total number of teachers in the country, and in the circumstances it would be fallacious to conclude that the applicant had no real and substantial interest in the litigation to redress the unlawful dismissal of three teachers. Before holding that the applicant before him had the requisite *locus standi*, he summarised the legal position as follow:

> From these authorities it is apparent what the legal approach to the issue of *locus standi* should be. The petitioners must show that they have a direct and substantial interest in the subject matter and what is required is a legal interest in the subject matter of the action.[70]

The judge would later emphasise that "[i]t is well settled that, in order to justify its participation in a suit such as the present, a party … has to show that it has a direct

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[63] *Van Huyssteen v. Minister of Environmental Affairs and Tourism*, 1996 (1) SA 283.
[64] 1996 (1) SA 984 (CC).
[65] For this narrow approach to standing, *see* para. 38, and for a critique of this narrow approach, *see* O'Regan J's judgment, especially para. 226.
[66] Paras. 163–168.
[67] Para. 165.
[68] *See Port Elizabeth Municipality v. Prut NO & Another*, 1996 (4) SA 318 (E), 324H-325J.
[69] 1990 (2) ZLR 48 (HC).
[70] *Ibid.*, at 57B.

and substantial interest in the subject-matter and outcome of the application".[71] Although the phrase 'direct and substantial interest' is meant to bar litigants from bringing all sorts of vexatious and frivolous claims to courts of law, it tends to suggest that for one to have recourse to the courts, they must be seriously and directly affected by the conduct of the defendant. The assertion that a litigant should show a 'direct and substantial interest' which could be affected by the court's decision on the issues raised by a particular case implies that it has to be the person whose rights have been infringed who institutes proceedings in our courts. In other words, it is only when the rights of the petitioner are implicated that the courts may hear the matter. This means that the capacity to litigate would only be accorded to a plaintiff who shows that their rights have been or are in danger of being infringed or adversely affected by the conduct complained of.

Section 85(1)(a) of the Constitution embodies the common law rule that the person claiming the right to approach the court must show on the facts that he or she seeks to vindicate his or her own interest adversely affected by an infringement of a fundamental right or freedom.[72] The infringement must be in relation to himself or herself as the victim or there must be harm or injury to his or her own interests arising directly from the infringement of a fundamental right or freedom of another person. There must be a direct relationship between the person who alleges that a fundamental right has been infringed and the cause of action. This familiar rule of *locus standi* was based on the requirement of proof by the claimant of having been or of being a victim of an infringement – whether actual or threatened – of a fundamental right or freedom enshrined in the Declaration of Rights.

Section 85(1)(a) of the Constitution represents the traditional and narrow rule of standing. The shortcomings of this rule prompted Chidyausiku CJ, in *Mawarire v. Mugabe NO and Others*,[73] to make the following remarks:

> Certainly this Court does not expect to appear before it only those who are dripping with the blood of the actual infringement of their rights or those who are shivering incoherently with the fear of the impending threat which has actually engulfed them. This Court will entertain even those who calmly perceive a looming infringement and issue a declaration or appropriate order to stave the threat, more so under the liberal post-2009 requirements.[74]

It appears Chidyausiku CJ was mostly concerned with the fact that the traditional approach to standing only served a litigant who had suffered an infringement of their rights or who had faced an imminent threat to their rights. This approach had to be broadened to include even those who calmly perceive a looming infringement in order to fulfil the constitutional imperative that any person alleging that a right has been, is being or is likely to be infringed is entitled to approach the courts for relief.

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[71] *Ibid.*, at 52–53. The Court was following Beck J's holding in *Deary NO v. Acting President & Ors*, 1979 RLR 2090 (G), at 203A. For comparative jurisprudence, *see* Cobertt J in *United Watch and Diamond Co (Pvt) Ltd & Others v. Disa Hotels Ltd & Anor*, 1972 (4) SA 409 (C).
[72] *See Mudzuru and Another v. Minister of Justice, Legal and Parliamentary Affairs and Others*, CCZ 12/15, 8-9.
[73] CCZ 1/2013.
[74] *Ibid.*, at p. 8.

Yet, the main threat to access to justice has been the fact that the categories of persons entitled to approach the courts for a remedy has been limited under the traditional rules governing standing.

As is demonstrated below, there has been a significant paradigm shift, especially in light of the broad provisions of section 85(1) of the Constitution, towards the liberalisation of *locus standi.* The new approach addresses the shortcomings of the traditional and narrow approach. It is intended to enhance access to justice by individuals and groups without the knowledge and resources to vindicate their rights in the courts. There is no doubt that the new approach to Declaration of Rights litigation acknowledges that the old approach defeated the idea behind conferring entitlements upon the poor. The majority of people who benefit from the state's social provisioning programmes do not have the resources, the knowledge and the legal space to drag powerful states or transnational corporations to court in the event of a violation of their rights. Insisting that the person who institutes proceedings be the one whose rights have been directly and immediately adversely affected would hinder public interest litigation by non-governmental organisations, pressure groups and other interested persons.

Nonetheless, there is room for broadening the ambit of standing under section 85(1)(a) of the Constitution to ensure that a person would have standing to challenge an unconstitutional law if they could be liable to conviction for an offence charged under that law, even if the unconstitutional effects were not necessarily directed at them per se. As Malaba DCJ once observed, "[i]t would be sufficient for a person to show that [they were] directly affected by the unconstitutional legislation" and it mattered not whether they had suffered an infringement or not.[75] In the Canadian case of *R v. Big M Drug Mart Ltd*,[76] a corporation was allowed to challenge the constitutionality of a statutory provision at a criminal trial on the grounds that it infringed the rights of human beings and was accordingly invalid. The corporation had been charged in terms of a statute which prohibited trading on Sundays.

Although the corporation did not have a right to religious freedom, it was nonetheless permitted to raise the constitutionality of the statute which was held to be in breach of the Charter on the Rights and Freedoms of the Person. According to the Court, the corporation had a financial interest in the form of profits made out of trading on Sundays. This approach broadens the meaning of the phrase 'own interests' used in section 85(1)(a) of the Constitution to include indirect interests such as commercial interests. In attempting to demonstrate that the statute was unconstitutional, the corporation argued that the statute infringed the fundamental right to freedom of religion of non-Christians who did not observe Sunday as the day of rest and worship. In getting the statute declared unconstitutional, the corporation's primary purpose was the protection of its own commercial interests and freedom from criminal prosecution for alleged breach of an invalid statutory provision.

[75] *Mudzuru and Another v. Minister of Justice*, at p. 10.
[76] (1985) 18 DLR (4th) 321.

Interests have been defined broadly in both Canadian and Zimbabwean jurisprudence. In the Canadian case of *Morgentaler Smoling and Scott v. R*,[77] male doctors who were prosecuted under anti-abortion provisions successfully challenged the constitutionality of the impugned legislation. The legislation directly violated pregnant women's right to have an abortion and did not in any way directly negatively affect the rights of males. Although the rights did not and could not vest in the male doctors, the anti-abortion provisions reduced the doctors' revenue in-flows in the sense that if pregnant women were free to consult the male doctors, the later would benefit financially from charging pregnant women for performing abortions. The doctors had their own financial and personal interests to protect in challenging the constitutionality of the anti-abortion legislation, even though the legislation primarily infringed upon women's fundamental right to security of the person as protected in section 7 of the Canadian Charter. This approach has been replicated by domestic courts. For instance, in *Retrofit (Pvt) Ltd v. PTC and Another*,[78] the court held that the applicant had *locus standi* to bring the suit to protect a 'commercial self-interest and advantage' that was being threatened by the respondent.

4.2 *Any Person Acting on Behalf of Another Person Who Cannot Act for Themselves*

The Constitution confers on 'any person' the authority to seek redress 'on behalf of another person who cannot act for themselves'. To claim relief based on this ground, the applicant should usually demonstrate why the person whose rights are adversely affected is not able to approach the court personally and should also show that the person in question would have instituted proceedings if they were in a position to do so. In *Wood and Others v. Ondangwa Tribal Authority and Another*,[79] the South African Appellate Division allowed church leaders to seek in the interests a large, vaguely defined group of persons who feared being arrested, prosecuted and be handed summary punishment on the basis of their political affiliations. The Court held that it would be impractical to expect the persons whose rights and interests were allegedly violated to approach the Court themselves. Part of the reason was that the majority of the affected persons were tribesmen living 800kms away from the seat of the Court and lived in an environment in which legal assistance was not easily accessible.[80] The reasoning of the Court supports the view that standing should be allowed under section 85(1)(b) of the Constitution where the party affected feared victimisation if they launch court proceedings in their own name.

There are numerous groups of persons who are patently unable to institute proceedings on their own behalf for various reasons. Due to conditions of stringent rules governing pre- or post-trial detention, detained persons constitute one category of persons who are usually incapable of acting for themselves. Under section 24(1) of the LHC, any person could seek redress on behalf of detained persons.

[77] (1988) 31 CRR 1.
[78] 1995 (2) ZLR 199 (S).
[79] 1972 (2) SA 294 A.
[80] *See also* J. R. De Ville, *Judicial Review of Administrative Action in South Africa* (2003) p. 424.

Accordingly, the traditional condition that the person instituting proceedings be substantially and directly affected by the impugned conduct would be generally shelved for purposes of ensuring access to justice by detainees. Due to the deprivation of liberty and physical confinement, lack of access to legal practitioners at custodial institutions and other administrative or institutional barriers, detainees are usually not able to institute proceedings to vindicate their rights. As such, it is reasonable for any person acting on behalf of detained persons to institute court proceedings to defend or advance the rights of detainees. Additional categories of persons who are generally incapable of acting on their own behalf include mental health patients and children. With regards to children, some countries such as South Africa now confer on them the capacity to litigate and this might have implications on the provisions that are relied upon to justify standing on behalf of children.

4.3 *Any Person Acting as a Member, or in the Interests, of a Group or Class of Persons*

Members of groups or persons acting in the interests of a group have the legal competence to represent such groups in class actions. In terms of section 85(1)(c) of the Constitution, 'any person as a member, or in the interests, of a group or class of persons' is allowed to approach a court alleging that a right has been or is about to be infringed. This provision underlines the importance of class action and seeks to avoid the proliferation of separate court proceedings by litigants who are collectively affected by the conduct of a defendant. To constitute a class action, the defendants must have the same cause of action. More importantly, however, standing in the interest of a group or class of persons is not constrained by the requirement that the members of the group or class of persons be not able to act in their own names.

Local courts have confirmed the importance of class actions and the role they play in enhancing access to court by people who are similarly negatively affected by the impugned law or conduct. In *Law Society and Others v. Minister of Finance*,[81] the Law Society sought to challenge the constitutionality of a withholding tax that would affect practicing lawyers as a group. Counsel for the respondents objected, arguing that the Law Society did not have *locus standi*. McNally JA, in his usual clarity, remarked that the Supreme Court would take a broad view of *locus standi* generally, especially given that the Class Action Act was not yet in force and he was not under a legal obligation to make an order that would hinder the development of class actions. He held as follows:

> [T]he question is whether the Law Society has a basis for claiming that the Declaration of Rights has been or is being contravened in relation to itself. In this jurisdiction there has not yet been a great deal of development in the field of class actions or representative actions. The Class Actions Act, No. 10 of 1999, is not yet in force. But it would not be right for this court to make

[81] 2000 (2) BCLR 226 (ZS).

> any ruling that would hinder the development of such actions. Therefore we are disposed to take a broad view of locus standi in matters of this nature.[82]

McNally JA held that the applicant had standing, especially given that the applicant had statutory empowerment to involve itself in proceedings of this sort.[83] He partly relied on the provisions of the Legal Practitioners Act, [Chapter 27:07], particularly section 53, which provides that one of the objects of the Law Society is "to employ the funds of the Society in obtaining or assisting any person to obtain a judicial order, ruling or judgement on a doubtful or disputed point of law where the Council of the [Law] Society deems it necessary or desirable in the interests of the public".[84] As such, the Law Society had a real and substantial interest in the proceedings.

Matters relating to representative actions have also arisen in the context of labour-related disputes. In *Makarudze and Another v. Bungu and Others*,[85] the Harare High Court had to determine whether other members of a trade union had *locus standi* to initiate proceedings for the removal of the president of the union on the basis that the president, having been dismissed by the employer, had legally ceased to be a member of the union. Mafusire J held that the "court will be slow to deny *locus standi* to a litigant who seriously alleges that a state of affairs exists, within the court's area of jurisdiction, where someone in [a] position of authority, power or influence, abuses that position to the detriment of members or followers".[86] Given that the plaintiffs reasonably seriously felt that the first defendant had become ineligible to hold any office within the union and to continue serving in the position of chairman, the Court had to avoid fettering "itself by pedantically circumscribing the class of persons who might approach it for relief. There could be no better demonstration of, or justification for, *locus standi in judicio* than the plaintiffs' position in this matter."[87]

Moreover, the Court held that it was beyond doubt that the applicants "had a direct and substantial interest in the management of the affairs of the Union [and that] they [had] demonstrated a sufficient connection to the subject-matter of their complaint".[88] In the words of the Court, "[i]f an alien, in the sense of someone having lost the capacity to remain a member of the Union, let alone of Excom, continued to cling onto that position, then a member or members of the Union, individually or collectively, would certainly have the right, power and authority to approach the courts for relief".[89] On the whole, domestic courts have indicated that they are prepared to allow groups of persons similarly affected by the conduct or law complained of to initiate court proceedings, individually or collectively, to advance the interests and rights of the group. This is consistent with the constitutional

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[82] At 243B-C. McNally JA indicated that he was following the Chief Justice's line of thought in *Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General & Others*, 1993 ZLR 242 (S) at 205A-E.
[83] *Ibid.*
[84] *Ibid.*
[85] HH 08-15.
[86] *Ibid.*, p. 7.
[87] *Ibid.*
[88] *Ibid.*
[89] *Ibid.*

provision regulating standing and access to courts by any person acting as a member, or in the interests, of a group or class of persons.

4.4 *Any Person Acting in the Public Interest*

Regardless of the difficulties confronted in attempting to flesh out a universally acceptable definition of the 'public interest', it can be construed as an action instituted by a representative in the interest of the public generally, or in the interest of a section of the public, but not necessarily in that representative's own interest. In *Mudzuru v. Minister of Justice*, the Court was at pains to emphasise that the public interest litigation procedure should not be exploited "to protect private, personal or parochial interests since, by definition, public interest is not private, personal or parochial interest".[90] The public interest does not connote "that which gratifies curiosity or merely satisfies appetite for information or amusement".[91] This is an important safeguard against vexatious, frivolous and *mala fide* actions brought to the courts, not in an attempt to have access to justice, but to buy time and sometimes prevent the administration of justice. There is an unambiguous distinction between 'what is in the public interest' and 'what is of interest to the public'. Public interest issues relating to fundamental rights and freedoms include, among others: public health; national security; defence; international obligations; proper and due administration of criminal justice; independence of the judiciary; observance of the rule of law; the welfare of children; and a clean environment.[92] As argued by Sloth-Nielsen and Hove:

> [M]atters that are of interest to the public are often matters that arouse the public's curiosity, for example, a scandal involving a person widely known in that society. Whereas matters in the public interest involve the protection and promotion of fundamental rights of a section of society, matters of interest to the public do not revolve around the protection or promotion of any rights.[93]

The central question is whether the challenged law or conduct or violation of any of the fundamental right and freedoms protected in the Constitution has the effect of adversely impacting on the community or a segment thereof. It is not material that the impugned law or conduct affects the interests of a significant segment of society. Where, however, the fundamental rights and freedoms of any of the vulnerable or disadvantaged group is negatively affected by the challenged law, the courts will most likely ground standing in the public interest clause.[94] In *Ferreira v. Levin*,[95] the Constitutional Court of South Africa set out the criteria for determining whether a matter is 'genuinely in the public interest'. O'Regan J held as follows:

> Factors relevant to determining whether a person is genuinely acting in the public interest will include considerations such as: whether there is another reasonable and effective manner in

[90] *Mudzuru v. Minister of Justice*, p. 15.
[91] *Ibid.*, p. 17.
[92] *Ibid*.
[93] J. Sloth-Nielsen and K. Hove, '*Mudzuru & Another v The Minister of Justice, Legal and Parliamentary Affairs* & 2 Others: A Review', 16 *African Human Rights Law Journal* (2016) p. 554, at p. 559.
[94] *Mudzuru v. Minister of Justice*, p. 18.
[95] 1996 1 SA 984 (CC).

> which the challenge can be brought.; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the Court and the opportunity that those persons or groups have had to present evidence and argument to the Court.[96]

These findings were reinforced in *Lawyers for Human Rights v. Minister of Home Affairs,*[97] where the same Court added the degree of the vulnerability of the people affected, the nature of the right said to be infringed and the consequences of the infringement of the right as crucial elements to be considered.[98] These criteria ensure that only cases that are genuinely intended to promote the public interest are entertained by our courts and to distinguish such cases from those intended to advance private or political or publicity interests.[99] Public interest litigation does not only promote human rights, but enhances the rule of law by ensuring that the majority of the cases are decided based on the merits and not on mere technicalities or failure to comply with procedural formalities. It requires courts to proceed to the substance of the application, to apply the relevant rules of law and to determine whether or not these rules have been violated by the impugned law or conduct.

Public interest litigation has a long history in Zimbabwe and a number of pre- and post-independence judicial decisions have dealt with circumstances in which public authorities and private bodies may institute proceedings in the public interest.[100] For them to justify their appearance before the court in the public interest, the petitioner must demonstrate that the interest at stake involves a large number of victims such as to constitute the public interest. As Makarau J would have it, "[t]he parties to the dispute and the nature of the dispute [must be] such as to place the litigation in the public domain".[101] For instance, litigation to protect the environment may be pursued in the public interest. In *Deary NO v. Acting President and Others*,[102] a public body that had brought an application on behalf of the citizens of the then Rhodesia against the colonial government alleged that it had standing based on the public interest. Although the applicant is cited as Deary, the application was brought by the Catholic Commission for Justice and Peace, a public authority, seeking to protect the rights of the citizenry. The *locus standi* of the applicant was objected to and initially it was contended that the application had been brought for purely political reasons and was vexatious. In holding that the applicant was properly before the Court, Beck J made the following remarks:

> It must be said from the outset that the Court will be slow indeed to deny locus standi to an applicant who seriously allege that a state of affairs exists within the court's area of jurisdiction,

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[96] *Ferreira v. Levin, para.* 34.
[97] 2004 (4) SA 125 (CC).
[98] Paras. 16–18.
[99] *See* A. K. Abebe, 'Towards More Liberal Standing Rules to Enforce Constitutional Rights in Ethiopia', 2010 10:2 *African Human Rights Law Journal* (2010) p. 407, at p. 414.
[100] *See generally Law Society of Zimbabwe v. Minister of Justice, Legal & Parliamentary Affairs and Another*, 16/06, *Law Society and Others v. Minister of Finance, 1999* (2) ZLR 231 (S), In re Wood and Another 1994 (2) ZLR 155 (S); *Ruwodo v. Minister of Home Affairs and Others 1995* (1) ZLR 227 (S) and *Capital Radio (Private) Limited v. Broadcasting Authority of Zimbabwe and Others, SC 128/02*.
[101] *The Zimbabwe Stock Exchange v. The Zimbabwe Revenue Authority, HH 120-2006*, p. 6.
[102] 1979 ZLR 200 (S).

> whereunder people have been or about to be, and will continue to be unlawfully killed. No more pressing need for the protection of the mandatory interdict *de libero homine exhibendo*, or a prohibitory interdict restraining such alleged oppression can possibly be imagined. (See Wood and others v Ondangwa Tribal Authority and Another, 1975 (2) SA 294 (AD). The non-frivolous allegation of a systematic disregard for so precious a right as the right to life is an allegation of an abuse so intolerable that the court will not fetter itself by pedantically circumscribing the class of persons who may request the relief of these interdicts.[103]

The nature of the right plays an important role in determining the extent to which a court is prepared to entertain matters brought before it in the public interest. As the above remarks suggest, where the right allegedly infringed by the impugned conduct is 'so precious' and compelling that its violation would negatively impact on the enjoyment of other constitutional rights and freedoms, courts should not limit their powers to entertain cases simply because the plaintiff is not directly affected by the impugned conduct.

In *Mudzuru and Another v. Minister of Justice, Legal and Parliamentary Affairs and Others*,[104] two young girls who had dropped out of school after becoming pregnant sought to challenge the constitutional validity of the statutory provisions allowing girls of particular ages to marry before attaining majority status. The applicants claimed that the fundamental rights of a girl child to equal treatment before the law and not to be subjected to any form of marriage enshrined in section 81(1) as read with section 78(1) of the Constitution had been, were being and were likely to be infringed if an order declaring section 22(1) of the Marriage Act and any other law authorising child marriage unconstitutional was not granted by the Court. Counsel for the applicants conceded that the applicants were not victims of the alleged infringements of the fundamental rights of girl children involved in early marriages since they had attained the age of majority.

The applicants failed to show that any of their own interests were adversely affected by the alleged infringement of the rights of girl children subjected to early marriages. The Constitutional Court of Zimbabwe dismissed as 'erroneous' the respondents' contention that the applicants lacked standing under section 85 (1) (d) of the Constitution. It held that "[t]he argument that the applicants were not entitled to approach the court to vindicate the public interest in the well-being of children protected by the fundamental rights of the child enshrined in s 81(1) of the Constitution, overlooked the fact that children are a vulnerable group in society whose interests constitute a category of public interest".[105] Thus, public interest litigation becomes a mechanism designed to ensure that vulnerable groups in society are fully protected.

The bulk of human rights violations negatively affect not only individuals but also families and the communities in which people live. While it may be difficult, in some cases, to identify particular individuals affected by the infringement of rights, it is patent in the majority of contested cases that the disputed legislation or conduct

[103] *Ibid.*, at 203A-B.
[104] 79/14 (2015) ZWCC 12.
[105] *Ibid.*, pp. 11–12.

violates certain rights. Public interest litigation enables lawyers and non-governmental organisations to expose and challenge human rights violations in instances where there is no identifiable person or determinate groups of persons directly negatively affected by the disputed legislation or conduct. This line of reasoning is applied in *Mudzuru and Another v. Minister of Justice*, where Malaba DCJ makes the following remarks:

> Section 85(1)(d) of the Constitution is based on the presumption that the effect of the infringement of a fundamental right impacts upon the community at large or a segment of the community such that there would be no identifiable persons or determinate class of persons who would have suffered legal injury. The primary purpose of proceedings commenced in terms of s 85(1)(d) of the Constitution is to protect the public interest adversely affected by the infringement of a fundamental right. The effective protection of the public interest must be shown to be the legitimate aim or objective sought to be accomplished by the litigation and the relief sought.[106]

Some jurisdictions, South Africa is a typical example, have generous standing rules which open the gates for a wide range of persons and entities to bring claims on behalf of others or in the public interest.[107] In countries where victims of human rights violations are often too poor to seek a remedy, the significance of civil society intervention and therefore the need to broaden standing rules cannot be overemphasised.[108] To this end, the ECOWAS Court once held:

> A close look at the reasons above and public international law in general, which is by and large in favour of promoting human rights and limiting the impediments against such a promotion, lends credence to the view that in public interest litigation, the plaintiff need not show that he has suffered any personal injury or that he has a special interest that needs to be protected to have standing. Plaintiff must establish that there is a public right which is worthy of protection which has been allegedly breached and that the matter in question is justiciable. This is a healthy development in the promotion of human rights and this court must lend its weight to it, in order to satisfy the aspirations of citizens of the sub-region in their quest for a pervasive human rights regime.[109]

Public interest litigation allows courts to entertain matters they would not entertain if they were to follow the technical rules and procedural formalities historically governing *locus standi*. According to Olowu, "it is important for the effective protection of human rights … to achieve liberal and wider access to court for social action and public interest litigation".[110] Elsewhere, the ECOWAS Court has relied on the *action popularis* to hold that "in public interest litigation, the plaintiff need not show that he has suffered any personal injury or has a special interest that needs to be protected to have standing. Plaintiff must establish that there is a public right which is worthy of protection which has been allegedly breached and that the matter

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[106] *Ibid.*, p. 12.
[107] *See* section 38 of the South African Constitution, 1996.
[108] S. T. Ebobrah, 'Human Rights Developments in African Sub-regional Economic Communities During 2009', 10 *African Human Rights Law Journal* (2010) p. 233, at p. 262.
[109] *Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP)*, ECW/CCJ/APP/0808, 27 Oct 2009, para. 34.
[110] D. Olowu, *An Integrative Rights-Based Approach to Human Development in Africa* (2009) p. 172.

in question is justiciable."[111] Requiring the plaintiff to demonstrate a personal interest 'over and above' those of the general public unnecessarily limits the jurisdiction of domestic courts, the usefulness of public interest litigation and marginalised people's rights to the provision of goods and services.

4.5 *Any Association Acting in the Interests of Its Members*

Section 85(2)(e) of the Constitution confers on "any association acting in the interests of its members" the capacity to seek relief on behalf of its members. There has been little development of the law governing the standing of associations in domestic courts. More importantly, however, the Constitution does not refer to 'incorporated associations', thereby leaving room for unincorporated associations to approach the courts for relief. This is important, specifically in Zimbabwe where the rise of the informal sector (employing thousands of citizens) has witnessed the proliferation of unincorporated associations.

Although local courts have had limited experience with actions brought by associations, other jurisdictions have had occasion to deal with such matters. In *South African Association of Personal Injury Lawyers v. Heath and Others*,[112] the Court relied on a similar provision of the South African Constitution (*i.e.* section 38(e)) to grant the applicant association *locus standi* to challenge the constitutionality of search and seizure provisions that threatened to infringe the constitutional rights of its members. In *Highveldridge Residents Concerned Party v. Highveldridge Transitional Local Authority and Others*,[113] the Court had to address the capacity of an unincorporated association to litigate in its own name. In this case, the applicant association sought relief in the interests of the residents of a township. The respondents challenged the applicant association's capacity to litigate on the ground that as an unincorporated association the association did not have the attributes of a *universitas,* and therefore lacked the capacity to litigate in its own name. The Court held that the Constitution's expanded *locus standi* provisions demonstrated that the common law restrictions on the *locus standi* of voluntary associations could not apply without qualification to associations seeking redress for alleged violations of fundamental rights. In *Rail Commuter Action Group and Others v. Transnet Ltd t/a Metrorail and Others* (No 1),[114] the Court adopted an approach that advances the fundamental rights and interests of a vulnerable constituency represented by a voluntary association. Following the *Highveldridge* line of reasoning, the Court held that "to restrict voluntary associations in the way that they are restricted by common-law requirements would be contrary to the ideal of a vibrant and thriving civil society which actively participates in the evolvement and development of a rights culture

[111] *Registered Trustees of the Socio-economic Rights and Accountability Project (SERAP) v. Federal Republic of Nigeria & Universal Basic Education Commission, Suit ECJ/CCJ/APP/08/08,* p. 16.
[112] 2000 (10) BCLR 1131 (T). Standing was no longer an issue when this case came before the South African Constitutional Court. *See South African Association of Personal Injury Lawyers v. Heath and Others*, 2001 (1) SA 883 (CC).
[113] 2002 (6) SA 66 (T).
[114] 2003 (5) SA 518, 556 (C).

pursuant to the rights enshrined in the Bill of Rights".[115] This liberal approach to the issue of standing broadens the promotion of fundamental rights and ensures that cases are not dismissed based on mere technicalities.

At the domestic level, it remains to be seen whether the courts will follow the same line of reasoning adopted by South African judges. Arguably, our courts should draw inspiration from the rulings of courts in other foreign jurisdictions, especially in light of the fact that the Constitution confers on them the discretion to consider foreign law when interpreting provisions in the Declaration of Rights.[116] Given that standing provisions are found in the Declaration of Rights and that our Constitution was largely derived from the South African Constitution, the relevance of court judgments from that jurisdiction cannot be overemphasised.

5 The Demise of the Dirty Hands Doctrine

The formulation of the dirty hands doctrine is mirrored in the famous maxim 'he who comes into equity must come with clean hands'. Despite its rootedness in 'natural law' principles and its moralistic tenor, the doctrine has been scrapped off the constitutional legislation of most civilised jurisdictions. Section 85(2) of the Constitution provides that a person may not be debarred from approaching a court for relief simply because they have contravened 'a law'. This effectively means that a litigant can mount a claim challenging the constitutionality of a piece of legislation in terms of which they are being charged. The rationale behind this approach is simple; it would not make sense to require litigants to first comply with a piece of legislation which violates their rights for them to be given the right to challenge the constitutionality of that piece of legislation.

Unfortunately, domestic courts have a sad history of using this doctrine to deny litigants any audience before them. The *locus classicus* in this regard is *Associated Newspapers of Zimbabwe (Pty) Ltd v. Minister of State for Information and Publicity in the Office of the President.*[117] In that case, the Court refused to hear the applicant's claim because it had not yet complied with the provisions of the piece of legislation it sought to challenge. Chidyausiku CJ observed as follows:

> This is a court of law and as such cannot connive or condone the Applicant's open defiance of the law. *Citizens are obliged to observe the law of the land and to argue afterwards*. It was entirely open to the applicant to challenge the constitutionality of the Act before the deadline for registration and thus avoid compliance with the law it objects to pending a determination by this Court. In the absence of an explanation as to why this course was not followed, the inference of a disdain for the law becomes inescapable. For the avoidance of doubt the applicant is not being barred from approaching this Court. All that the applicant is required to do is to submit itself to the law and approach this Court with clean hands on the same papers.[118]

[115] *Ibid.*, para. 24.
[116] Section 46(1)(e) of the Constitution.
[117] *Associated Newspapers of Zimbabwe (Pvt) Ltd v. Minister of State for Information and Publicity in the President's Office,* (07/03) (Pvt) 2003 ZWSC 20 (11 September 2003).
[118] *Ibid.*, emphasis added.

The Court clearly misdirected itself in this respect. Requiring litigants to suffer prejudice and harm before they can be heard by the courts is not even remotely reconcilable with the notions of justice and fairness, even for the average legal systems. The Court's assertion appears to have proceeded from the erroneous premise that the state's laws are perfect and that citizens' rights are not recognised as long as they have not yet complied with those laws. The Constitution now concretises the need to provide prompt redress to victims or potential victims of constitutional rights violations by scrapping away the dirty hands doctrine which in effect denied the general public access to justice and, in most instances, violated the rule of law.

6 Principles with Which All Court Rules Must Comply

The constitutional provisions governing standing outline four principles with which all court rules must comply. These principles are meant to ensure that the promise of access to justice protected in section 85 of the Constitution is not thwarted by restrictive court rules at every level of the judicial system. They include the need to fully facilitate the right to approach the courts; the fact that formalities relating to court proceedings, including their commencement, should be kept to a minimum; the need to ensure that the courts are not unreasonably restricted by procedural technicalities; and the need to ensure that experts in relevant fields of the law make submissions as friends of the court.[119]

These principles are generally meant to ensure both that as many cases as possible reach the stage where the parties have the opportunity to be heard in court and are decided based on merits. In a way these principles are meant to ensure that rules of court do not prevent courts from determining whether impugned laws or conduct are valid or constitutional. They allow courts to entertain as many cases as possible to ensure that there is due respect for the rule of law and that the majority of litigants have access to both procedural and substantive justice. This approach is reinforced by the constitutional injunction that the absence of court rules should not limit the rights to commence proceedings and to have one's case heard and determined by a court of law.[120] In the event that a court has not yet adopted its own rules of procedure, it should be guided by the letter and spirit of section 85 as a whole. Below is an explanation of how each of the principles relating to court rules promotes human rights, access to justice and the rule of law.

6.1 *The Need to Fully Facilitate the Right to Approach the Courts*

Rules of court may not unnecessarily restrict access to court by individuals seeking relief for violations of fundamental rights. If they do so such rules would be inconsistent with the letter and spirit of the new Constitution. The need to have rules of court which facilitate rather than restrict access to court must be interpreted in line with the purposes of two other provisions of the Constitution. The first is section 85(2)

[119] Section 85(3)(a)–(d) of the Constitution.
[120] Section 85(4) of the Constitution.

which, as has been demonstrated above, liberalises *locus standi* and permits a broad range of individuals to approach the courts for relief should their or other persons' human rights be violated. The liberalisation of *locus standi* is intended to broaden access to court, and rules of court may not undermine this purpose. In the event that rules of court restrict access to court by victims of violations of rights, such rules have to be declared invalid to the extent of their inconsistency with the Constitution. This approach is in line with the rule, entrenched in section 2(1) of the Constitution, that the Constitution is the supreme law of the land and any law or conduct that is inconsistent with it is invalid to the extent of the inconsistency.

In addition, the requirement that rules of court enhance rather than limit access to court is more directly related to the right to a fair hearing as protected in section 69(1)–(4) of the Constitution. Section 69(3) provides that "[e]very person has the right of access to the courts or to some other tribunal or forum established by law for the resolution of any dispute". The Constitution departs from the assumption that no one should be denied access to court for the resolution of their disputes and recognises the need to have rules of court which make this objective possible. The principle of equality underlies the core of the structure of fair trial rights and lies at the heart of the modern legal system.

The right to a fair hearing, including access to court, is an important norm of international human rights law that is designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms. At the domestic level, the right to a fair hearing and access to court is illimitable and non-derogable.[121] Section 86(3)(e) of the Constitution provides that "[n]o law may limit the right to a fair trial", and section 87(4)(b) of the Constitution provides that "[n]o law that provides for a declaration of a state of emergency … limit any of the rights referred to in section 86(3), or authorise or permit any of those rights to be violated". It is patent that there can be no fair trial without access to court in the first place. The significance given to this set of rights informs the constitutional injunction that rules of court facilitate rather than limit access to court.

6.2 *The Need to Keep to the Minimum Formalities Relating to Court Proceedings*

Failure to comply with minor requirements as to the completion of forms has been held to be a 'minor omission' that should not impede an applicant's right to have a matter determined by a court of law. In *Telecel Zimbabwe (Pvt) Ltd v. POTRAZ & Others*,[122] the applicant contested the cancellation of its licence by the first respondent (POTRAZ), a regulatory body responsible for licencing in terms of the relevant statute. The first respondent had cancelled the licence on the grounds that the applicant had failed to comply with the requirement that it cede 11 per cent of its shares to locals in terms of the Indigenization and Economic Empowerment Act.[123] Counsel for the first respondent sought to contest the validity and urgency of the

[121] *See* sections 86(3) and 87(4)(b) of the Constitution.
[122] HH-446-15.
[123] Chapter 14:33 of the Laws of Zimbabwe.

application and argued that the application did not comply with Rule 241(1) of the High Court Rules, 1971 in that the purported Form 29B does not contain a summary of the grounds on which the application is brought. As such, the first respondent argued that there was no application at all before the Court due to lack of compliance with the relevant Rule. Counsel for the applicant conceded the omission of the grounds from the Form, argued that the grounds were contained in the founding affidavit and prayed the Court to condone what he thought was a 'minor omission'. Mathonsi J, for the Court, held as follows:

> I take the view that the rules of court are there to assist the court in the discharge of its day to day function of dispensing justice to litigants. They certainly are not [designed] to impede the attainment of justice. Where there has been a substantial compliance with the rules and no prejudice is likely to be sustained by any party to the proceedings, the court should condone any minor infraction of the rules. In my view to insist on the grounds for the application being incorporated in Form 29B when they are set out in abundance in the body of the application, is to worry more about form at the expense of the substance. Accordingly, by virtue of the power reposed to me by r 4C of the High Court Rules, I condone the omission.[124]

Accordingly, failure to conform with court rules or other formalities may be condoned to ensure that the applicant approaches a court of law for relief. The adoption of the Constitution created room for the local courts to place more emphasis on substance rather than form. Ultimately, the need to ensure that courts are not unreasonably restricted by procedural technicalities is intended to ensure that such technicalities do not frustrate both the liberalisation of *locus standi* and access to justice by aggrieved persons.

6.3 *The Need to Ensure That Courts Are Not Unreasonably Restricted by Procedural Technicalities*

Procedural technicalities may not be invoked in a manner that unreasonably restricts the courts' institutional competence to entertain cases that are brought before them. One of the procedural technicalities often relied upon by local lawyers to frustrate access to justice has been the argument that matters brought before the courts on an urgent basis are not urgent at all. When this happens, the court is then required to rule on whether or not the matter is urgent before making a ruling on the merits of the case. Ultimately, this delays court proceedings and enables the other party to buy time on the basis of a mere procedural technicality. In *Telecel Zimbabwe (Pvt) Ltd v. Post and Telecommunications Regulatory Authority of Zimbabwe (POTRAZ) & Others*,[125] the respondent submitted that the applicant should not be entertained on an urgent basis because the matter was simply not urgent, in fact this is self-created urgency. Given that the applicant had been made aware on 5 March 2015, argued the first respondent, through a formal letter that the first respondent intended to cancel its licence, it should have taken remedial action at that point instead of waiting until 30 April 2015 to file an application challenging the cancellation of the licence. The Court agreed with counsel for the applicant in the following terms:

[124] *Telecel Zimbabwe v. POTRAZ,* p. 6.
[125] HH-446-15.

> [R]aising the issue of urgency by respondents finding themselves faced with an urgent application is now a matter of routine. Invariably when one opens a notice of opposition these days, he is confronted by a point *in limine* challenging the urgency of the application which should not be made at all. We are spending a lot of time determining points *in limine* which do not have the remotest chance of success at the expense of the substance of a dispute. Legal practitioners should be reminded that it is an exercise in futility to raise points *in limine* simply as a matter of fashion. A preliminary point should only be taken where firstly it is meritable and secondly it is likely to dispose of the matter. The time has come to discourage such waste of court time by the making of endless points *in limine* by litigants afraid of the merits of the matter or legal practitioners who have no confidence in their client's defence vis-à-vis the substance of the dispute, in the hope that by chance the court may find in their favour. If an opposition has no merit it should not be made at all. As points *in limine* are usually raised on points of law and procedure, they are the product of the ingenuity of legal practitioners. In future, it may be necessary to rein in the legal practitioners who abuse the court in that way, by ordering them to pay costs *de bonis propiis*.[126]

Just like the Constitution, the Court, in *Telecel Zimbabwe v. POTRAZ*, recognises a genuine concern that if undue emphasis is placed on technicalities many litigants will suffer denial of access to justice based on sheer technicalities which leave their causes unresolved. In *Zibani v. Judicial Service Commission and Others*,[127] Hungwe J emphasised that "courts should be slow, and indeed they are slow, in dismissing legitimate causes on the basis of technical deficiencies that may exist on the papers".[128] Where the technical deficiency raised does not in any way resolve the issues placed before the court by the applicant, it would be a travesty of justice for the Court to dispose of a matter based on such deficiency. Excessive reliance by litigants on deficiencies which do not dispose of the issues under consideration, wastes the time of the court, delays the substance-related resolution of the dispute and violates the constitutional command that courts be not unreasonably restricted by procedural technicalities.

With reference to the issue of urgency, it is vitally important for the courts to be mindful that the threshold for determining urgency should not be so high that litigants are likely to face difficulties in proving that the matter is indeed urgent. If an applicant demonstrates that there is an imminent threat to any of their rights and, more importantly, that there is a possibility of irreparable harm if the court does not intervene, the matter should then be heard on an urgent basis.[129] As is the tradition,

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[126] *Telecel v. POTRAZ*, p. 7. In *The National Prosecuting Authority v. Busangabanye & Another*, HH 427/15, p. 3, the Court held as follows: "In my view this issue of self-created urgency has been blown out of proportion. Surely a delay of 22 days cannot be said to be inordinate as to constitute self-created urgency. Quite often in recent history we are subjected to endless points *in limine* centred on urgency which should not be made at all. Courts appreciate that litigants do not eat, move and have their being in filing court process. There are other issues they attend to and where they have managed to bring their matters within a reasonable time they should be accorded audience. It is no good to expect a litigant to drop everything and rush to court even when the subject matter is clearly not a holocaust."

[127] HH 797/16.

[128] *Ibid.*, p. 4.

[129] *See Triple C PIGS (Partnership) and Another v. The Commissioner-General Zimbabwe Revenue Authority*, HH7-2007, where Gowora J held that "[a]s courts, we therefore have to consider, in the exercise of our discretion, whether or not a litigant wishing to have the matter treated as urgent has shown the infringement or violation of some legitimate interest, and whether or not the infringement of

the test for determining urgency is objective, not subjective.[130] In *Dilwin Investments P/L t/a Formscaff v. Jopa Engineering Company Ltd*,[131] Gillespie J made the following remarks about the idea of the urgency of court proceedings:

> A party who brings proceedings urgently gains a considerable advantage over persons whose disputes are being dealt with in the normal course of events. This preferential treatment is only extended where good cause can be shown for treating one litigant differently from most litigants. For instance where, if it is not afforded, the eventual relief will be hollow because of the delay in obtaining it.[132]

An applicant would have shown 'good cause' if they establish, first, that the respondent has by their actions threatened or interfered with some legally recognised right or legitimate expectation in a way that is likely to result in irreparable harm and, second, that the absence of immediate relief from the court would eventually render any subsequent relief hollow. Once this threshold for examining the urgency of the matter is reached, a court may not create additional requirements for proving 'urgency' in a bid to restrain its competence to hear the matter as this would constitute a self-imposed procedural technicality.

6.4 *The Need to Ensure That Any Person with Particular Expertise Appears as a Friend of the Court*

Rules of court should also "ensure that any person with particular expertise appears as a friend of the court".[133] Friends of court, commonly known as *amicus curiae,* play a pivotal role in assisting courts to reach informed judgments. The term 'friend of the court' can have a wide range of meanings.[134] Historically, the term *amicus curiae* referred to a person who appeared at the request of the court to represent an unrepresented party or interest.[135] The person who appears as a friend of the court would be tasked with presenting the best possible case for the unrepresented party or parties. In this case, the role of the friend of the court is not any different from that of the paid legal practitioner. The second form of *amicus* responds to a request by a court for a lawyer to appear before it to give guidance in developing answers to novel questions of law which would have arisen in a matter or, in some cases, where a practicing lawyer asks for permission to intervene for this purpose.[136] In this case,

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such interest if not redressed immediately would not be the cause of harm to the litigant which any relief in the future would render a *brutum fulmen*".

[130] *See generally Document Support Centre P/L v. T. F. Mapuvire*, HH 117/2006.

[131] HH 116/98.

[132] *See also Dilwin Investments P/L t/a Formscaff v. Jopa Engineering Company Ltd,* 1998 (2) ZLR 301 (H), p. 302.

[133] Section 85(3)(d) of the Constitution.

[134] *See* C. Murray, 'Litigating in the Public Interest: Intervention and the Amicus Curiae', 10 *South African Journal on Human Rights* (1994) p. 240, at pp. 241–243.

[135] *See*, for example, The Merak S: *Sea Melody Enterprises SA v. Bulktrans (Europe) Corporation, 2002* (4) SA 273 (SCA).

[136] For an educative discussion on the role of *amicus curiae*, *see* G. Budlender, 'Amicus Curiae', in S. Woolman and M. Bishop (eds.), *Constitutional law of South Africa*, 2nd edition (2014) 8-1.

the *amicus* does not represent a party's interest or view and would simply articulate the legal position on a particular issue.

The third type of *amicus* relates to either a law society or bar association intervening in the application for the admission of a legal practitioner.[137] In this case, the professional body appears not to represent the interests of its members but to advise the bench in a manner that advances the interests of justice.[138] The fourth type of *amicus* involves a non-party requesting the right to intervene to advance a particular legal position which it has chosen. This normally happens when non-governmental organisations or independent research centres request leave to intervene to clarify complex legal questions related to their focus areas.[139] In this case, the *amicus* normally appears to advance the public interest on a particular issue of tremendous legal importance and assist the court to fully comprehend the issues involved.

The idea that rules of court should ensure that any person with particular expertise should appear as a friend of the court is an important innovation by the drafters of the new Constitution. This approach reinforces the idea of participatory democracy which lies at the heart of the new constitutional order. Moreover, concrete cases often raise far-reaching legal, economic and political questions that are often beyond the interests of the parties to the litigation. The fact that legal disputes may have consequences which affect the rights and interests of the parties not before courts raises the need for specialist information and justifies the need for a more liberal approach to the admission of *amicus curiae*. Thus, our Constitution underscores the need to evaluate the impact of litigation upon categories of persons not already before the courts and, in a way, challenges the notion that the resolution of legal disputes merely affect those who are party to litigation.

Public interest or non-partisan type of *amicus curiae* play an important role in assisting courts to reach informed decisions about legal disputes before them.[140] The central purpose of an *amicus* is to assist the court rather than to advance a particular point of view. In *Hoffman v. South African Airways*,[141] the South African Constitutional Court explained the role of an *amicus* in the following terms:

> An amicus curiae assists the Court by furnishing information or argument regarding questions of law or fact. An amicus is not a party to litigation, but believes that the Court's decision may affect its interest. The amicus differs from an intervening party, who has a direct interest in the outcome of the litigation and is therefore permitted to participate as a party to the matter. An amicus joins proceedings, as its name suggests, as a friend of the Court. It is unlike a party to litigation who is forced into the litigation and thus compelled to incur costs. It joins in the proceedings to assist the Court because its expertise on or interest in the matter before the

[137] *Ibid.*
[138] *Ibid*.
[139] For a detailed discussion of this type of *amicus*, *see* N. Lieven and C. Kilroy, 'Access to the Court under the Human Rights Act: Standing, Third Party Intervenors and Legal Assistance', in J. Jowell and J. Cooper (eds.), *Delivering Human Rights: How the Human Rights Act is Working* (2003) p. 115.
[140] *See generally In Re Northern Ireland Human Rights Commission*, [2002] UKHL 25, at para. 24. *See also* S. Hannett, 'Third Party Intervention: In the Public Interest?', 1 *Public Law* (2003) p. 128.
[141] 2001 (1) SA 1 (CC).

> Court. It chooses the side it wishes to join unless requested by the Court to argue a particular position.[142]

Generally, these remarks adequately explain the importance of *amicus curiae*. However, it should be emphasised that an *amicus* is allowed and, in most cases, required to identify its position in its application for admission. What makes the *amicus*' views more credible is neither that it has not identified its chosen legal position nor that it has no interest in the outcome of the case, but that it is not directly involved in the dispute in the first place.

Our legal system is adversarial in nature and lawyers from both sides are generally driven by the need to demonstrate why the other side should not win a particular case. More often than not, counsel for applicants and respondents are influenced by the desire to win cases 'at all costs', and this implies that they are often not well placed to perform their most important function, namely assisting the court to reach a correct and informed judgment. They side with their clients, carry out research intended to prove or disprove a particular element of the law that serves their client's interests and sit in the client's corner in court, raising as many objections as possible and making very few, if any, concessions. The adversarial nature of our legal system underlines the critical role that friends of the court can play in assisting courts to reach fair rulings in concrete cases. This partly explains why section 85(3)(d) provides that rules of every court should allow a person with particular expertise to appear as a friend of the court.

7 Referral of Cases to the Constitutional Court

It is important to understand the referral procedure because this is a promising avenue through which litigants might be afforded audience before the Constitutional Court. The courts seem to have placed emphasis on the need to have an application which is accompanied with evidence of why a litigant may seek to refer a matter to the Constitutional Court even if such a process may cause delays and undue hardships for the party that wishes to have its matter heard before the Constitutional Court. Section 175(4) of the Constitution provides as follows:

> If a constitutional matter arises in any proceedings before a court, the person presiding over that court may and, if so requested by any party to the proceedings, must refer the matter to the Constitutional Court unless he or she considers the request is merely frivolous or vexatious.

The discretion to refer matters to the Constitutional Court should always be exercised with full consideration of the interests of justice[143] as well as the principles stipulated in section 85 of the Constitution. These include the reduction of formalities relating to commencement of court proceedings and the need to avoid unreasonably restricting the administration of justice due to procedural technicalities.[144]

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[142] *Ibid.*, para. 63.
[143] Section 167(5) of the Constitution.
[144] Section 85(3)(a) and (b) of the Constitution.

There are cases where the magisterial discretion to refer matters to the Constitutional Court has either been exercised inappropriately or entirely misunderstood by the trial magistrate. In *S v. Njobvu*,[145] the applicant had applied to the trial magistrate to have the matter referred to the Supreme Court in terms of section 24(2) of the LHC[146] (which is more or less the equivalent of section 175(4) of the 2013 Constitution) on the grounds that the applicant's right to trial within a reasonable time had been infringed. The magistrate granted the application without hearing any evidence or argument notwithstanding the fact that the applicant intended to place evidence before the court in order to enable it to properly refer the matter to the Supreme Court. The Supreme Court eventually dismissed the application mainly because of the magistrate's misdirection in terms of the law and held that "the proceedings before the magistrate in respect of this application, having been conducted contrary to the law and rules of procedure, were a nullity".[147] It is highly likely that the reasoning applied by the Supreme Court will not bode well with the current Constitution, particularly with section 85(3)(c) which provides that cases should not be thrown out on the basis of unnecessary procedural irregularities.

The second point is that it becomes clear that the rule that the trial magistrate must first conduct an inquiry by receiving evidence as to the allegation of the contravention of the Declaration of Rights is very problematic in that it is time consuming and has the potential of severely inconveniencing the applicant, especially in cases where a timeous remedy is sought from the Constitutional Court. This 'inquiry requirement' can potentially blow into a 'trial within a trial' of some sort, and this only increases the time and cost of the litigation. Assuming that the applicant is unsuccessful after the inquiry, they still have recourse to apply directly to the Constitutional Court to hear the matter, but there are high chances that the unsuccessful litigant might become discouraged by misconstruing the refusal of a referral as a sign that their allegations are unmeritorious and there is no incentive for forking out more money to secure direct access to the Constitutional Court.

If due regard is to be had to section 85(3) of the Constitution, it becomes imperative to find that requiring trial magistrates to undertake an investigation into an applicant's claim for purposes of making a referral to the Constitutional Court will delay and sometimes obstruct the course of justice as argued above.[148] However, this is not to entirely dismiss the valid point that the direct access mechanism is to be ordinarily avoided because it requires the court to convene as a court of first instance thereby denying the court the benefit of other judges' considerations or opinions. It is true that cases should sometimes go through other courts so that when they finally reach the Constitutional Court arguments can be reconsidered and refined, but the need

[145] *S v. Njobvu*, 2007 (1) ZLR 66 (S).
[146] Section 24(2) of the LHC provided as follows: "If in any proceedings in the High Court or in any court subordinate to the High Court any question arises as to the contravention of the Declaration of Rights, the person presiding in that court may, and if so requested by any party to the proceedings shall, refer the question to the Supreme Court unless, in his opinion, the raising of the question is merely frivolous or vexatious."
[147] *S v. Njobvu*, p. 6.
[148] Section 85 (3)(c) of the Constitution provides that the courts should not be unreasonably restricted by procedural technicalities.

to afford this opportunity to the apex court should lead to the unnecessary dismissal of cases due to procedural technicalities. In other jurisdictions, it has been stated that the 'direct access' mechanism is an exceptional procedure[149] and that this principle is premised on the reasoning that "decisions are more likely to be correct if more than one court has been required to consider the issues raised".[150] These are noble considerations, but they should not be insisted upon where procedural delays are likely to result in an injustice.

In the case of *Chihava & Ors v. Principal Magistrate & Anor*,[151] the applicants approached the Constitutional Court in terms of section 85(1) of the Constitution alleging that the manner in which criminal proceedings against them were conducted in the Magistrates' Court breached their fair trial rights provided for in section 70 of the Constitution. They sought an order quashing the proceedings and directing a trial *de novo* before a different magistrate. This application was made whilst proceedings were still pending in the Magistrates' Court and on this ground the respondents raised a point *in limine* stating that the only course which was open to the applicants was a referral in terms of section 175(4) of the Constitution since the subject matter of the application had arisen during the course of proceedings. The Court upheld this point *in limine*. The Court also held that where a lower court improperly refuses to refer a matter in terms of section 175(4) of the Constitution, the unsuccessful litigant is nonetheless entitled to approach the Constitutional Court directly in terms of section 85(1) of the Constitution.

It is important to observe that this is an unnecessary technicality. There are no compelling reasons for denying a litigant an opportunity to have their case heard before the Constitutional Court by way of referral by a lower court only to require them to directly apply to the Constitutional Court itself. There is a high probability that when a magistrate refuses to refer a matter to the Constitutional Court, the unsuccessful litigant may be led to believe that this entails that their claim is of no merit and they should not pursue it further, which is not necessarily the case.

A favourable scenario would be immediate referral to the Constitutional Court if a constitutional matter arises during the course of proceedings in a lower court. Obviously the Constitutional Court would retain the power to throw out a matter if it deems it as 'merely frivolous or vexatious'. Basically, the filtering of constitutional matters by lower courts is undesirable and is counterproductive if litigants still retain their right to pursue the matter directly. It only serves to delay the direct access route which, in principle, creates space for the determination of constitutional matters on the merits. In *Chihava & Others v. Principal Magistrate & Anor*, Gwaunza JCC specifically acknowledges "that section 85(1) does not expressly exclude a direct approach to this Court where the violations alleged were perpetrated in the course of proceedings in a lower court".[152] This tends to suggest that when a constitutional issue arises during proceedings in the lower courts, the presiding judge should not

[149] *See,* for example, *S v. Zuma and Others*, 1995 (2) SA 642 (CC) and *S v. Prinsloo*, 1996 (2) SA 464 (CC).
[150] *Bruce & Another v. Fleecytex Johannesburg CC & Others, 1998* (2) SA 1143 (CC).
[151] *Chihava & Ors v. Principal Magistrate & Anor, (1) 2015* (2) ZLR 351 (CC).
[152] *Ibid.*, p. 3.

readily dismiss the petitioner's attempt to have direct access to the Constitutional Court, especially where the legal issue in question is of fundamental social value.

8 The Liberalisation of *Locus Standi*, Access to Justice and the Enjoyment of Human Rights in Zimbabwe

The rule that a litigant approach courts for relief only when they have a direct and substantial interest in the matter makes it impossible to challenge legislation or conduct where the affected individual is unable to bring a challenge (prisoners for instance) or when arbitrary, unlawful and unconstitutional legislation exists but has not yet affected any person or has affected persons who are unable to institute court proceedings. The liberalisation of rules governing standing reflects a conceptualisation of human rights and the rule of law in terms of which the judiciary sits at the centre of decision-making processes and can be approached to determine any constitutional dispute and assess the validity of governmental action against the demands of the Constitution and the law.[153] It becomes difficult for the courts to claim that the occasion has not yet arisen for them to consider whether or not the impugned law or conduct is invalid.

When a court refuses to entertain a matter on the basis that the petitioner does not have standing in terms of the applicable rules, the same court is essentially refusing or neglecting its duty to assess the validity or constitutionality of the impugned conduct or legislation. Keyzer notes, "as a matter of constitutional law, that people are entitled to know whether the laws that govern them are valid", and therefore the general public must have standing to obtain a binding declaration about the state of the law.[154] A liberal approach to standing requires courts to place substantial value on the merits of the claim and underlines the centrality of "vindicating the rule of law and ensuring that unlawful decisions do not go uncorrected".[155] This has implications for the realisation of the rule of law and the enjoyment of human rights. In *R v. Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Ltd*,[156] Lord Diplock made the following remarks:

> It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of *locus standi* from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped.[157]

In one of its recent cases, *Mudzuru v. Minister of Justice*, the Constitutional Court adopted a similar approach to standing and extended to everyone the right to institute proceedings even on occasions when they have an indirect or direct interest

[153] S. Evans and S. Donaghue, 'Standing to Raise Constitutional Issues in Australia', in R. S. Kay (ed.), *Standing to Raise Constitutional Issues* (2005) p. 115, at p. 142.
[154] P. Keyzer, *Open Constitutional Courts* (2010) p. 138.
[155] A. Street, *Judicial review and the Rule of Law: Who Is in Control?* (2013) p. 24.
[156] [1982] AC 617.
[157] *Ibid.*, at 644E.

in the outcome of the dispute. The Court held that while the applicants had failed to fulfil the requirements for standing under section 85(1)(a) of the Constitution – which permits persons to act in their own interest – they could still act in terms of section 85(1)(d) which allows public interest litigation. In its analysis on the relationship between broad standing rules and access to justice, the Court held that the Constitution guarantees:

> real and substantial justice to every person, including the poor, marginalised, and deprived sections of society. The fundamental principle behind section 85(1) of the Constitution is that every fundamental human right enshrined in Chapter 4 is entitled to effective protection under the constitutional obligation imposed on the state. *The right of access to justice, which is itself a fundamental right, must be availed to a person who is able*, under each of the rules of standing, *to vindicate the interest adversely affected by an infringement of a fundamental right, at the same time enforcing the constitutional obligation to protect and promote the right or freedom concerned.*[158]

The constitutionalisation of public interest litigation and class actions constitutes an unambiguous departure from the traditional 'direct and substantial interest' requirement. In essence, it represents a shift from the historical emphasis on the existence of a link between the challenger of a particular law and the challenged law. It underlines the importance of conferring on individuals, groups or civil society organisations the right to challenge the national laws in which they operate, even if there is no direct link between their own rights and the law they are challenging. This approach rightly locates the source of constitutional challenges and seeks to prevent the state from immunising unconstitutional legislation or decisions. It places emphasis not on the question of whether the claim is being brought by the appropriate person but on whether the challenged law or conduct is valid or constitutional.

There are strong linkages between broad standing rules, access to constitutional justice and the enjoyment of human rights in all political communities. This is because "a more liberal standing regime … makes it easier for individuals to raise constitutional issues as a means of vindicating constitutional entitlements".[159] The current Constitution contains both a fairly comprehensive list of founding values and principles and promising human rights guarantees that play an important role in guiding state and non-state actors. Given that the Constitution protects a broad range of civil and political rights as well as economic, social and cultural rights, access to constitutional justice implies the vindication of these rights and imposes on the state the duty to ensure that citizens have access to platforms that have a constitutional mandate to apply, interpret and enforce the law.

The special status of constitutionally protected human rights norms and standards requires the state to facilitate access to court and therefore to adopt a liberal approach to standing, especially in the context of constitutional litigation. The substantive content of economic, social and cultural rights mirrors not only a

[158] *Mudzuru v. Minister of Justice*, p. 14, following the reasoning of the South African Constitutional Court in *Ferreira v. Levin NO & Others*, 1996 (1) SA 984 (CC), emphasis added.
[159] S. Evans, 'Standing to Raise Constitutional Issues', 22:3 *Bond Law Review* (2010) p. 38, at p. 50.

commitment to social justice but the need to improve the material conditions of the poor and marginalised. When deciding matters affecting persons living on the margins of society and the economy, it is vitally important for the courts to embrace the liberalisation of standing and to avoid shutting the doors of justice to persons whose capacity to enjoy their rights is severely imperilled.

With respect to founding values, which include respect for fundamental rights and freedoms, it is important to realise that they perform an important interpretive function and broaden the meaning of substantive constitutional provisions entrenching human rights. Both the liberalisation of *locus standi* and the founding principle of respect for fundamental rights and freedoms legitimise the instrumentalisation of the state in that they revolve around the idea that the central purposes of the law and the state are to serve the citizen and to protect human rights, to prevent the arbitrary and unlawful use of public power, to enable individuals to challenge public authorities that are thought to infringe upon the fundamental rights of the citizen and to ensure that unjust laws are struck down by an independent judiciary.[160] To this end, the liberalisation of *locus standi* constitutes one of the means through which the twin ends of access to justice and human rights can be achieved.

9 Conclusion

This chapter has demonstrated that the prospects for access to justice and the enjoyment of human rights have been, at least in theory, improved by the liberal approach to standing entrenched in the current Constitution. The liberalisation of *locus standi*, particularly the constitutionalisation of public interest litigation, has broadened the number of persons who may appear before the local courts to vindicate their or other people's rights. A liberal approach to standing enables citizens to approach the courts to determine wide-ranging constitutional disputes and assess the validity of governmental action against the demands of the Constitution and the law. This requires courts to place substantial value on the merits of the claim and underlines the centrality of vindicating the rule of law and ensuring that unlawful decisions do not go uncorrected.

However, access to justice in the sense of access to court requires more than just the implementation of constitutional provisions regulating standing, access to court and human rights. There are numerous possibilities for enhancing access to justice through other means than by insisting on strict adherence to duties imposed on the state by constitutional provisions. First, the Constitution itself might be unknown to the ordinary citizens who are often the victims of gross violations of human rights. It could be that the country also needs to embark on grassroots-based legal literacy and educative programmes especially targeting remote rural communities where the majority of the people are uneducated and unaware of the applicable constitutional provisions. This could be done through initiatives involving Parliament, local law schools, civil society organisations, independent commissions and other relevant

[160] *See generally* J. H. H. Weiler, 'The Rule of Law as a Constitutional Principle of the European Union', Jean Monnet Working Paper 04/09, p. 44.

institutions in mobile legal aid clinic work educating communities about their constitutional rights and how to enforce these rights.

Second, it could be that there is need for a huge drive towards representation of litigants by public interest lawyers or trained paralegals. This highlights either the need for lawyers in private practice to, on their own volition or through some kind of regulatory provision, develop or broaden their *pro bono* services or for the government to expand the role and increase substantially the budget and visibility of the Legal Aid Directorate. Finally, the complexities associated with the formal justice system and the limited public knowledge of formal court proceedings might be a solid reason for increasing calls for the simplification of the relevant procedures to ensure not only that the average person understands what is involved but also that the formal justice system is accessible to local communities. Only then can we have full access to justice and promote the rule of law in the formal courts.

More importantly, however, access to justice and the enjoyment of human rights are not fostered by liberal standing rules alone. In other words, courts play an important but limited role in promoting human rights, and if other players do not perform their functions, the enjoyment of fundamental rights and freedoms will remain a distant dream. To this end, other institutions such as independent commissions, the auditor general, the National Prosecuting Authority, the police service, line government ministries, civil society organisations and rights holders themselves should claim their place in the fight against human rights abuses. In poor and middle income countries, the government remains the primary duty bearer in the protection and promotion of human rights. As such, the roles of the Ministry of Justice, Legal and Parliamentary Affairs, the Ministry of Finance and Economic Development, the Ministry of Home Affairs, the Ministry of Health and Child Care and many others should also take a leading role in the promotion of human rights. The government should not ‘occupy the back seat’ and wait for the judiciary and civil society to drive social and economic transformation. If the entire economic, social and political system perceives the realisation of human rights as a collective responsibility, the liberalisation of standing will feed into the system and ensure that constitutional rights enjoy the full measure of protection to which they are entitled.