UNIVERSITY OF ZIMBABWE
STUDENT JOURNAL
LAW REVIEW

Thoughts on reforming areas of the Family Law and the Criminal Procedure in Zimbabwe

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6. Notes and Comments should not exceed 2500 words and notes and comments longer than this will, regrettably, not be accepted.

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“We the people of Zimbabwe,
United in our diversity by our common desire for freedom, justice and equality, and our heroic resistance to colonialism, racism and all forms of domination and oppression,
Exalting and extolling the brave men and women who sacrificed their lives during the Chimurenga / Umvukela and national liberation struggles,
Honouring our forebears and compatriots who toiled for the progress of our country,
Recognising the need to entrench democracy, good, transparent and accountable governance and the rule of law,
Reaffirming our commitment to upholding and defending fundamental human rights and freedoms,
Acknowledging the richness of our natural resources,
Celebrating the vibrancy of our traditions and cultures,
Determined to overcome all challenges and obstacles that impede our progress,
Cherishing freedom, equality, peace, justice, tolerance, prosperity and patriotism in search of new frontiers under a common destiny,
Acknowledging the supremacy of Almighty God, in whose hands our future lies,
Resolve by the tenets of this Constitution to commit ourselves to build a united, just and prosperous nation, founded on values of transparency, equality, freedom, fairness, honesty and the dignity of hard work,
And, imploring the guidance and support of Almighty God, hereby make this Constitution and commit ourselves to it as the fundamental law of our beloved land.”

PREAMBLE TO THE NEW ZIMBABWEAN CONSTITUTION
FOREWORD

Over a decade ago in the case of Chapeyama v Matende `1999(1) ZLR 534 (HC) I remarked that “the need to adapt customary law and indeed the general law to the changing socio-economic environment either through legislation or through judicial law making constantly presents itself to the court. That need has been recognized for quite some time. Yet the legislature has not moved with alacrity nor has the judiciary addressed the need with clarity and consistency”. The need to consistently develop our law to ensure that our society is inspired by justice and the rule of law presents itself time and again and it is for us to embrace that need and to ensure that we realize the benefits of the rule of law and democracy. Zimbabwe has just entered a new Constitutional era and this will necessitate a great overhaul of some of our laws. It is incumbent upon the judges of the courts of law; lawyers and law students alike to uphold what we resolved by the tenets of our new Constitution. We must uphold peace and liberty. We owe it to ourselves and the next generations of Zimbabwe. Indeed, the need to develop the law especially in a society like ours which has just witnessed the dawn of a new constitutional dispensation has presented itself and what better way to gather thoughts on reform than through a platform of aspiring lawyers who have the energy and zeal to research and explore legal concepts which can be used to better our legal fraternity. The idea of a student journal should be applauded and encouraged in law students as it will build the skills in legal writing and in formulating sound legal arguments. This idea is also important in that it encourages those who will be here tomorrow to critique our system and processes, to challenge us to do more, to remind us that whilst justice might not be the easiest of standards, it remains a value we must all strive to embrace. As such, this idea of law students organizing themselves to share thoughts about tomorrow should not only be applauded, it should be supported and even encouraged. To Simbarashe Mubvuma, Herbert Muromba and the entire law review team, I congratulate you for pioneering such a noble idea. As the student run law review grows, I encourage every law student to be part of this initiative to develop our laws.

Former Judge M Chinhengo *

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*M Chinhengo* is a former Judge of the High Court of Zimbabwe who has also served as a Judge in the High Court of Botswana. He is one of the principal drafters of the new Constitution of Zimbabwe.
EDITORIAL

The overwhelming dimension of legal discourse in the present Zimbabwean concept demands an elaborate and thorough exposition of the various subjects. It is undeniably a fact that most of the publications on the law are confined to mere compilation or examination and elucidation of cases and statutes. As such, a crystallized analysis of the evolutionary aspects and the issues of contemporary law development remain more or less unexplained in the relevant Zimbabwean literature. Recently, the developments in the constitutional disposition of the country have become so pervasive and overwhelming that one can hardly deny the importance and necessity of proper exposition in social development and, especially, law and justice. The efforts of the Law Development Commission and the Legal Resources Foundation to further the ends of law development as a sine qua non of its determination to cater for peace and justice need to be commended. Yet it is imperative to give the young people of Zimbabwe the opportunity to advance thoughts on reform in the various areas of our law. The fundamental principle of saving mankind from the scourge of injustice and violence has been substantiated in recent times on equal footing with projecting the inalienable rights of mankind. The contribution of a number of luminaries and experts on the law have not only provided the foundation for the contents of the present issue of the University of Zimbabwe Students Journal – Law Review, but also hopefully opened a new vista of legal insight for the readers including students, teachers, lawyers, judges, scholars, human rights activists, social development planners, politicians, and governmental officials. It is our hope that this issue will prove a milestone towards law development both for the present generation and the posterity.

Simbarashe Mubvuma

Editor-in-Chief 2012-2013
ACKNOWLEDGEMENTS

Over the course of compiling any publication, one accumulates more debts than can be acknowledged in a few lines. A multi-authored publication such as this is an enormous team effort. Therefore, our special thanks go to all the distinguished contributors and advisors—both within the faculty of law at the University of Zimbabwe and beyond. We are very grateful to those who contributed financially to this publication, and especially the International Commission of Jurists, Zimbabwe. We are confident that this publication comes forward reflecting the aims of the commission and its noble mission. Our special thanks go to the good former Judge Moses Chinhengo whose insight has opened doors of wisdom for us in our publishing efforts. His enthusiasm in ensuring our success has been an inspiration to all of us at the University of Zimbabwe Student Journal. The tremendous assistance ushered in by Mr. Penduka of ICJ Zimbabwe is humbling and the editors are truly grateful. To our distinguished patron, Professor Geoff Feltoe, whose calmness and assistance inspired us to believe that we could realise the dream of a student publication, the editors are grateful. To a wonderful lady who taught us "to hold ourselves to a higher standard", Dr. Amy Tsanga, the editors are truly thankful. The editors also thank Ms Slyvia Chirawu for her distinguished paper on family law which has brought colour to our humble beginnings. We are confident that we will continue making future history together.

Editors 2013

Harare, November 2014
Dedication

The editors dedicate this issue to Mercy Masenda, a friend, colleague and classmate who passed on in the summer of 2012. May her soul rest in peace.
THE LESSON FROM MAPINGURE’S CASE: THE TRUTH ABOUT TERMINATION OF PREGNANCY IN ZIMBABWE

A reflection on the case of Mapingure v. Minister of Home Affairs & Ors HH-452-12 and the lessons to be drawn in relation to termination of pregnancy in Zimbabwe: Thoughts on reform

Tafara Goro

ABSTRACT

Abortion is illegal in Zimbabwe except in limited circumstances which are set out in section 4 of the Termination of Pregnancy Act [Chapter 15:10]. It is these unjustified limitations that have caused hardships and attracted much criticism upon our abortion laws, leaving many calling for reforms. This is especially so after the High Court ruling in the case of Mapingure v. Minister of Home Affairs & Ors HH-452-12. It is clear that the court’s decision has revealed a Pandora’s Box of the impact our abortion laws on women’s reproductive rights. Clearly, it is now the time that the legislature reforms our laws on abortion to relax and extend the provisos relating to termination of pregnancy.

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INTRODUCTION

Zimbabwe has a dual legal system provided for in Section 89 of the Constitution. As such, the application of general law and customary law are of equal force. Jurists have wasted much ink and mountains of paper criticizing the existence of this kind of a system and many a number have called for reforms. Mostly, it has been highlighted that conflict of laws is heightened by the co-existence of customary law which is sometimes too conservative in respect of human rights and tend to violate the notion of gender equality, as opposed to general law which has, admittedly, a flexible set of legal norms. That discrimination of women permeates all societies is not in doubt. Clearly, any form of discrimination needs urgent action especially with respect to women’s reproductive rights. The issue of abortion has remained both a medical and legal problem in Zimbabwe. Restrictive abortion laws always present social, legal, medical and economic problems which ignite heated debates on whether or not to legalise abortion. However, more liberalised abortion laws like “on request without restrictions” abortion laws will, of course, attract attention in the Zimbabwean context. It must be borne in mind that abortion is not per se illegal. Different jurisdictions have reacted differently, some legalising it and some like Zimbabwe still illegalising it.

ZIMBABWE’S TERMINATION OF PREGNANCY LAWS

A critical mind will always ask a question begging for an answer: What do women in Zimbabwe want? It is a question which legislators and human rights advocates have been grappling with for many years. The other question is: What is meant by women’s reproductive rights? This paper will attempt to provide answers to these questions. The root cause of these problems has been better explained by a lawyer specialising in women issues, who said that “women are not speaking up. Traditionally, in Zimbabwe women have not been called to voice their opinions, so the concept of saying what they want is foreign to them and it will be suicide. Instead they choose to stay silent... and then risk a back-street abortion”, said a women rights lawyer.

Abortion has been defined both in legal and medical circles. The ordinary definition is “the deliberate termination of a human pregnancy” or “the natural expulsion of a foetus from the womb before it is able to survive

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independently”\(^2\). A foetus has been defined as “an unborn or un-hatched offspring of a mammal, in particular an unborn human more than eight weeks after conception”\(^3\). In legal terms, abortion is committed by “unlawfully and intentionally killing and causing the expulsion from the uterus of a human foetus”\(^4\).

Statistics show that more than 70 000 illegal abortions are carried out in Zimbabwe every year, with Zimbabwean women running a 200 times greater risk of dying of abortions complications and post abortion psychological traumas than their counterparts in South Africa, where the procedure is legal\(^5\). As can be seen, abortion is still our ugly secret, but indeed, it is a thriving one that cannot be hidden anymore.

With a largely Catholic society supported by a strongly blended set of customs, biblical sentiments have been resorted to by non-reformists to support the restrictive laws and quash all opposition and suggestions on the need for legalisation and liberalisation\(^6\). This has led to the practice being condemned by both the church and the state\(^7\). Having the foundations of our legal system deep rooted in the archaic notions of Roman-Dutch law’s attitude towards abortion and the inferiority of women, our law has remained conservative with the normative of culture intertwined with the patriarchal ideology which exists in a society dominated by men. All these notions have since hardened in our law and received recognition even through legislative frameworks through the inherited Termination of Pregnancy Act which was last amended in 1979. The Act does not define precisely what is meant by the term “termination of pregnancy.” On the other end, South African Choice of Termination of Pregnancy Act\(^8\) offers a better definition which ensures particularity.

Prior to the enactment of the Termination of Pregnancy Act of 1977, abortion legislation in Zimbabwe was governed by Roman-Dutch common law, which permitted an abortion to be performed only to save the life of the

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\(^2\) The Concise Oxford Dictionary, Oxford University Press.  
\(^3\) Op cit.  
\(^5\) According To a Report by United Nations Children’s Fund, UNICEF.  
\(^6\) Jeremiah 1:4 -5 “Then the word of the LORD came unto me, saying, before I formed thee in the belly I knew thee; and before thou camest forth out of the e womb I sanctified thee, and I ordained thee a prophet unto the nations” from the King James Version Translation.  
\(^7\) “As a Christian, there is no grey area: abortion is murder” said a local priest, “The foetus from conception, has a life, a soul, and we, as human beings, have no right to kill it”. This of course has its rationale basis intertwined with the criminal law notions of protecting potential human life.  
\(^8\) Section 1(X) "Termination of a pregnancy” means the separation and expulsion, by medical or surgical means, of the contents of the uterus of a pregnant woman; and a woman is also defined as any female person of any age. The provision of precise definitions ensures particularity and certainty in the application and interpretation of Statutory Instruments. Zimbabwe is persuaded to follow suit.
pregnant woman. The Termination of Pregnancy Act (No. 29 of 1977) extended the grounds under which a legal abortion could be obtained in Zimbabwe. The Act permits the performance of an abortion if continuation of the pregnancy so endangers the life of the woman or so constitutes a serious threat or permanent impairment to her physical health that the termination of the pregnancy is necessary to ensure her life or physical health, or where there is a serious risk that the child to be born would suffer from a physical or mental defect of such a nature as to be severely handicapped, or where there is a reasonable possibility that the foetus is conceived as a result of unlawful intercourse. “Unlawful intercourse” is defined by the Act as rape, other than rape within a marriage, incest or intercourse with a mentally handicapped woman. However, nothing in the statute extends the definition of rape to include marital rape and statutory rape such that, on a proper construction of the Act, these are not grounds which warrant a lawful termination of pregnancy.

A legal termination of pregnancy must be performed by a physician in a designated institution with the permission of the superintendent of the institution. If the pregnancy resulted from unlawful intercourse, a magistrate of a court in the jurisdiction where the termination will be performed must certify that the alleged intercourse was reported to the police and that pregnancy may have resulted from the alleged rape. When the termination is requested because the pregnancy poses a threat to the life or physical health of the pregnant woman, or on grounds of foetal impairment, two physicians that are not members of the same practice must certify to the relevant hospital superintendent that one of these conditions exists. However, if the woman’s life is in danger, a physician can perform the abortion in a place other than a designated institution and without a second medical opinion.

Therefore, given this background, a termination of pregnancy which is not authorised by law under the Act, according to the present Constitution as well as the Draft Constitution of January 2013\(^9\), is a criminal offence dealt with as such in the Criminal Law (Codification and Reform Act)\(^10\). Of not is that there are some who have come ashore and contended that the law is outdated and that it is no longer relevant to Zimbabwean modern society with the booming urban lifestyle, increasing educational opportunities for women and technological developments which have eroded the traditional cultural values such that sexual promiscuity especially among adolescents has increased. Section 15 of the General Laws Amendment Act is worth noting as it confers majority status on women who attain the age of 18 (both under customary and general law); who, it is submitted, should be given an opportunity to make decisions, including deciding whether or not to bear

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\(^9\) Section 12 of the Constitution, Section 48(3) of the new Constitution and Section 3(1) of the Termination of Pregnancy Act [Chapter 15:10].

\(^10\) Section 60, of the Criminal Law (Codification and Reform) Act [Chapter 9:23].
children and issues relating to child-spacing\textsuperscript{11}. However, statistics show that the age when sexual activity for girls is rife has been lowered to 12 years. The debate on whether or not to legalise abortion has dominated the arena together with other huge debates such as those on the death penalty, gay and lesbian rights among many other controversial issues. Therefore, the debate on abortion is a sensitive one and is accompanied by voices of feminists, reformists, religionists and politicians who have already descended into the arena trying to push for reforms or a strict interpretation of abortion laws.

A local advocate was quoted saying “If society is to condemn mother/children care where does it begin to pass judgment? Does it begin with the woman who aborts a foetus within two weeks ‘safe period’ or with the mother who gives birth and dumps the new-born in the cistern of a railway station toilet? Or perhaps it should begin with a health care programme that does not offer women free access to contraception and sexual education”. Confronted by such questions, our policy makers who have boasted that they want to protect rights of the child cannot explain why newspapers are full of horrendous stories of infanticide and baby dumping, hence, it is obvious that our system needs to re-adjust and adapt itself to the contemporary community needs. This is probably worsened by dire economic conditions in Zimbabwe which provided fuel for the countless stories of infanticide, unlawful abortion and increased incidents of economic violence on women. This is peculiarly noticed due to the fact that orphanages in the country are strangled by a struggling social welfare system and are full of children who have been dumped under economic pressure. It is along this line of thought that the author thinks it is necessary to relax the provisions and adopt the South African approach in redefining and stretching the circumstances provided for in Section 4 of the Termination of Pregnancy Act, to include and to allow termination of pregnancy on economic and psychological grounds.

The following are the relevant provisions of both Section 4 of the Zimbabwe Termination of Pregnancy Act and Section 2 of the South African Choice of Termination of Pregnancy Act:

\textsuperscript{11} This position has been elaborated in Section 78 of the Draft Constitution which provides that; “Every person who has attained the age of eighteen years has the right to found a family”. This provision applies to every person and is gender neutral. It is clear that a woman who attains the age of 18 is to be imputed with this right whether or not to find a family and has the same right with regard to family making decision as that of a male partner. This provision can be as a deviation from discrimination laws which were given a legal immunity in Section 23 of the current Constitution. Reference can also be made to Section 17 of the Draft Constitution that gave an obligation to the state to ensure gender balance in all works of life. Thus our laws on abortion must be in accordance with the national objectives provide for in the Draft Constitution and fully acknowledge the role of women in the family making decisions, the effect of restrictive abortion laws on women’s right to family making decisions and women’s reproductive rights.
Section 4 of the Zimbabwe Termination of Pregnancy Act

4. Circumstances in which pregnancy may be terminated

Subject to this Act, a pregnancy may be terminated—

(a) where the continuation of the pregnancy so endangers the life of the woman concerned or so constitutes a serious threat of permanent impairment of her physical health that the termination of the pregnancy is necessary to ensure her life or physical health, as the case may be; or
(b) Where there is a serious risk that the child to be born will suffer from a physical or mental defect of such a nature that he will permanently be seriously handicapped; or
(c) Where there is a reasonable possibility that the foetus is conceived as a result of unlawful intercourse.

The conditions under which a pregnancy must be terminated in Zimbabwe are laid down in Section 5 of the Act.

South Africa Choice of Termination of Pregnancy Act

Section 2. (1) A pregnancy may be terminated-
(a) Upon request of a woman during the first 12 weeks of the gestation period of her pregnancy;
(b) From the 13th up to and including the 20th week of the gestation period if a medical practitioner, after consultation with the pregnant woman, is of the opinion that-
   (i) The continued pregnancy would pose a risk of injury to the woman's physical or mental health; or
   (ii) There exists a substantial risk that the foetus would suffer from a severe physical or mental abnormality; or
   (iii) The pregnancy resulted from rape or incest; or
   (iv) The continued pregnancy would significantly affect the social or economic circumstances of the woman; or
(c) After the 20th week of the gestation period if a medical practitioner, after consultation with another medical practitioner or a registered midwife, is of the opinion that the continued pregnancy-
   (i) Would endanger the woman's life;
   (ii) Would result in a severe malformation of the foetus; or
   (iii) Would pose a risk of injury to the foetus.

(2) The termination of a pregnancy may only be carried out by a medical practitioner, except for a pregnancy referred to in subsection (1) (a), which may also be carried out by a registered midwife who has completed the prescribed training course.

From the above, one can easily compare and contrast the Zimbabwe position and the South African position. Section 4 of the Termination of Pregnancy Act, only specifies that abortion can be done only where the continued pregnancy would cause serious physical impairments to the mother. However, a different picture is displayed when the position is juxtaposed with Section 2(1) (b) (ii) of the Choice of Termination of Pregnancy Act which provides that if the continued pregnancy will also result in mental impairment, the termination will be lawful. It is thus submitted that this is a
lacuna in our law which is rather unjustifiable, given the psychological trauma that accompanies many unwanted pregnancies especially those arising from “unlawful sexual” intercourse like what happened in the Mapingure case as well as pregnancy by an HIV positive woman. By limiting the circumstances to physical health, the more restrictive approach leaves a woman suffering from mental trauma resulting from the pregnancy with no option but to resort to “unsafe” back-street abortionists or to carry the pregnancy to its full term and then afterwards resort to dumping the child. It is submitted that such instances are rife in Zimbabwe. This only shows that there is something seriously wrong which is in need of urgent legislative intervention as this will only result in an increased rate of maternal mortality and child dumping.

The application of these rigid statutory provisions reached the hallmark in the case of Mapingure v. Minister of Home Affairs HH-452-12. The court’s decision in this case has been met with various justified and unjustified criticisms mainly from international organisations on the discrimination of women, women organisations and various interest groups within and outside Zimbabwe. This paper reflects on the judgment and on Zimbabwe’s abortion laws, as well as the implications of the court’s ruling on women’s reproductive rights.

**STATEMENT OF THE FACTS**

In the case of Mapingure v. Minister of Home Affairs & Ors, the applicant was robbed and raped. She immediately lodged a report with the Zimbabwe Republic Police after the incident. At the police station she requested the attending detail to visit a doctor as she sought medical intervention in a bid to prevent pregnancy and also any possible transmission of sexually transmitted infections. However, at the police station, she did not receive prompt assistance and was left to wait the whole day in order to get assistance from the responsible officer. Later that same day, she was taken to hospital where she was to be attended to by a doctor. She asked the doctor to ensure that she does not fall pregnant or contract any sexually transmitted infection. The doctor responded to the effect that he could only terminate the pregnancy in the presence of the police and a report was required with all this was to being done within 72 hours.

The following day, the plaintiff went back to the police station and she was referred to the Criminal Investigation Department (CID) where she was attended to by the investigation officer who further referred her to an officer who was not available indicating that he was the only one who could accompany her to the doctor. However, conscious of the 72 hours, she went back to the doctor and explained to him all the inconveniences she was facing, but the doctor insisted that she get the report. It was just after the 72 hour period that she managed to be accompanied by an officer with the report. However, when she confronted the doctor, his response was that it was too late to undertake the operation. As a result, she was referred to a
public prosecutor and she reiterated her story to no avail since the public prosecutor instructed her to wait until the rape and robbery trial was underway. By the time the magistrate gave her the certificate, the pregnancy was already 7 months old. The matron who was assigned to undertake the termination procedures refused to terminate the pregnancy saying that it was now too late. She then gave birth to a female child. She mounted a suit against the three defendants [The Minister of Home Affairs, Minister of Health and Child Welfare, Minister of Justice, Legal and Parliamentary Affairs] for negligence and for maintenance of the minor child. The case was heard by BERE J in the Harare High Court who concluded that the three defendants were not liable. The trial judge made reference to both Section 4 and 5 of the Termination of Pregnancy setting out the procedures that have to be followed before a lawful termination of pregnancy can be carried out on the ground that it resulted from unlawful intercourse 12.

**ANALYSIS OF THE JUDGMENT AND THE TERMINATION OF PREGNANCY ACT**

The Mapingure case has since attracted attention, raising eyebrows and enlightened the whole world that Zimbabwe is still reluctant to realise that we are living in a contemporary world which shuns the continuation of a grip on out-dated norms which fail to acknowledge women’s reproductive rights. It is clear from the facts of the case that the pregnancy was a result of rape perpetrated on applicant by robbers, thus, it was not in much doubt that the pregnancy was a result of unlawful intercourse. It is submitted that this is a classical situation where termination was lawful under the Termination of Pregnancy Act and no question of strict procedures should have been taken into account beyond informing the police. The reaction of the police that the applicant received is not a new phenomenon as it appears to be a reflection of how rape victims are treated in Zimbabwe with some being labelled as “self-inducing” rape victims and viewed with unwarranted suspicion. This could be a reflection of a society whose ideologies have been brewed and blended with paternalism, religionism, and conservatism. Rather than vindicating the interests of justice in the matter, the court seems not to have fully applied its mind to the real issue at hand, and was easily swerved and led astray by the procedural requirement as set out in the section. A key lesson from the case is that the police and all the relevant authorities must be educated on the need to perform their functions in a judicious manner. However, despite this failure, it remains a very difficult task for the judiciary to call for radical reforms which contradict the deeply entrenched social, political, moral and religious norms in this field. Of course, it cannot be overlooked that there are competing interests such as the generally shared moral, religious and ethical views of the community that have since

12 See also Ex parte Miss X 1993 (1) ZLR 233.
supported the continued existence of the Termination of Pregnancy Act in its present restrictive manner.

What the judgment reveals is the continued existence of archaic restrictive abortion laws inherited from the past which have since resulted and precipitated the fact that those who cannot afford “safe” abortion, end up resorting to consulting traditional healers or the n’angas/sangomas. In Harare a concoction of pungent is being sold by traditional healers laying their wares from seedy looking markets dominated by adolescent women at around US $40 per dose. By allowing this condition to hatch, this obviously precipitates the number of unlawful abortions. By relaxing our laws of abortion, it is hoped that this might reduce these incidents and the need to resort to “back-street abortions” which have led to an increase in maternal mortality rates in Zimbabwe because of the “unsafe” procedures and poor post-abortion facilities provided by back-street abortion “specialists”.

Essentially, the question of abortion has presented a three-pronged problem, viz, moral, human rights and societal. Those who support the legalisation of abortion in Zimbabwe are constantly watching the situation in South Africa where the Choice of Termination of Pregnancy Act was changed and provided for “on request” without restrictions liberal abortion policies. It has since been argued that the present abortion laws in Zimbabwe should seize to be the preoccupation of criminal law but to be fully administered by the social welfare, health and facility control. The rationale has its theoretical foundation deep rooted in the elastic economic and social life of modern day Zimbabwe. Where the law on abortion is restrictive, making abortion illegal with only limited termination exceptions, as noted above, will just add fuel to incidents of back-street “unsafe” abortion and also an increase in maternal mortality-with women suffering post abortion consequences as far as their physical health and even their economic situation. It is, thus, against this criticism that the court in the Mapingure case failed to call for reforms in our law of abortion. It is submitted that, it has been the norm that the judiciary has played an important role in influencing the course of the law.

The frequently asked question is that if we adopt a more liberalized abortion law, will this not erode our moral and cultural values? However, it is clear

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14 “...judges have an inescapable function in developing the law. Their decisions necessarily advance their view of human rights. In human rights cases, they may nowadays receive assistance from international statements of human rights and the jurisprudence developing around such statements. there are limits to the “activism “of the judiciary in controversial human rights cases. Judges themselves do well to recognise these limits both for their legitimacy and effectiveness. An important modern challenge to the judiciary is that of resolving this dilemma between the pressures for restraint and the urgency of action” speech by The Hon Justice Michael Kirby CMG; “The role of the judge in advancing human rights by reference to International Human Rights Norms” at the Judicial Colloquium in Bangalore 24-26 February 1988.
that the law should always seek to strike a balance between any competing interests such that despite any moral sentiments, the author still holds the view that restrictive interpretation of abortion laws will make no good, as this has resulted in increased cases of infanticide, maternal mortality and child dumping. Our law should move from the “restrictive” and “conditional” archaic abortion laws to a more “liberal”, reformist approach as has been done in the United Kingdom, Japan and China. The situation on the ground in Zimbabwe is “safe abortion” for the rich whilst the poor face the “wrath” of the law. Our laws are falling short of trying to achieve a balance between women’s reproductive rights and what the general public might view as morally right.

Given the court’s decision in the Mapingure case, the balance happens to be tilting more and more to protecting the bonos mores of society more than women’s reproductive rights. Another point to note is that our restrictive laws on abortion have since resulted in health hazards caused by illegal abortions, a financial burden of illegal abortion on the health service that has to provide post-abortion medication considering the current statistics on the extent of illegal abortions in Zimbabwe which are largely unknown and even scary to enquire into. It is also difficult to ascertain the financial burden imposed on health services, but information from other developing countries has been used to formulate the effect they have on health services. Hence, all these problems call for legislative intervention and the adoption of a more liberal set of abortion laws.

As already noted above, the only question that remains unanswered and which the article seeks to answer is: What does the women in Zimbabwe want? This question will be answered at the end of this paper using an extract from the Policy Project which has managed to come up with a set of policy recommendations. Of course, it is clear that the call for reform, legalisation and liberalisation of abortion laws is the immediate solution. However, before any reform can be adopted it must be noted that there is no “one size fits all” application of abortion-related policies as each country determines its policies guided by the availability of finance, availability of trained medical personnel to perform abortions, the maximisation of other available contraceptive mechanisms, and whether legalising abortion will lower the birth rate and the rate of admissions for illegal abortion, hence, a decrease in health service expenditure on admission of post-abortion victims who need to be provided with drugs, laboratory services, blood etc. All these problems should be laid down at the doors of our policy makers to ensure that our law strikes a balance between the two competing interests, viz, women’s reproductive rights and the bonos mores and to ensure the extension of circumstances in which lawful termination can be carried out.
for example, for socio-economic reasons, HIV infection\textsuperscript{15}, and mental instability.

The question, what is meant by women’s reproductive rights should be answered in the broader context of all women rights. The American view is rather persuasive as it captures pertinent issues, “If the right to privacy means anything, it is the right of the individual, \textit{married or single, to be free from unwarranted governmental intrusion} into matters so fundamentally affecting a person as the \textit{decision whether or not to bear or beget a child (my emphasis)}\textsuperscript{16}. This view aptly captures what women’s reproductive rights are all about and also when, and how government is permitted to intrude in matters dealing with the exercise of these rights. The decision making process referred to above is a free and voluntary process which either result in the required output; this is mostly an exercise where we see women using contraceptive methods to limit the risk of getting unwanted pregnancies. However, in the case that there happens to be an unplanned pregnancy it must be possible on those grounds that the steps taken to limit or prevent the pregnancy have failed and this should of course warrant a lawful termination. That, it is submitted, is the whole essence of the right to privacy in relation to the decision whether or not to have children as well as child-spacing decisions.

The judgment in Mapingure has heightened criticism against the practice in Zimbabwe where the government has overstepped the boundaries and has successfully eroded this right that must be accorded to women. This view goes directly to contradict the decision by the learned BERE J in Mapingure \textit{v. Minister of Home Affairs} where the reason for dismissing the claim was just a procedural one which in fact does not warrant much credibility because of its rigidity and ignorance of the need to move towards reformation, legalisation, liberalisation, simplicity with the reason not directed at solving the root of the problem. It would appear that the court used an armchair approach as it surveyed the stringent procedures and was content to dismiss the claim on that basis and quashed the defence of ignorance of the law which it seems to have been extended to this rather peculiar situation. This

\textsuperscript{15} The real question that has been left unanswered in Zimbabwe is: Can a mother who is HIV positive have a lawful abortion? It is clear that if she has full blown AIDS, the pregnancy would pose a threat to her physical health and would be entitled to have the pregnancy terminated on that ground. If however, she has not yet developed full-blown AIDS, it is clear that this will not have adverse effects on her physical health, thus cannot be a ground for termination. However, it is clear that there is a significant risk that there can be mother to child transmission, and in this instance it must be a justifiable ground for termination and it will be extremely cruel to oblige her to carry her pregnancy to full term in the full knowledge that there is a high chance the child born will contract HIV and will suffer grievously before dying a few years of birth. This is the question that the proliferers of protection of potential human life cannot answer. Hence it means that protection of potential human life is insufficient ground for illegalising abortion and reformers argue that the law should provide for abortion in these circumstances.

\textsuperscript{16} Griswold v Connecticut, (1965) 381 U.S. 479
principle, which is usually used in the criminal law should itself be revisited and modified following the South African approach, thus, it should not have been the cornerstone of the court’s decision. It has long been argued that it is not the business of the government to intrude more and more into the family making decision, that the government need only be responsible to provide the necessary infrastructure to ensure safe abortion mechanisms. It is also clear that, although the courts do not make law, the court must be able to drive reform and to ensure that the rights of every citizen are enjoyed to fullest measure. If there is need for reform, they should ensure flexibility of the law and not to adhere to a rigid interpretation accompanied by interpretation with magnifying glasses. Thus, by leaving the whole process in the hands of the government with its over-stringent, rigid, laborious procedures, this will obviously be a serious impediment directed at denying women’s reproductive rights and their right to privacy of which the modern world has condemned. Therefore, the decision in this case stays condemned as ignoring the reality of women’s reproductive rights.

CONCLUSION

The fact remains that the driving force behind the continued existence of restrictive abortion laws in Zimbabwe is that they are a product of history, deep rooted in cultural and religious norms with any step towards the legalisation reform likely to be meet with difficulties and resistance. However, this is not new in Zimbabwe’s history and it is well accepted that every effort for reform will be meet with criticism and resistance. Zimbabwe cannot claim that it cannot legalise abortion basing on such grounds as moral sentiments of a numbered few as it has managed to decriminalise adultery over the years and addressed the legal age of majority issue among others despite some sectors of society having strong moral opinions in relation to these matters. The clear message is that there is no reasonable excuse than to attend to the urgent need for legalisation of abortion or the extension of the provision of Section 4 of the Act to include abortion on economic, mental and into instances where the mother has full blown HIV/AIDS infection. It is submitted that we follow the South African approach in this regard.

RECOMMENDATIONS

The immediate response is to extend the circumstances under which abortion is lawful in Zimbabwe that is, by adopting a liberal abortion law. There is also a need to extend the defence of ignorance of law to be an excuse in reasonable circumstances. This will call for reforms both in the Criminal law and its applicability in civil cases. It is submitted that this reform is one that can be achieved only in the long term. Listed below are some of the immediate recommendations and methods that can be used to reduce the
problems highlighted in the discussion as put forward in the report\textsuperscript{17}. In general, to be encouraged is better community dialogue and mobilization. Specific recommendations include the following:

- Sensitize and educate on the dangers of unsafe abortion, the need for prompt medical attention for complications, and PAC;
- Broadcast information on the radio and in newspapers,
- Host drama performances and workshops;
- Encourage church attendance and dialogue at church on unsafe abortion;
- Establish and support programs for youth;
- Facilitate networking among community organizations;
- Engage elected officials and politicians;
- Continue dialogue on sensitive policy issues, such as legalization of abortion and family planning services for youth; and
- Expand and improve PAC services by offering clients confidentiality, counselling, and support.

However, all these recommendations must be done with a full acknowledgment of adopting such policies and a fiscal implementation mechanism. The health community must recognize the important role of the broader community in solving the problems of unwanted pregnancy and unsafe abortion and in strengthening PAC services. These research findings suggest three key strategies:

a. Listening to the community - Community members have information that health care managers and providers need in order to design and provide services that will better meet client needs. Incorporating client perspectives is critical because many clients in need are not seeking services. Community members are eager to provide their perspectives if they feel they are being listened to and respected.

b. Educating the community - The awareness of women’s reproductive rights is ensured by health related information. Education should be a cornerstone of PAC service delivery. Many people, particularly young people, do not understand the seriousness of abortion complications. More broadly, knowledge about sex and reproductive health is seriously lacking. The health community must reach out to the larger community to provide this education.

\textsuperscript{17} Policy matters unsafe abortion and post abortion Care In Zimbabwe: Community Perspectives www.policiypreject.com No 1 of January 2000“Community Perspectives on Unsafe Abortion and Post-abortion Care in Zimbabwe” by Susan Settergren, Cont Mhlanga, Joyce Mpofu, Dennis Neube, and Cynthia Woodsong, April 1999. Emily Pierce and Susan Settergren prepared this brief.
c. Partnering with the community - Unwanted pregnancy and unsafe abortion are multidimensional problems deeply embedded in societal and cultural norms and practices. The health community cannot, and should not, operate alone. As PAC programs are established and improved, opportunities to create linkages and synergies with other community services and organizations must be explored.
RESURRECTING SANDURA JA’S MINORITY VIEW IN CRUTH V. MANUEL

The wrath of the many children born out of wedlock in Zimbabwe: An evaluation of the law in Zimbabwe with regards to the natural fathers of children born out of wedlock: Thoughts on reform.

Simbarashe Mubvuma *

ABSTRACT
The position of the law in Zimbabwe in relation to natural fathers of children born out of wedlock is that they do not have an inherent right of access or custody to their minor children. Implicit in the majority judgement in Cruth v. Manuel is that the starting point in making a determination of whether an order of custody or access will be granted in favour of the natural father is simply this; as the mother of the child born out of wedlock has all the rights to the child as embodied in the maxim een moeder maakt bastaard, i.e., as far as the mother in concerned, the law does not regard the child as illigitimate, the father can only succeed in persuading the court to grant him custody or access if he sets out and establishes compelling reasons as to why this should be done. The onus is upon the father to prove that the inherent rights of the mother to custody are being exercised in an improper manner and should, thus, be interfered with. The minority judgement of Sandura JA in Cruth proposes a different approach which involves only asking one question which is; what is in the best interests of the child. The approach dispels the issue of the stated maxim and the consequent onus on the father to set out compelling reasons why the “rights of the mother must be interfered with.” Simply, the minority opinion proposes abolishing the use of the “born inside or outside of wedlock” criterion in custody and access disputes. It makes the inquiry one of simply ascertaining what would be in the best interests of the child. This paper explores the need to affirm the spirit of the minority judgement in Cruth’s case and to encourage legislative intervention and reform in this area of the family law.

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INTRODUCTION

The case of *Cruth v. Manuel 1999 (1) ZLR 7 (S)* [Cruth’s case] brings up an issue of importance concerning the rights of access for the natural fathers to children born out of wedlock. Decided by the Supreme Court of Zimbabwe more than a decade ago on January 8, 1999, the case reminds us of key issues which, when taken to their logical conclusion, reflect on the discrimination of children on the basis of being born inside or outside wedlock. Of note is that the social attitude towards the institution of marriage as being sacred has generally shifted over the years. A study by Welshman Ncube concluded that there are now extremely high instances of non-marital pregnancy and birth with some families having as much as half a dozen. The study also concludes that the increase in the number of children born out of wedlock is a consequence of a now eroded cultural fabric. Although there was a difference in the causes of the supposed cultural and moral disintegration of African society, what is common cause is that the

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1. Cruth v. Manuel 1999 (1) ZLR 7 (S)
3. The view is supported by Dominique Meekers a paper titled; “Sexual Initiation and Premarital Childbearing in Sub-Saharan Africa” (Macro International Inc. Columbia, Maryland 1993) where it is stated at page 1 that “The literature on African family formation suggests that age at marriage is rising in many African societies, especially among the better educated and urban segments of the population. At the same time, it is believed that the age at menarche is declining (e.g., Rogo, 1986), and that premarital adolescent sexual activity is increasing (Charlin and Riley, 1986). Clearly, if this change in premarital sexual behaviour is not compensated for by an increase in premarital contraceptive use, then it is expected that there will be an increase in the proportion of out-of-wedlock adolescent births (National Institute of Development Research and Documentation, University of Botswana, 1988). NOTE: The author uses DHS data of surveys conducted between 1986-1989 in Burundi, Ghana, Kenya, Liberia, Mali, Togo and Zimbabwe.
4. [According to the study by Welshman Ncube] A difference in opinion arose between the young and the old as to why there has been a perceived moral and cultural disintegration in African society. The general feeling amongst the elderly was that this was as a result of government laws and policies ranging from the enactment of disruptive and unpopular laws to the teaching of anti-cultural values within the curriculum of education institutions. According to Chief Khanyisa Ndiweni (as quoted by Welshman Ncube supra); “Our culture has been corrupted and completely destroyed by Western influences. In our culture a child of every adult member of the community who had complete powers of discipline over that child. Because of this, children were obedient and would never disobey an adult. This nonsense about the Legal Age of Majority which says a little of eighteen years who knows nothing about life and who has been fed all her life by parents in an adult over whom parents have no control is the main reason why these young girls do not listen to their parents. Another problem is that this Western way of life we live today takes our children out of the family for most of the day so that there is no time to properly teach them our traditions and customs. Children who do not know their customs are like the lost nations of the Bible. They cannot prosper. This is why most girls now sleep around. They see people kissing and having sex on television, they listen to songs on radio which promote sex; they follow this fashion of wearing dresses and skirts which show off everything of their legs, backs and breasts. These are the causes of non-marital pregnancy.”
respect that was once accorded to the institution of marriage has generally been eroded. It is not in much doubt that the rate of children born out of wedlock has increased. It also must be considered that it has generally been noted that the number of cohabiting partners on a world scale is increasing\(^5\). The increase in cohabiting partners undoubtedly causes more problems in terms of legal considerations such as the rights of access for the natural fathers to children conceived in such unions. In light of these enormous changes in the nature of the family, the family law needs to “reflect, and perhaps even pre-empt social change and values”\(^6\) in a way that ensures that the law stays relevant and consistent with the prevailing social trends.

**SCOPE AND PURPOSE**

The purpose and scope of this note is threefold. The first and perhaps, the most important of the three is to analyse and understand the import of the decision in *Cruth’s case* as contrasted with the diverging tide of authorities, albeit persuasive and not binding, against which it was decided. It shall be sought, in the second instance, to assess the relevance of the Convention on the Rights of the Child which was ratified by Zimbabwe in 1990 in respect of the issue relating to access and custody of children born out of wedlock. It shall then be sought, in the final instance, to share some thoughts on reform as inspired by steps which have been taken in other jurisdictions to alleviate what, in one’s estimation, can be regarded as the wrath and discrimination of children born out of wedlock. This note will, thus, first set out the law emerging from *Cruth’s* case as can be acquired from the majority judgements by Muchechetere JA and Ebrahim JA. The position will be

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\(^5\) Studies from all over the world indicate that cohabitation is on an increase. In the U.K, for instance, Statistics from the Office for National Statistics (ONS) review that cohabiting couples have increased to 5.9 million since 1996. These statistics show that people between 25 and 35 years were the most likely to cohabit with the number of such couples rising to 27% in 2012 as compared to 7% in 1996. In the United States, declines in disapproval of pre-marital sex, divorce and cohabitation were dramatic during the 1960’s and the 1970’s (Zoya Gubernskaya – *Changing Attitudes toward Marriage and Children in Six Countries* 2008). In countries such as Botswana, the 1992 census resulted in 12% of persons over 15 reporting themselves as cohabiting but the figure had jumped to 17% in 2001. The Central Statistics Office of Botswana only started to enumerate cohabiting unions as a separate marital category in 1991 (Zitha Mokomane – University of Botswana). Further data from the Botswana Family Health Surveys (BFHS) indicated that the proportion of women aged 15-49 years who were in cohabiting unions increased from 11% to 17% between 1988 and 1996. In South Africa, the Census of 1996 had 1 268, 964 people describing themselves as living with a partner while the 2001 Census had nearly 2.4 million people stating that they were living in domestic partnerships. As a result of globalisation, one is of the view that the changing attitudes in Europe and the United States towards marriage, cohabiting and pre-marital sex have had an influence on the changing perspectives of the African population. Zimbabwe is no exception.

contrasted to that emerging from the dissenting opinion of Sandura JA. An attempt will be made to assess how our courts have followed the decision in *Cruth* in later cases. By referring to specific Articles of the Convention on the Rights of the Child, an evaluation shall be undertaken to assess how this impacts on the issue under discussion. In giving examples of reforms, legislative or otherwise, which have been taken in other jurisdictions, it is hoped that one will give valuable thoughts on reform.

THE FACTS IN CRUTH V MANUEL

After the appellant (the natural father of the minor child) and the respondent (the mother of the minor child) met in February 1992, they started living together in November 1992. When the two started living together, the respondent had one minor child from a previous marriage. For a period of four years starting in November 1992 and ending in November 1996, the parties lived together. No marriage was contracted between them. It emerged from the facts that despite not being married, the two conducted themselves in all material respects as husband and wife. They also shared household expenses. A child was born to the union in August 1993. When certain differences arose between the applicant and the respondent, the parties ceased to live together on 30 November 1996. Shortly thereafter, the appellant made attempts to see the child and was allowed to see the child twice per week. This was the case between the period of November 1996 and December 1996. At this point the respondent informed the appellant that he could only see the child once a month on the last Sunday of each month, at Greenwood Park between 10am and 12pm and in the respondent’s presence. The reasons for this new state of affairs was never determined by the court nor stated by the respondent. The court, however, found that on at least three occasions, the appellant went to Greenwood Park but the respondent and the child did not turn up. It also emerged in evidence that the respondent had earlier been advised by her legal practitioners that the appellant did not have any inherent right of access to the child because the child had been born out of wedlock. In the instance, the appellant filed an application in the High Court seeking an order permitting him to collect the child every other Friday at 6 pm, spend the weekend with him and return him to the respondent by 6 pm on Sunday. The respondent opposed the claim and counterclaimed payment of maintenance for the child. It also emerged in evidence that the appellant had previously offered to pay maintenance with the respondent refusing to accept it. The presiding Judge dismissed the application on the merits and in respect of the counter-claim for maintenance, the Judge ordered the appellant to pay the claimed amount. The appellant then appealed the dismissal of the application permitting the appellant access to the child.
THE ROMAN DUTCH LAW POSITION CONFIRMED IN CRUTH’S CASE

The present position of the law was reaffirmed in the two separate majority judgements of the Supreme Court of Zimbabwe in Cruth v. Manual. In his majority opinion, Muchechetere JA, after quoting Douglas v. Meyers\(^7\) and B v. P\(^8\) summarised the position in the following terms:

“I have always understood the above to mean that the father of a child born out of wedlock has no rights at all in the child and that conversely all these rights are vested in the mother. The law does not therefore recognise the father of a child born out of wedlock as a parent to it but gives full recognition to the mother. In the circumstances, the rights of the mother to the child are the same as the rights of legitimate parents to their children...The rights of legitimate parents and therefore those of the mother of a child born out of wedlock cannot be interfered with ordinarily. Third parties and the father of a child born out of wedlock are placed in the same category, can only interfere with those rights in the interests of the child if they are not being exercised properly. In my view, it should first be appreciated here that it is the rights of the parents and the mother which the third parties would seek to interfere with. And one cannot interfere with another’s rights if the other person is exercising them properly. The trigger that warrants any interference must therefore be an allegation that the exercise by the mother of her rights causes some concern”.

“...It therefore follows, in my view, that a father of a child born out of wedlock cannot come to the court and simply allege that because he is the father of the child, or he is richer than the mother, or he pays maintenance etc., it is in the interest of the child to interfere with. Similarly, a third party e.g. child welfare department [or a] religious organisation cannot come to court and simply ask for the rights of either the legitimate parents of a child or the mother of a child born out of wedlock to be interfered with in the interests of the child when no concern has been raised about the exercise of the rights. This would, in my view, be elevating the legal status of an illegitimate father to that of a spouse in a divorce situation or on separation and negating the accepted principle of law that he has no inherent rights in the child born out of wedlock. There must therefore be some allegation that the mother is not exercising her rights properly”\(^9\).

Ebrahim JA, concurring with Muchechetere JA, stated the position of the law concerning natural fathers of children born out of wedlock in the following terms;

\(^7\) Douglas v. Meyers 1991 (2) ZLR 1 (H)
\(^8\) B v. P 1991 (4) SA 113 (T)
\(^9\) Cruth’s case supra at 14-15 – The passage is preceded by the following remarks; “I have read the judgement prepared by my brother Sandura JA but respectfully disagree with it. In my view, in cases of this nature it is of paramount importance to keep in mind the point of law which I consider has been approved and accepted in all the cases cited above, that is, Douglas v. Meyers supra and B v. S supra. It is to the effect that; ‘...there is no inherent right of access or custody for a father of a minor illegitimate child but the father, in the same way as other third parties, has a right to claim and be granted these if he can satisfy the court that it is in the best interests of the child...Douglas v. Meyers supra at p 914E’”
“I agree with the views of Muchechetere JA. The court is being asked to substitute its own decision for that of a person in whom parental authority of the minor concerned is vested where such person has not been shown to be competent to make such a decision. I do not believe that the function of the court as the upper guardian of all minors embraces the right to assume such a role. The mere fact that the court may reach a different conclusion as to where the best interest of the minor lie does not automatically make it the best arbiter of such an issue. Accordingly, it is my view that the starting point in conducting an inquiry of this nature is whether the third party instituting the inquiry has provided some basis on which a finding could be made that the court is more competent than the person having parental authority to make the decision. If no such basis exists, the inquiry can proceed no further, whether the third party is the father of a minor born out of wedlock or otherwise. If the law is to be changed with regard to such fathers, the decision must be that of the legislature, not the court”.

Sandura JA based his minority opinion on a passage appearing in the two cases of B v. S at 582C-F and T v. M at 57H-58A which summarised the position in the following terms:

“It is true that the father of a legitimate child has a right of access at common law…, with which right he can confront the mother if she refuses access. But that right will be to no avail if for any reason she persists in her refusal. He will then have to go to court for an order enforcing access. If access is found to be adverse to the child’s welfare, he will fail. By comparison, the father of a child born out of wedlock who considers access is in the best interest of the child can confront the mother with the contention that he should, on that ground, be granted access. If she refuses to concede that, he will have to go to court to obtain an order granting him access. As in the other example, he will fail if access is not in the child’s best interest. The difference between the respective positions of the two fathers is therefore not one of real substance in practice.” [Howie JA in B v. S] (Emphasis is mine)

“While at common law the father of a child born out of wedlock, unlike the father of a legitimate child, has no right of access, the difference between the respective positions of the two fathers is not one of real substance in practice since in our modern law whether or not access to a minor child is granted to its non-custodian father is dependent not upon the legitimacy or illegitimacy of the child but in each case wholly upon the child’s welfare, which is the central and constant consideration. Accordingly, and to the extent that one may choose to speak in terms of an inherent right or entitlement, it is the right or entitlement of the child to have access, or to be spared access, that determines whether contact with the non-custodian parent will be granted.” [Scott JA in T v. M]

A reading of the majority judgements as quoted above gives one the clear position that under our law, the natural father of a child born out of wedlock has no inherent right of access or custody to that child. As confirmed by Muchechetere JA and Ebrahim JA, the position of the natural father is no

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[10] Cruth supra at 16
different to that of a third party such as the social welfare department or a religious organisation. The judgement also confirms that the mother to a child born out of wedlock is vested with all the rights to access and custody and is just in the same position as the parents to a legitimate child. The decision confirms that like any other rights, a third party can only be allowed to interfere with these rights if it is shown that they are not being exercised properly. As such, the decision is to the effect that without any proof as to the improper exercise of the rights by the mother, a father, or anyone else, cannot be granted the rights to access or custody. Essentially, as set out in Douglas v. Meyers and in Cruth’s case, the father of a child born out of wedlock bears an onus to prove compelling reasons as to why he must be allowed access or given custody. Indeed, and as stated by Sandura JA in his minority opinion, the law, as it stands, requires the father to show compelling reasons as to why the father should be given access, that is, according to the sentiments by Muchechetere JA, to be allowed to interfere with the mother’s rights to custody. As is apparent, the approach in the majority starts the inquiry on the father’s entitlement to access from the position of the mother’s rights which will be interfered with if access or custody is to be granted to the father. By emphasising that the father must satisfy the court that there has been an improper exercise of the right of custody by the mother, it is clear that the inquiry begins with the supposition of the rights of the mother and proceeds to lay out the instances in which the father can, supposedly, be allowed to interfere with them. Clearly, and as confirmed in Debbie Jones v. Edmondo Raimondi HB9/09 by Ndou J at page 3, the true position is that a father has no rights to the child but can be granted custody or access upon

11 Cruth’s case at page 14
12 This is confirmed by a passage (also quoted in Douglas’s case supra) from Boberg in “The Law of Persons and the Family” where he states, at 333-346; “The legal position of an illegitimate child is founded upon the philosophy that een moeder maakt geen bastaard, i.e, as far as the mother is concerned, the law does not regard the child as illegitimate; his disabilities to his relates to his rights vis-à-vis his father and third parties...Whereas the parental power over a legitimate child rests in his father, in the case of an illegitimate child it is his mother who, unless she is herself a minor has the right of guardianship and custody over him and whose surname and domicile he assumes. The father’s only right over the child is that of reasonable access. Where it is in the child’s interest, however, the court may deprive the mother of guardianship or custody, transferring these rights to the father, or even conferring them on a third party.” The position was also reiterated by Ndou J in the case of Debbie Jones v. Edmondo Raimondi HB9/09 where he at 2 stated thus: “In Zimbabwe it is trite that under both common and customary law all the rights in respect of a child born out of wedlock are vested in the mother and she has the same rights as those of the parents of a legitimate child. The father of a child born out of wedlock has no rights at all in relation to the child. Such a father is in the same situation as a third party in relation to the child. To hold that the father of the child born out of wedlock has rights would be to elevate the legal status of the father of such a child to that of a spouse in a divorce and allow unwarranted interference in the mother’s rights over the child. This may be a bad law to a loving and responsible father in the position of the respondent, but that is the law.”
13 Cruth’s case at page 14

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proof on the exception that there is improper exercise of the inherent rights by the mother of the child. Indeed, Ndou J pointed out that the position can be viewed as bad law for a caring and responsible father, yet it is the law and as is generally accepted, the court is not tasked with making the law. At page 4 in Jones’s case, the learned judge reminds us that “our august legislature has not deemed it necessary to intervene statutorily like their counter parts did in neighbouring South Africa.” He also reminded us that the members of Parliament in this jurisdiction are without a doubt presumed to be alive to the position of such fathers and that they will act accordingly when a case is made out for legislative intervention. That the time for legislative intervention could be now is quite apparent.

Of importance is the fact that Muchechetere J (as he then was) in the earlier case of Douglas v. Meyers supra14 purported to use as authority for some of the conclusions he reached, a passage from Spiro’s Law of Parent and Child15 which states that:

“It was pointed out that the natural father is not possessed of the parental power and is not the guardian of the minor illegitimate child. But this principle does not conclude the inquiry into the question whether he is a complete stranger in relation to the illegitimate child.

“First of all, as will be more fully shown later, the natural father is subject to the duty, though jointly with the mother, to maintain the illegitimate child. Thus his duty has been said to be based on paternity. In Wilson v. Ely 1914 WR 34 a natural father was granted access to an illegitimate child ‘especially as it was his duty to supply maintenance’. If the learned judge meant thereby to refer to a rule of law, he went, with respect, too far. But the maintenance duty is a factor which cannot be ignored...It is against this background that the question must be approached whether the natural father may apply for access or even custody...In these matters there is, it is considered, only one question, viz, what is best in the interests of the minor illegitimate child. If it is in the interests of the minor illegitimate child that the natural father should have access, such access should be granted to him [emphasis by Muchechetere J]. If the interests of the minor illegitimate child so demand, custody, if not even guardianship may be awarded to the natural father.”

What is especially confusing is trying to understand how the learned judge, against such a background, and having quoted authority which places emphasis on the best interests of the child when dealing with an application for an order of access, went on to put emphasis on the issue of the rights of the mother and instances in which they can be interfered with as the foremost consideration in determining access of children born out of wedlock. If the remarks by Spiro are to be taken in their context, one would get the feeling that the central, and indeed the only consideration would be the best interests of the child. In one’s view, the remarks so quoted are clear in directing the

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14 Douglas v. Meyers supra
emphasis not only to the rights of the mother viz-a-viz those of the father to a child born out of wedlock, but to the key consideration of all, the best interests of the child. Regardless of such an apparent inconsistency in emphasis, what is important to note is that the law to be administered in Zimbabwe, according to section 89 of the Constitution is the law which was in force in the Colony of Cape of Good Hope on 10 June 1891 as modified by subsequent legislation having in Zimbabwe the force of law. In light of this clear position, the court in the determination of a case and in the absence of any subsequent legislation on a particular issue, the court is tasked with ascertaining the law in force at the Cape on 10 June 1891. That the law in force on 10 June 1891 regarding the rights of fathers of children born out of wedlock is embodied in the maxim *een morder maarks bastaard* cannot be faulted. On that basis, one cannot be entirely justified in concluding that *Cruth* was wrongly decided. As such, one can only argue for legislative reform or judicial intervention as was the case in Botswana (these issues are discussed below under thoughts for reform).

By way of comparison, the approach by Sandura JA views the matter from a different perspective. As can be seen in the passages quoted by the learned judge, the position of fathers, either of legitimate children or those born out of wedlock, is not to be assessed using a legitimate/illegitimate criterion. As pointed out by Scott JA, and quoted with approval by Sandura JA in *Cruth*, the paramount consideration is simply whether or not it is in the best interests of the child to grant the father access or custody. The latter approach can be supported by authorities in other jurisdictions, the most emphatic of which being the English case of *S v. O (Illegitimate Child: Access) (FD) 1982 3 FLR 17* at 18 where Sir George Baker P states the following:

“As has been said many times in this Court, and in a decision by the full Divisional Court of the Division, *M v. M (Child: Access) [1973] 2 All ER 81*...access is a right of the child. In that case it was held that no court should deprive a child access of either parent unless it was wholly satisfied that it was in the interests of the child that access should cease, and that was a conclusion at which the court should be extremely slow to arrive. I, for my part, take the view that that applies equally to illegitimate parents. Children, whether born in wedlock or not, need fathers. If there is a father then he should have the opportunity of developing the relationship.”

**WHY RESURRECT SANDURA’S MINORITY VIEW?**

What makes the minority opinion by Sandura JA important is the fact that it recognises the fact that access is in no way a right of any parent; it is the right of the child. The minority opinion is sound in that it does not emphasise the rights of any parent but makes the best interests of the child the “most central and constant” consideration in deciding whether or not to grant a non-custodian parent access, regardless of the child having been born outside of wedlock. The reasoning by Sandura JA is important in that it
does not seek to use the nature of the legal relationship between the parents as a criterion for determining the child’s right of access but involves an inquiry into only one issue, whether an order for access would be in the best interests of the child.\(^\text{16}\) Whilst the majority judgements refer to the best interests of the child to a certain extent\(^\text{17}\), what makes this Roman Dutch Law approach deficient when measured against the modern trends in other jurisdictions is that it uses the legal relationship, or lack thereof\(^\text{18}\), of the parents as a starting point in determining the issue of access. Such an approach, by any stretch, cannot be supported by the changing legal convictions of society which now view as necessary, the need to treat every child equally. The South African case of *Fraser v. Children’s Court, Pretoria North and others 1997 (2) SA 261 (CC)* the right of a father to a child born out of wedlock to be consulted before the mother can consent to an adoption raises also raises issues of the unconstitutionality of discriminating non-marital fathers. Indeed, it cannot be faulted that the Roman Dutch position discussed in this paper could as well be inconsistent with the provisions of section 23 of the Constitution of Zimbabwe. The position is also inconsistent with section 56 the January 25, 2013 Draft Constitution of the Republic of Zimbabwe.\(^\text{19}\) 

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16 As to what the “best interests of the child entails see the words of Goldin AJA (as he then was) in the case of *W v. W* 1981 ZLR 243 (A) at page 247H where states that; “A court will only deprive a natural parent of custody and award it to a third party upon special ground. Such special grounds include detrimental and undesirable effects upon the physical, moral and psychological or educational welfare of a child. The test is still not whether a third party can provide materially or possess more desirable attributes, but whether the parent or parents should be deprived of custody for any reason involving harm or danger to the child’s welfare as mentioned above.”

17 The judgement in Cruth’s case supra reflects that the issue of the best interests and welfare of the child only arises if it has been established that the mother is exercising the rights to custody improperly. This is clear from the words of Ebrahim JA at 16 where he states that; “…The mere fact that the court may reach a different conclusion as to where the best interests of the minor child lies does not automatically make it the best arbiter on such an issue. Accordingly, it is my view that the starting point in conducting an inquiry of this nature is whether the third party instituting the inquiry has provided some basis on which a finding could be made that the court is more competent that the person having parental authority to make the decision. If no such basis exists, the inquiry proceeds no further, whether the third party is the minor child born out of wedlock or otherwise…”

18 The sentiments by Ndou J in *Shumba v. Shumba HB25/05* (although being a case relating to, in the main, paternity) seem to have a great deal of force in this regard, he stated thus at 2; “I think it is high time that we acknowledge the futility and cruelty of penalising children for their parents’ sexual misdemeanours. We should regard equality of status as a basic human right.” (my emphasis)

19 **56 Equality and non-discrimination**

(1) All persons are equal before the law and have the right to equal protection and benefit of the law.

(2) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(3) Every person has the right not to be treated in an unfairly discriminatory manner on such grounds as their nationality, race, colour, tribe, place of birth, ethnic or social origin,
Constitution also makes the approach proposed by Sandura JA the more preferable one in all cases relating to the children.

THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

The approach advocated for by Sandura JA is perfectly in unison with the United Nations Convention on the Rights of the Child which Zimbabwe ratified over two decades ago. The principle of non-discrimination set out in Article 2 of the Convention is one whose resonance can never be overstated. Indeed, it is acknowledged that although the Convention affirms non-discrimination for rights “set forth in this Convention” without then expressly stating the rights which are the subject of this paper, important indications can be gathered from other parts of the Convention which display the underlying intention and spirit of the Convention to ensure non-discrimination of any form. Article 9 of the Convention sets out the position that is consistent with the views of Sandura JA in his minority opinion. Article 9 (3) reads as follows:

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language, class, religious belief, political affiliation, opinion, custom, culture, sex, gender, in or out of wedlock marital status, age, pregnancy, disability or economic or social status, or whether they were born

20 Article 2 of the Convention on the Rights of the Child reads as follows; “(1) States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. (2) States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians, or family members.” [my emphasis]

21 Welshman Ncube in Law, Culture, Tradition and Children’s Rights in Eastern and Southern Africa makes the following observations at page 3; “The major shortcomings of Article 2 (1) is that it does not extend the prohibition against discrimination to other rights or matters not dealt with in the Convention. It is formulated in such a way as to entitle all children to the enjoyment of the rights set forth in the Convention without discrimination but does not abolish discrimination in the general sense such as it would if it were to state that no child shall be discriminated against on the basis of status, birth, and so on. Accordingly, if children are discriminated against in other matters not specifically dealt with as rights under the Convention they may not invoke the protective provisions of Article 2 (1). The same shortcomings are evident in the equivalent provision of the Charter on the Rights and Welfare of the African Child (1990).” With respect, the sentiments these state, in one’s view, too formalistic as to ignore the spirit of the Convention as a whole. It should be remembered that more than anything, the Convention is based on principles more than anything else. These principles have been called the “four pillars” which underlie the Convention. These are non-discrimination (Art 2), best interest of the child (Art 3), the right to life, survival and development (Art 6) and respect for the views of the child (Art 12).
“States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests.”

The Convention is clear in respect to the need to ensure that a child maintains personal relations and direct contact with both parents without any form of discrimination (see also section 81 of the Draft Constitution). By virtue of the universality of human rights and in this case the rights of the child, it is clear that the only qualification that warrants an entitlement to the right to maintain personal and direct contact with both parents is simply that of being a child.22 Issues of a difference in treatment on the basis of the parents’ status in terms of marriage at the time of birth are a clear case of discrimination under the Convention on the Rights of the Child. If, however, the view that the Convention on the Rights of the Child does not provide for non-discrimination beyond the rights set forth in the Convention [which do not include non-discrimination on the basis on being born inside or outside wedlock], reference can still be made to the Universal Declaration of Human Rights [which has, indeed become customary international law]. Article 25 (2) of the Declaration specifically provides that all children, whether born inside or outside wedlock shall enjoy the same social protection. That the law ought to be a key tool of social protection is not in much doubt.23 Even in light of the provisions of section 111B of the Constitution of Zimbabwe [as at 19 April 2013], the fact that Zimbabwe has not incorporated the Convention on the Rights of the Child into domestic law does not make ratification completely no importance to our law. The fact that Zimbabwe ratified the Convention gives the provisions of the Convention persuasive value and as such, cannot be ignored completely. One is of the view that the position of the law emerging from Cruth, and later followed [albeit seemingly doctored to give a hint of prominence to the best interests of the child] in Lothian v. Valentine24 needs legislative intervention if the law is to


24 Lothian v. Valentine HH 91-07 where the learned Gowora J at page 9 stated that; “The cardinal common law principle according to our law is that the mother of a child born out of wedlock is its legal guardian from birth until some special order is made by [a] court. The father to such child cannot claim custody as of right but, may, in the same manner that any other third party can, claim custody of such child. This court, in the exercise of its...
stay relevant to the changing social trends and the need to ensure non-discrimination of children born out of wedlock. This position, in one’s view, must be met by legislative intervention without delay if the law is to eradicate discrimination of children on the basis of being born inside or out of wedlock.

**LEGISLATIVE INTERVENTION IN OTHER JURISDICTIONS**

A number of governments in Africa have taken legislative steps to ensure that children born out of wedlock are not discriminated against. A summary of some of the countries and the respective steps taken now follows:

**Namibia**

In Namibia, the *Children’s Status Act 6 of 2006* came into force on 3 November 2008 and the Act removes discrimination against children born out of wedlock and provides for custody, access and guardianship of such children. Section 11 (1) of the Act provides that both parents of children born outside wedlock now have equal rights to become the child’s custodian.\(^{25}\) It affirms that the mother does not have a referent right over the father in such instances. The Act also provides that if the parents cannot agree on who should be the primary custodian of the child, a competent court can be approached for an order and as the parents have equal rights of custody, it is clear from Section 3 (1) that the issue of custody will be determined by having regard to the “best interests of the child” as the paramount consideration.\(^{26}\) If a similar statute was to be enacted in Zimbabwe, the common law position emerging from *Douglas* and *Cruth* would cease to be law.\(^{27}\)

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\(^{25}\) *Children’s Status Act 6 of 2006, Sec 11 (1)*

\(^{26}\) Of importance is Section 2 (1) of the Namibian Children’s Status Act which affirms that the objective of the Act “promoting and protecting the best interests of the child and to ensure that no child suffers discrimination or disadvantage because of the marital status of his or her parents.” Indeed, in making a determination as to which parent is to be granted custody, the provisions of Section 3 (1) which state that when making a determination pertaining to custody, guardianship or access, the best interest of the child are, despite anything to the contrary stated in any law, the paramount consideration.

\(^{27}\) Other states such as Nigeria, through its Child’s Right Act 2003 have also set out provisions which affirm non-discrimination of children on the basis of the circumstances of their birth.
South Africa

The position in South Africa is set out in the Natural Fathers of Children Born out of Wedlock Act 86 1997. Section 2 (1) of the Act provides that a court may on application by the natural father of a child born out of wedlock make an order granting him access rights or custody or guardianship of the child on the conditions determined by the court. The Act further states that such an order shall not be granted unless it is satisfied that to do so would be in the best interests of the child. The court is also given the authority to cause an investigation to be carried out to determine what would be in the best interest of the child for the purposes of Section 2. The position in South Africa gives the court a wide discretion in relation to the factors

28 Access to and custody and guardianship of children born out of wedlock by natural fathers
2. (1) A court may on application by the natural father of a child born out of wedlock make an order granting the natural father access rights to or custody or guardianship of the child of the conditions determined by the court.
   (2) An application referred to in subsection (1) shall not be granted –
   (a) unless the court is satisfied that it is in the best interest of the child; and
   (b) until the court, if an enquiry is instituted by the Family Advocate in terms of section 3, has considered
      The report and recommendations referred to in that section.
   (5) In considering an application referred to in subsection (1), the court shall, where applicable, take the following circumstances into account:
   (a) The relationship of the applicant and the natural mother, and in particular, whether either party has a history of violence against or abusing each other or the child;
   (b) The relationship of the child with the applicant and the natural mother or either of them or with proposed adoptive parents (if any) or any other person;
   (c) The effect that separating the child from the applicant or the natural mother or proposed adoptive parents (if any) or any other person is likely to have on the child;
   (d) The attitude of the child in relation to the granting of the application
   (e) The degree of commitment that the applicant has shown towards the child, and, in particular, the extent to which the applicant contributed to the lying-in expenses incurred by the natural mother in connection with the birth of the child and to the expenditure incurred by her in connection with the maintenance of the child from his or her birth to the date on which the order (if any in respect of the payment by the applicant for the child has been made and the extent to which the applicant complies with such order);
   (f) ........................
   (g) Any other fact that, in the opinion of the court, should be taken into account.

29 The notion of the best interest of the child has taken shape in many jurisdictions with Article 681 of the Transitional Civil Code of Eretria stating that the custody and maintenance of children born outside wedlock shall be regulated having regard solely to the interest of the child.
which may be taken into account in determining whether or not to grant the order.

Botswana

In Botswana, the Judges have taken it upon themselves to further the view that in an application for an order of custody or access by the natural father of a child born out of wedlock, the test to be applied is that of the best interests of the child. In the case of Modisenyane v. Modisenyane (2) [2006] 2 B.L.R. 65 Chinhengo J approved the central test to be applied in the following terms;

“A child has a right to have access or to be spared access and so access is granted or denied depending on where the best interests of the child lie. Access is a two-way process. In one sense it is a right granted in the interest of the non-custodian parent and in another and more decisive sense, it is a right granted in the best interest of the child – see V v. V 1998 (4) SA 169 (C) at page 189 C-E where it was said that the child’s right to have access is complimented by the parent’s right to have access to the child.”

The position was also confirmed by Dingake J in the case of Ndlovu v. Macheme 2008 3 BLR 230 HC where he affirms the best interests of the child standard as having gained supremacy. The learned judge also affirms the view that no parental right, or claim as regards [to] access has any meaning if it is inimical to the best interests of the child. Despite the views reflected in the decisions of the courts of Botswana, the Roman Dutch Law position which requires “good cause” to be shown if the inherent right of custody vested in the mother under the Roman Dutch law is to be interfered with has not been altered by statute.

THOUGHTS ON REFORM AND CONCLUSION

The conclusion that one will inevitably come to is that the legislature has to intervene as has been done in Namibia and South Africa. The changing social trends and the need to eradicate discrimination of children on the basis of having been born inside or outside wedlock dictate that the legislature intervenes without delay. As stated by Muchechetere JA and Ebrahim JA in Cruth’s case, the decision to alter the Roman Dutch Law position that a natural father of a child born out of wedlock has no inherent right on the minor child so conceived has to be made by the Legislature and not by the court. The legislature has a number of options on the table. The one is to

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30 The process in Botswana seems to be that of judicial incorporation of the provisions of the Convention on the Rights of the Child in which were Parliament has not enacted legislation domesticking international law, the judiciary may nonetheless rely on the provisions of a treaty in adjudicating cases, thereby giving the treaty a status on national law (see page 13 of “In The Best Interest of the Child: Harmonising Children’s Laws in West and East Africa supra)
follow the path taken by Namibia which enacted the Children’s Status Act which abolished the common law position and gave equal rights to parents of children born out of wedlock. The Act makes the best interests of the child the only consideration in determining the issues of custody, guardianship or access of children regardless of whether they are born outside of wedlock. Another option is adopting the path taken by South Africa by way of the Natural Fathers of Children Born out of Wedlock Act. The advantage of the South African Act is that it gives the court a discretion which would act as a cushion to unscrupulous men who, having neglected to care for their children born out of wedlock, will seek to vindicate rights of custody, guardianship or access for reasons other than a genuine need to build a relationship in the best interests of the child. A further option is that advocated for by the Zimbabwe Law Development Commission which involves the addition of a section to the Guardianship of Minors Act [Chapter 5:08]. The section will have the effect of making the best interests of the child the sole consideration in granting an order of custody, guardianship or access regardless of the fact that the child was born out of wedlock. Whichever option the Legislature chooses, the common factor is that the best interests of the child should be the most central and constant considerations in making a determination in all cases regardless of the status of the child in question. All the options for reform are perfectly in unison with many existing statutes which make reference to the notion of the best interests of the child. These include sec 5 of the Customary Law and Local Courts Act [Chapter 7:05], sec 4 of the Guardianship of Minors Act [Chapter 5:08], the Children’s Act and the Matrimonial Causes Act [Chapter 5:13]. Reforms will also be in line with sections 19 (1), 56 and 81 of the 25 January Final Draft Constitution of Zimbabwe which affirm that the State must adopt policies to ensure that in matters relating to children, the best interests of the child concerned are paramount. Reforms will also be in line with the general provisions of the Convention of the Rights of the Child to which Zimbabwe is a party. In the end, what is clear is that Zimbabwe must move in line with the need to eradicate the wrath of the many children born out of wedlock. Action should be taken and it should be taken fast. The spirit of the views of Sandura JA in Cruth’s case over a decade ago must be remembered and efforts must be made towards legislative reform.
OF LAND REFORM, THE CAMPBELL JUDGEMENT AND THE SADC TRIBUNAL
Hon. Patrick Anthony Chinamasa∗

ABSTRACT

The following is a presentation delivered by the Minister of Justice, the Honourable Patrick Chinamasa on the 23rd of May 2014 at the University of Zimbabwe, Faculty of Law. The Minister gives his opinion on the legal battle between the government of Zimbabwe and Mike Campbell Private Ltd. He refers to the now defunct SADC Tribunal and the much publicised land reform exercise in Zimbabwe.

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From the outset, I wish to pay tribute to the staff of the Faculty under the leadership and guidance of Dean, Mr Emmanuel Magade for maintaining high standards in this Faculty despite the tremendous challenges that the university has faced owing to the economic hardships that the country has been through. Despite these challenges the Faculty has continued to produce graduates of a very high calibre a significant number of which have made their mark not only in Zimbabwe but in the regional and international sphere. The success of the Faculty in the International Moot Court Competition through the years has ensured that the Faculty remains on the international map. Recently too, one of your students was given an award by the International Association of Law Schools for her outstanding paper on human rights. I must also congratulate the students for remaining focused in their studies under difficult circumstances which for some time meant that no student could be accommodated on campus.

You have been studying in the Faculty for the last four years and the time for you to depart and join others in the legal fraternity is fast approaching. It is therefore fitting that the Dean has chosen this moment for me to meet with you and exchange notes with you on a subject of my choice. There are times when too many choices create problems. This was one such moment for me as I battled with the selection of the subject. Was it to be on your employment prospects? Indigenisation and Economic Empowerment? International Criminal Court [ICC]? I finally settled on a matter which has been the subject of much publicity in the local and international press and in respect of which the full story has not been told; a matter which should be of interest to all students of law; the story of the SADC Tribunal.

Those of you who have studied Public International Law will no doubt have made one reference or another to the SADC Tribunal. Indeed, I doubt that a study of Public International Law wherever taken today would exclude some mention of the SADC Tribunal. As your Minister of Justice, I have been actively involved together with other SADC Ministers of Justice in the debate on the future of the Tribunal in the past five or so years. It is therefore my pleasure to share with you the background leading to the current position where Tribunal stands dissolved pending the adoption of a new Protocol on the Tribunal. The new Protocol will make it clear that the jurisdiction of the Tribunal is limited to disputes between Member States of SADC.

The lesson which we learn from the SADC Tribunal is the manner in which the rich countries, the Western countries, are able to manipulate international law to suit their own agendas. They are able to twist international law, to orchestrate the taking of positions purporting to be the correct interpretation of the law by non-governmental organisations that they fund and control and to even influence the staff of regional organisations such as SADC into adopting positions which suit their interests to the detriment of the interests of the Member States.
In our case, the desire of the SADC Member State was to create a Tribunal to adjudicate disputes between Member States. Instead the project was deliberately manipulated by Western Countries to produce a Tribunal which would be a tool in their fight against our land reform programme. I do not want to dwell too much on the history of our land as that must remain a subject for another day. I will therefore attempt to summarise it in a few paragraphs.

In the late 19th century, Cecil John Rhodes and his colonists seized indigenous owned land, cattle, minerals and other property at will without compensation to the indigenous inhabitants. It is well documented that settler occupation at the time was brutal, violent, deceitful and racist in method, manner and motivation. The impact on the indigenous inhabitants was significant as they lost all rights to property and were at the entire mercy of the settlers. Such conduct created the basis of racial confrontations and mistrust that have existed ever since. In 1969, during the illegal unilateral declaration of independence in the then Rhodesia, the white government passed the Land Tenure Act which divided the country’s cultivable areas into two halves. About 4000 whites farmed the predominantly more fertile half in varying degrees of productivity and intensity, whilst about 4 million indigenous people were confined to the ecologically poor half. This inequality persisted right up to the independence of the country in 1980, and continued thereafter until the fast track land resettlement programme of 2000. Due to repression and injustice at the hands of the white settlers, the blacks took up arms to fight the settler first in 1896-1898 (First Chimurenga) and thereafter the armed revolution flared in 1963-1980 (Second Chimurenga) until the whites succumbed in 1979 and agreed to enter into talks with the black nationalists.

The independence constitution crafted at Lancaster House prohibited the new Zimbabwe Government from compulsorily acquiring land for resettlement during the first ten years from independence. Instead, it prescribed a policy of acquiring land on a “willing-seller willing buyer” basis.

By 2005 it had become clear to the government of the Republic of Zimbabwe that the Land Acquisition Act was unsuited to the kind of land reform which needed to be undertaken in the country. In order to enable government to acquire more land at a faster pace Constitutional Amendment (No. 17) Act was passed under which, among other things, courts were precluded from entertaining challenges to compulsory acquisitions by disgruntled landowners. This is the amendment referred to the Campbell judgment of the Tribunal handed down in 2008. The enactment of Constitutional Amendment (No. 17) effectively served to underscore and emphasise that Zimbabwe’s Land Reform Programme, implemented as it was on a national scale, was a nationalization of land in the same form and manner as the land nationalization which took place in Tanzania, Zambia,
Mozambique and Angola. As a matter of fact our nationalisation process was less severe than the nationalisation which took effect in Tanzania, Zambia, Mozambique and Angola. In those countries no compensation at all was paid for both land and improvements. Whereas in our case we have said we pay compensation for improvements only and not for land. It is singularly instructive and significant that in those countries their nationalizations were not subjected to challenge.

The overall result of the programme of land show that a total of 6 214 farms measuring 10.8 million hectares have been acquired, compulsorily or otherwise, for resettlement on the basis of self-contained A1, villagised A1 and A2 Models. The total number of beneficiaries in the A1 settlement model is 350 000 household families and 16 386 families in the A2 settlement model.

Having ailed our courts in their challenge to the Constitutional Amendment (No.17), the dispossessed white farmers acting together with Britain and other Western countries turned to the SADC Tribunal for rescue. They have tried everything. They have gone as far as manipulating the rules of international law to get their way.

But how did the SADC Tribunal come into existence? The coming into being of SADC was an agreement between a number of States and as such governed by international law. International law is that body of law which is composed for its greater part of principles and rules of conduct which states feel themselves bound to observe, and therefore, do commonly observe in their relations with each other. It is that indispensable body of rules regulating for the most part the relations between States, without which it would be virtually impossible for them to have a steady and frequent intercourse. The Vienna Convention on the Law of Treaties which is recognised as a restatement of customary international law makes it clear that a State is not bound by a treaty or protocol to which it has not consented. Ratification is the formal declaration by a State of its consent to be bound by a treaty. In our case, it is Parliament which ratifies international agreements.

The process of ratification is not for academic purposes but serves real and practical considerations. By reason of its sovereignty, a State is entitled to enter or withdraw from participation in any treaty should it so desire. Often a treaty calls for amendments or adjustments in national law. The period between signature by the Head of State and ratification enables States to pass the necessary legislation or obtain the necessary parliamentary approvals, so that they may thereupon proceed to ratification. There is also the democratic principle that the government should consult public opinion either in Parliament or elsewhere as to whether a particular treaty should be confirmed.
It is settled in international law that a State is not bound by a treaty by whatever name called to which it has not consented through ratification. Ratification is the essentially necessary; and you will not find a modern treaty in which it is not expressly so stipulated.

Thus it was the adoption and entry into force of the SADC Treaty was done in conformity with international law. Ten Heads of State and Government signed the Treaty on 17 August 1992, after which the Treaty was then subjected to ratification by the signatory States as required by Article 40 of the Treaty. It entered into force (on 30 September 1993) thirty days after the deposit of instruments of ratification by two-thirds of the signatory States.

Article 9 of the Treaty established the institution of SADC which included the Summit and, yes, the Tribunal. The Treaty itself did not spell out the “composition, powers, functions…” of the Tribunal but instead provided in Article 16 that-

“the composition, powers, functions, procedures and other related matters governing the Tribunal shall be prescribed in a Protocol adopted by the Summit”.

Furthermore, Article 22 of the Treaty stated that each Protocol was to be “subject to signature and ratification by the parties thereto.”

So read the Treaty which was signed by the President of Zimbabwe on 17 August 1992 and which Zimbabwe was the first country to ratify on 17 November 1992.

The wording and understanding was clear to all. The powers and functions of the Tribunal were to be determined at a later stage through a Protocol which Member States were to ratify in accordance with international law.

The Protocol on the Tribunal was adopted eight years later by the Head of States and Government on 7 August 2000 who duly signed the Protocol in accordance with its Article 34. It was to be subjected to ratification by the Member States in terms of its own Article 25 and was to enter into force thirty days after the deposit of instruments of ratification by two-thirds of the Member States.

Up to this stage you will observe that SADC was complying fully with the requirements of international law. But the fight for our land was about to begin, and the stage was being set with the active assistance of the SADC Secretariat to the creation of a Tribunal which would become a weapon to aid the white farmers.

By 14 August 2001 when the Heads of State and Government met in Blantyre, Malawi, only one member State, Botswana, had ratified the Protocol.
It was at that meeting that the Summit adopted the Agreement Amending the Treaty which agreement it is now being argued exempted Protocol on the Tribunal from the requirement that as with other protocols, it was to be subject to ratification by Member States and would only enter into force after ratification by two-thirds of the Member States and be binding only on those Member States who would have ratified it. The Agreement amended Article 16 by adding the words “which shall, notwithstanding the provisions of Article 22 of this Treaty, form an integral part of this Treaty.” Unknown to all was that a gigantic exercise was now underway as part of a grand project to reverse the land reform programme. It would later be argued by the Secretariat that the words “notwithstanding the provisions of Article 22” meant that the Protocol would be exempted from the requirement that all Protocols were to be subject to ratification. One wonders why, if it was intended that the Protocol would no longer be subject to ratification, language to that effect was not used.

Now, this purported amendment to the Treaty of 14 August 2001 was not subjected to ratification by Member States and yet, so claim the secretariat, it was binding on all Member States. The impropriety of their position is glaring for all to see. Member States had ratified a Treaty which expressly provided that there was to be negotiated a protocol on the Tribunal at a future date which Protocol would be subjected to ratification and only bind those Member States who would have ratified it. Now, without being given an opportunity to consent, an amendment proposed by an organ of SADC, the Summit of Heads of State, it was to enter into force in respect of all Member States without ratification as is the requirement under international law. On what legal basis was such an amendment to bind Member States?

We were all lulled into sleep until 3 October 2002 when the Summit at its meeting held in Blantyre, Malawi, adopted the Agreement Amending the Protocol on the Tribunal. By then a further three Member States namely Lesotho, Namibia and Mauritius had ratified the Protocol, bringing the number to four but still an insufficient number to bring the Protocol into force. The averment is also made in the preamble to the Agreement Amending the Protocol that the Protocol came into force on 14 August 2001, the date on which the Summit agreed to the amendments to the Treaty. Under international law, the Protocol could not have entered into force by virtue of the 2001 Agreement Amending the Treaty. Firstly, the Agreement of 2001 was not itself subjected to ratification by Member States. The Treaty that the Parliament of Zimbabwe ratified is the one adopted by the Heads of State in 1992. Any amendments to it would properly require to be presented to our Parliament for ratification. That is basic customary international law. Secondly, the Agreement Amending the Protocol was a nullity. The Protocol had not yet entered into force and could not therefore be amended in terms of its own provisions.
Having set the trap, the secretariat then proceeded to secure the bait, the setting up of the Tribunal.

Thus it was then when Campbell filed his case at the Tribunal, the stage was set for what the Western countries thought was to be the most successful con trick of all time.

**Jurisdiction of the Tribunal**

Apart from the fact that Zimbabwe had not ratified the Protocol on the Tribunal and was not therefore bound by it, the Protocol itself had not been ratified by the requisite two thirds of the Member States and had not therefore entered into force. In addition to this irregularity which on its own renders the proceedings of the Tribunal null and void, an examination of the Treaty and the Protocol itself arrives at the conclusion that, in any case, the Tribunal did not have the jurisdiction to hear the Campbell matter.

The entire basis of the applications brought by the white farmers were founded upon the allegations that the government of the Republic of Zimbabwe had failed to observe and fulfil its obligations under the SADC Treaty. Specifically, these obligations were alleged to be contained in the preamble and Article 4, 5 and 6. Article 5 lists the principles of SADC as including human rights, democracy and the rule of law, solidarity, peace and security, to mention a few. Article 5 sets out the objectives of SADC which include consolidating, defending and maintaining democracy, peace, security and stability.

In its decision in the Campbell matter, the Tribunal decided that it had jurisdiction to hear the matter. You should read the judgment for yourself which is remarkable for its lack of depth for a Tribunal which purported to be the Supreme Court of the region. It ordered the Government of Zimbabwe to restore the ownership of farms to the white farmers.

The judgment of the Tribunal was flawed in many respects. The Tribunal decided that the principle enunciated in Article 4 of the Treaty created legally enforceable obligations and in particular that the principle of human rights, democracy and the rule of law meant that SADC individual Member States were under a legal obligation to respect and protect human rights of SADC citizens. I disagree. The observance of principles of the Member States to create such obligations, the Treaty would have so stated in express terms. Relations between States are not conducted on the basis of interpretation and assumptions. All States are equal and therefore any obligations that a State adopts have to be expressed clearly and without ambiguity. It cannot be otherwise. How do you expect a State to domesticate provisions which are open to different interpretations in different jurisdictions? It is inconceivable that the Member States would have
intended to leave it to the Tribunal to determine what human rights were to be observed in the region. Member States would have had to agree on a Protocol on Human Rights prior to contemplating the enforcement of its observance by Member States. Look at the European Union. The Member States adopted a convention on human rights which is enforced by their court. And yet when it comes to SADC, dubious inferences are arrived at to lead us into believing that we can leave it to a Tribunal to decide for us what the law of the region is?

Citizens require that their rights be clear and specific and not the product of a piecemeal approach by a judicial body. The Tribunal did not, in its judgment; attempt to explain in some rational manner and process of reasoning how it arrived at the conclusion that the principles enunciated in the Treaty give rise to legally enforceable obligations. I must also add that there is a wealth of authority for the view that a regional court or tribunal cannot claim and exercise direct or indirect jurisdiction over the territory, nationals or institutions of a State unless clear and unambiguous language bestows such authority on the court or tribunal considered. In the Campbell case, the Tribunal arrogated to itself jurisdiction which the Member States never intended to give it.

In separate 2007 judgments of the East African Court of Justice and the Economic Community of West African States Community Court of Justice, faced with similar circumstances, the Courts did not hesitate to come to the conclusion that jurisdiction with respect to human rights required a conclusion of a protocol to that effect without which the Court could not adjudicate on disputes concerning the violation of human rights.

Why is a Protocol on human rights a prerequisite to the granting of jurisdiction on human rights to a regional court? Member States have different political, social and economic systems and institutions. Whilst harmonization is the ultimate goal, it can only be achieved through a number of strategies which include the adoption of protocols, declarations, etc. The regional court or tribunal cannot be trusted to develop jurisprudence on the width and breadth of the treaty principles. What is good for Zimbabwe today might not be good for Zambia and vice versa. The legal systems in the SADC Member States differ from one State to another. Mozambique and Angola nationalised all their land in the early years of Independence. Would it now be up to the Tribunal to reverse those decisions?

It therefore came as no surprise that Zimbabwe refused to abide by the judgment of the Tribunal. A well-funded initiative was then launched by the framers to seek international assistance and sympathy for their cause. Non-governmental organisations were given statements to issue accusing the government of Zimbabwe of not abiding by international law. Some of these statements which were published in the local press were embarrassing
for their lack of understanding of international law principles. A study was even commissioned to strengthen the view that the Tribunal had not acted improperly. Up to this day whenever an opportunity arises, the public is told that SADC refused to accept the recommendations of a consultant that it had hired. Nothing could be further from the truth. SADC was led by the secretariat into believing that a firm by the name World Trade Institute Advisors Ltd based in Germany was to be the consultant for the study. A list of the consultant’s experts showed that they had personnel in a number of countries including Africa who were suitably qualified for the work. However, after the contract had been given to World Trade Institute Advisors, all these consultants disappeared and one man emerged as the consultant, a Dr Bartels of the University of Cambridge in England. Dr Bartels was completely unacceptable to Zimbabwe as he had previously authored for the secretariat articles which exhibited bias and lack of professionalism. In fact it was already on record in the minutes of Summit, that Zimbabwe had objected to the use by the Secretariat of Dr Bartels, a British expert, in a dispute between Zimbabwe and Britain. Had the Secretariat informed SADC that the same Dr Bartels was in any way involved with World Trade, they would not even have been consulted. The involvement of Dr Bartels remained hidden until it was too late to start all over again.

When it was put to Dr Bartels at the report back meeting that his study was a regurgitation of his previous paper his reply was that he had no apologies to make. He was a man on a mission. Up to this day we do not understand how World Trade came to surrender the consultancy to Dr Bartels. Dr Bartels himself offered no explanation. Some of his findings bordered on the offensive. For example, he makes the finding that “the most important consequence of this is as follows: under international law, a State may not rely on its national laws (including norms of constitutional status) as a defence to a violation of an international obligation”. Zimbabwe does not dispute that a State must abide by its international obligations. We were saying there was no such obligation in the first place.

Yet another one of his findings is that “all of SADC law is international law, and consequently binds SADC Member States regardless of their national laws, including their constitutions”. SO according to him, the Tribunal can make any decision it wants whether within its competence or not and Member States must abide by it regardless of their constitutions and national laws?

We were able to identify at least paragraphs in Dr Bartels report which were copied and pasted from the paper which he had previously prepared for the secretariat.
It is not surprising therefore that the Summit of SADC had no hesitation after reviewing all the information available including the flawed findings of Dr Bartels, to come to the conclusion that the Tribunal be suspended pending the adoption of a new Protocol which would make it clear that the jurisdiction of the Tribunal was limited to disputes between Member States. It will be made clear that the Tribunal does not have jurisdiction in disputes between persons and Member States. In simple terms, persons will not be able to appeal to the Tribunal against decisions of their national courts. Furthermore, Summit has directed that the process of adoption, entry into force and ratification of SADC instruments be reviewed to make it compatible with customary international law. The Summit has accepted that the shortcuts which the secretariat was employing to bring legal instruments into force is in violation of international law.

My address would not be complete if I did not make reference to the case of Luke Thembani whose name you will find alongside that of the white farmers in as co-applicant. Their papers look better with the name of Thembani included as it creates the impression that the government of Zimbabwe is repossessing farms from its own indigenous people and that therefore it is not only the white farmers who are unhappy with the Land Reform Programme. Thembani borrowed money from the Agricultural Finance Corporation of Zimbabwe on the security of his farm and subsequently lost the farm after he default in his repayments. The bank, acting in terms of the loan agreement and as provided for in the Agricultural Finance Corporation Act, took possession of the farm and sold it by public auction. Thembani successfully lodged an application to the High Court which nullified the sale on the grounds that the sale had not been properly advertised. The Agricultural Finance Corporation appealed to the Supreme Court which confirmed the sale of the property. Some years later, he made an application to the Tribunal for an order setting aside the sale on the grounds that the law which provides for the sale of property under the circumstances of the case violated the principles of SADC. The Tribunal upheld his application. I am sure you appreciate the legal issues which arise. The highest court of appeal in the matter was the Supreme Court of Zimbabwe. As far as the parties were concerned the matter was res judicata. The property had been sold and transferred to a new owner. That new owner was not a party to the proceedings before the Tribunal. The Agricultural Finance Corporation was not a party to the proceedings before the Tribunal. Neither was the Local Deeds Office cited. The case of Thembani is a clear illustration of the determination that the SADC Tribunal had adopted to force Zimbabwe into abandoning its land reform programme.

SADC has learnt a number of hard lessons from the problem of the SADC Tribunal. Developing countries must exercise care in entering into international agreements because the intentions of the western countries
may turn out to be targeted at more than what appears in black and white. The Rome Statute which created the International Criminal Court is another example of how the western countries are able to manipulate international conventions to suit their own agendas. The whole of SADC is surprised that the Tribunal had gone this far. Never in their widest imaginations did they foresee that the Tribunal would be the appellate court from decisions of the highest courts of the region. In fact if you were to go through the minutes and other papers of SADC prior to the Campbell judgment, nowhere will you find it suggested that the SADC Tribunal would constitute the appellate court of the region or that it was being set up to become the human rights court of the region. You will not find a single country that had amended its laws to provide for the referral of matters in whatever form to the Tribunal. It was all an innovation by the western countries using their financial influence and muscle to manipulate events way beyond their borders. Fortunately the Summit of SADC was able to put a stop to this unwelcome intrusion into the affairs of the region.

I thank you.
Reflecting on Child Rights and Zimbabwe’s Harmonisation of It’s International Obligations

Analysing Zimbabwe’s efforts in harmonising International Conventions on the rights of the child.

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Tafara Goro

Abstract
Children’s rights occupy a very important place in almost every modern legal system and have been incorporated in a variety of international instruments which were ratified into domestic laws in several jurisdictions. The current Constitution in Zimbabwe does not fully take into account the specific interests, concerns and rights of children. While laws to ensure the protection of children rights exist, there is a failure when it comes to implementation of these laws, particularly with regards to guaranteeing access, custody, maintenance, guardianship and justice for children. Zimbabwe is a signatory of many international instruments dealing with children’s rights. This article is an account of the process and findings on Children’s Rights in Zimbabwe. It seeks to provide an account of the response to the harmonization process of children's rights in Zimbabwe and a situational analysis of the current conditions of children's lives.

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A SYNOPSIS OF THE RELEVANT INTERNATIONAL INSTRUMENTS

UNIVERSAL DECLARATION OF HUMAN RIGHTS 1948 (UDHR)

The Universal Declaration of Human Rights recognises the inherent dignity and the equal and inalienable rights of all members of the human family regardless of sex, race, colour, language, religion or distinction of any kind.

THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD (ACRWC)

The African Charter on the Rights and Welfare of the Child was borne out of a feeling by African member states that the drafting of the Convention on the Rights of the Child missed important socio-cultural and economic realities of the African experience. However, the African Charter on the Rights and Welfare of the Child is not opposed to the United Nations Convention on the Rights of the Child. Instead, these two conventions are complementary. The African Charter stresses on the need to include African cultural values and experience whenever discussing or considering issues pertaining to the rights of the child in Africa.


INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 1966 (ICCPR)

The ICCPR deals in detail with the rights outlined in the Universal Declaration of Human rights and guarantees basic civil and political rights to all persons, “without distinction of any kind, such as race, colour, [or] sex…” [Article 2 (1)]. These rights include, amongst others, the right to life, freedom of movement, equality before the law, privacy, freedom of religion and the right to participate in public affairs.

CONVENTION ON THE RIGHTS OF THE CHILD 1989 (CRC)

The United Nations Convention on the Rights of the Child is an international agreement that was swiftly ratified by most states. Zimbabwe ratified the Convention in September 1990. The preamble recalls the basic principles of the United Nations and some specific provisions of certain relevant human rights treaties and proclamations. It reaffirms the fact that children, because of their vulnerability, need special care and protection and it places special emphasis on the primary caring and protective responsibility of the family. It also outlines the need for legal and other protective measures of the child
before and after birth. The CRC applies to all children and has the prohibition of discrimination as one of its founding principles.

**MILLENNIUM DEVELOPMENT GOALS 2000**

The 55th Session of the United Nations (UN) held in September 2000 adopted the United Nations Millennium Declaration which articulated, among other issues, eight Millennium Development Goals (MDG’s) with targets set to be achieved by 2015. The national priority goals for Zimbabwe are MDG 1 – eradicating extreme poverty, MDG 3 – promoting gender equality and MDG 6 – combating HIV and AIDS, Malaria and other diseases. The following goals have since been enunciated, that is, to eradicate extreme Hunger, Achieve Universal Education, Promote Gender Equality, between 2002 and 2015, the proportion of people whose income is less than the Total Consumption Poverty Line 2A Ensure that by 2015 all Zimbabwean children, boys and girls alike, will be able to complete a full programme of primary education. Eliminating gender disparity in primary and secondary education, preferably by 2005, and to all levels of education no later than 2015\(^1\) is also part of the agenda. This article will also measure Zimbabwe’s progress against the Millennium Development Goals.

**CHILDREN’S RIGHTS AND THE CONSTITUTION**

Children should be recognized as individuals possessing their own interests and rights, including the right to be part of a stable and permanent family, and the right to remain part of that family once it is established with an expectation that the status will be permanent. Indeed, these rights are constitutionally founded and are at the core of all liberties, for if children cannot count on the inalienable right to life and liberty in the family context, then one would wonder what our society offers them. These constitutional interests are both procedural and substantive such that they should not be disturbed absent a compelling, established competing interest which is entitled to constitutional protection. Even then, if the constitutionally protected interests are in conflict and evenly balanced, the conflict should be resolved in favour of the child (the best interests of the child principle).

**SCOPE OF DISCUSSION**

Any treaty or legislative enactment is a product of history. The Convention on the Rights of Children is to be explained historically to bring to light the spirit behind the treaty. However, the article is centred mainly on outlining why Zimbabwe has adopted this Convention, the condition and respect of

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\(^1\) The report shows that the Net Enrolment Ratio went down from 98.5% in 2002 to 91% in 2009. Primary school completion rates also went down from 82.6% in 1996 to 68.2% in 2006. While the net enrolment ratio decreased, there is near equality in lower secondary school by gender. However, girls comprise only 35% of the pupils in upper secondary school and secondary school completion rate is higher for boys.
children’s rights and whether or not there is any conformity with the provisions of the convention with regards to the spirit of the Convention. The article will also suggest reforms that can be employed\(^2\). This article seeks to address why there is no full acknowledgement of children’s rights in Zimbabwe and why we have more and more children languishing in poverty. The main challenges that have since given rise to draw backs to the full realisation of children’s rights in Zimbabwe seem to be poverty, political unrest, cultural norms which have imprisoned children in the family circles\(^3\), paternalism in the family, marginalisation of women and children, and economic turmoil. Like in many developing countries, these challenges have catalysed child exploitation, inadequate access to educational and health services, poor housing and many other socio-economic challenges.

Children are also human beings and have to be accorded the same rights that adults enjoy albeit with some limitations such as selling and buying liquor and the exercise of their right to engage in sexual activities among many other examples. Ignorance of human rights is also a factor perpetuating the failure to cater for the rights of the child. The doctrines of constitutionalism and the rule of law are germane doctrines as far as the constitutional protection of children’s rights is concerned. However, children’s rights are not to be treated as separate rights but must rather be seen as auxiliary rights which are meant to enforce to the full extent the realisation that a child has been a victim of history and marginalisation both in the family and public life. The importance of the issue of children’s rights has been formally acknowledged across the world it being a development that has been reflected by legislative changes in many countries in recent years. In spite of this and the development of the discourse related to the promotion of children’s rights within social and political institutions, Zimbabwe is still, in one view, very far from an ideal situation in terms of respect for these rights as compared even to its nearest sister, South Africa. The condition of children’s rights in Zimbabwe has been aptly captured and reiterated in many presentations that have been prepared for a number of international

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\(^2\) Legislation protecting children had its beginning in the 19th century, when the child was the object of the first legal Act which established the minimum age for working in the coal mines (e.g. The Mines Act, 1842 in the UK). It might therefore be argued that, in social and historical terms, the “discovery” of childhood and its distancing from the world of adults began with a process of the protection of children from the worst excesses of the industrial revolution, especially in the 19th and 20th centuries (Hendrick, 1994). The question that arises now, however, is how we should characterise the 21st century in relation to childhood and children: will this be the time for promotion and guarantee of children’s rights? will this period be one in which we see the construction of a new paradigm that no longer considers children’s rights as extra rights (Leach 1994) – i.e. as specific rights of one social group that are built at the expense of other rights?. Childhood and Rights: Reflections on the UN Convention on the Rights of the Child, Catarina Tomás

\(^3\) “Custom in Africa is stronger than domination, stronger than the law, stronger even than religion. Over the years, customary practices have been incorporated into religion, and ultimately have come to be believed by their practitioners to be demanded by their adopted gods, whoever they may be” (Lightfoot-Klein 1989:47 cited by Okome, 2003:71).
meetings. It is, thus, against this whole legal, socio-political and economic context that the article will measure the extent that we have complied with the provisions of the Convention on the Rights of the Children and any possible reforms that can be made.

**ZIMBABWE’S REACTION TO THE NEED FOR CHILD LAWS HARMONISATION PROCESS**

The Constitution of Zimbabwe contains a Declaration of Rights and Fundamental Freedoms. Following suit of most of the Anglophonic nations in Africa, Zimbabwe has a dual legal system. In terms of Section 111B of the constitution, international instruments do not automatically form part of the law unless incorporated into the law by an Act of Parliament. In the child laws harmonisation process, Zimbabwe ratified many international treaties dealing with the rights of the child. However, it has since remained a legal chorus that the problem is not the adoption of these so-called international instruments but the implementation of any law in Zimbabwe.

The CRC is the most ratified of all the treaties on human rights which invite an array of important changes in the social group of childhood, namely the introduction of the idea of children’s participation and the full realisation of children’s rights. Zimbabwe ratified the CRC in September 1990 but has not ratified the two Optional Protocols to CRC on the involvement of children in armed conflict and child prostitution and pornography. Of importance is that the Zimbabwean government by approving the CRC committed itself to allowing children to develop their potential in a context without hunger, without poverty, without violence, without negligence or other injustices or hardships through respecting their civil, economic, social, cultural and political rights. Thus, the treaty came to endorse, for the first time, the idea

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4. An abstract from Harmonisation of Children’s Laws in Zimbabwe Country Brief, ACREWC Draft, assert that “It is evident that while Zimbabwe has some good laws and policies on children, it has equally immense challenges when it comes to translating these laws into reality and tangible benefits for its children. These challenges arise not only from the economic problems that the country is currently reeling from, but also from the socio-political context. It is noteworthy that in the midst of all these challenges there are over 200 NGOs and other stakeholders working to address the many problems facing Zimbabwe’s children. Zimbabwe is a country with an estimated population of about 13 million people. It is also estimated that around 50% of the population is below 20 years of age. Zimbabwe as a constitutional democracy has its Constitution of Zimbabwe as the Supreme Law of the land as reaffirmed in Section 3”.

5. Section 89 of the Constitution.

that the child should be considered as being in possession of rights and fundamental liberties\textsuperscript{7}.

It is imperative to note that there are many child rights regulatory laws in the country\textsuperscript{8}. There also exist mechanisms such as the National Programme of Action for Children (NPAC) to facilitate and coordinate the implementation, monitoring and evaluation of the CRC and the ACRWC to ensure survival, development and protection. Moreover, to cement the implementation of child related laws, measures have since remained in place in line with Article 4 of CRC. For instance, the independence of the Judiciary is enshrined in Section 86 and 87 of the Constitution of Zimbabwe. With its adjudicating function, the judiciary is an important arm of the state when it comes to the vindication and interpretation of constitutional rights and values. The Office of the Public Protector is established by the Constitution\textsuperscript{9} and is mandated to investigate any action taken by an officer or person in any Ministry or department where there are allegations that an individual has suffered injustice arising out of that person or authority’s action.

The main problem in our jurisdiction is the main species of our laws concerning the rights of the child. Article 1 of CRC defines a child as every human being below the age of 18 years. The Children’s Act\textsuperscript{10} of Zimbabwe, on the other hand, defines a child as anyone below the age of 16. The problem also arises from legislation such as The Marriage Act [Chapter 5:11], which sets the minimum age of marriage to be 18 for boys and 16 for girls\textsuperscript{11}. The Criminal Law generally permits sexual relations between an adult man and a girl of seventeen, which, in effect, entails that sexual intercourse between minors and adults, is permitted. One very negative manifestation of this \textit{lacuna} is that in terms of the Criminal Law (Codification and Reform) Act\textsuperscript{12}, it is an offence for an adult male to have sexual intercourse with a girl below the age of 16 years\textsuperscript{13}. Even when the girl consents to the sexual relations, it is still an offence as she is deemed \textit{consensus incapax}. For most of these unscrupulous offenders who help themselves with little children, the obvious escape route from a conviction of statutory rape becomes marriage to the minor girl. The Customary Marriages Act [Chapter 5:07] does not provide for a minimum age of marriage. Thus, this obviously opens a minor girl child to sexual exploitation which contravenes Article 19 of CRC which our law has not as yet criminalised. Countries like Eritrea also have a long standing battle to reconcile its laws

\textsuperscript{7} Harmonisation of Children’s Laws in Zimbabwe Country Brief, ACREWC Draft, supra.
\textsuperscript{8} Which includes the Children’s Act [Chapter 5:06] providing for protection, adoption and custody of all children and the Guardianship of Minors Act, [Chapter 5:08] which deals with the guardianship of children. The Children’s Act sets up the Children’s Court (formerly known as the Juvenile Court) to deal with matters pertaining to children.
\textsuperscript{9} Section 107 of the Constitution.
\textsuperscript{10} Chapter 5: 06, Section 2
\textsuperscript{11} Section 22 of Marriage Act [Chapter 5:11].
\textsuperscript{12} Chapter 9:23
\textsuperscript{13} Section 70(3) of Criminal Law (Codification and Reform) Act.
and the harmonisation process is very slow as compared to Zimbabwe. However, despite all the contradictions that have since culminated in our law regarding the definition of the child, there are four basic principles that govern decisions related to the rights of children in Zimbabwe both in the realm of the common law and statute law. These are the following:

**THE BEST INTERESTS OF THE CHILD STANDARD**

Our law has embraced Articles 3 and 21 of CRC of which emphasis the principle of the best interests of the child which has now been deeply entrenched and recognised in our law. It is submitted that the realisation of this standard has been religiously followed in many civil and common law jurisdictions. The High Court is legally recognised as the upper guardian of all minors to ensure that the principles of best interests of the child are enforced. Existing legislation dealing with maintenance, divorce, matrimonial causes, adoption, custody, and institutional care have provisions which affirm that the best interests of the child concerned must be paramount. However, when coming to the implementation and the interpretation of this principle in the general context, there has since culminated a school of thought that the material means and circumstances of the parents take precedence over what is in the best interests of the child. Thus, at the end of the day “the best interests of the child principle has since eroded with what can be termed “the best interest of the parents” principle.

**NON-DISCRIMINATION**

The Constitution of Zimbabwe 1980 upholds the principle of non-discrimination on grounds of sex and gender as well as equality before the law. Some non-compliance with the CRC and the ACRWC in relation to non-discrimination however exists. The Administration of Estates Act [Chapter 6:01] which provides for the protection of the inheritance rights of men, women and children has some discriminatory elements. The law in

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14 Harmonisation of Children Laws in Eritrea: The African Child Policy Forum. But it is advisable that Zimbabwe follow the South African approach as enunciated in Section 28(3) of the South African Constitution which precisely defines a child as anyone below the age of 18. This will of course ensure particularity as all subsidiary legislation has to be in parity with the Constitution.

15 Section 5 of the Customary Law and Local courts Act [Chapter 7:05], and the dissenting judgment of Sandura J in Cruth v. Manuel, supra.

16 Section 23 of the Constitution

17 Section 5 of the Customary Law and Local Courts Act [Chapter 7:05] provides for it. The Matrimonial Causes Act [Chapter 5:13], which deals with matters relating to marriages, judicial separation and divorce, provides for it in Section 10. Our draft Constitution also provides for it in Article 19(1).

18 This can also be said in cases dealing with custody, guardianship and access of children born out of wedlock

19 Section 23 of the Constitution
Zimbabwe also allows for discrimination when it comes to marriage laws. In addition, the application of the principle that guardianship and custody of children born out of wedlock is vested in the mothers of those children, with the fathers being regarded as having no automatic right to custody or access is inherently discriminatory against children born out of wedlock. Customary law has immunity from constitutional scrutiny with regards to discrimination in Section 23 of the Constitution. The Criminal Law Code discriminates the boy child offenders against the girl child as they are susceptible to corporal punishment. This can be viewed as another extension of the discrimination on the basis of sex. Our law in this regard seems to ignore the spirit of Article 2 of CRC.

**THE RIGHT TO LIFE, SURVIVAL AND DEVELOPMENT**

This is an undisputed inalienable right of every human being. This right is outlined in Article 6 of the CRC and in Zimbabwe the right to life is a constitutionally guaranteed right under Section 12 of the Constitution. While the provision does not specifically refer to children, it should be understood as also referring to children since they are also human beings. The right to life of children is, therefore, guaranteed. Further to this, however, while the Constitution states that deprivation of life in relation to the carrying out of a

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20 Article 22 of the Marriage Act [Chapter 5:11] sets the minimum age of marriage at 18 years for boys and 16 years for girls

21 In South Africa this position was changed by the Natural Fathers of Children born out of wedlock Act 1997

22 According to the Constitution of Zimbabwe, “moderate” corporal punishment in the home environment is allowed. Article 7 of the Children’s Act, supra, also makes an exception to child abuse and neglect by accommodating any parent or guardian of any child or young person who administers a reasonable punishment to such child or young person, the Criminal Law (Codification and Reform) Act of 2004 provides that “(a parent or guardian shall have authority to administer moderate corporal punishment for disciplinary purposes upon his or her minor child or ward”. Where a male person under the age of 18 years is convicted of any offence the court which imposes sentence upon him may in lieu of any other punishment; or in addition to a wholly suspended sentence of a fine or imprisonment; sentence him to receive moderate corporal punishment, not exceeding six strokes that should be inflicted in private settings. While there were indications in 2011 of plans to prohibit corporal punishment in the school environment, the Education Act (2004) continues to allow the practice.

23 Provided for in Section 23 of the Constitution, The Constitution has been amended (Amendment No. 17) to include disability in the non-discriminatory clauses. The Mental Health Act, 1996 (No. 15 of 1996) provides for the welfare of the mentally ill, including children with mental disabilities. The Disabled Persons Act [Chapter 17:01] also provides for the welfare and rehabilitation of disabled persons and it gives the Department of Social Welfare the mandate to cater for the welfare and rehabilitation of disabled persons. In the implementation of the Act the Department has two major roles that are coordination and service provision.

24 Magaya v. Magaya 1999(1) ZLR 100 (S) and the majority judgment in Cruth v. Manuel SC-73-98 compared with Natural Fathers of Children Born out wedlock provisions in the Republic of South Africa enacted in 1997.
death penalty is allowed, the law in Zimbabwe exempts children from being subjected to the death penalty.25

RESPECT FOR THE VIEWS OF THE CHILD AND CHILD’S EVOLVING CAPACITIES STANDARD

Denial of this right is a denial of the right for one to exist, as communication seems to be the life blood of human existence and co-operation within human affairs. Articles 12 and 13 of CRC has been incorporated into our law but Zimbabwe’s laws in respect of child participation are very weak and have remained marginalized. Section 20 of the Constitution guarantees freedom of expression and the right to receive information. Article 12 of CRC has not been fully catered for in our jurisprudence. The provision has unwittingly found itself in the abyss and has to join the unattended cries about lack of freedom of expression that has seen journalists and other pressure groups pressurising for change in our law. However it must be borne in mind that there are a number of initiatives being undertaken to facilitate child participation.26 This is in accordance with Article 42 of CRC although the mechanisms in Zimbabwe are not far reaching as children in rural areas are short of information dissemination.

ANALYSIS OF SEVERAL CHILDREN RIGHTS

CIVIL AND POLITICAL RIGHTS

Article 7 of the CRC clearly advocates for these rights. In Zimbabwe, birth registration is provided for in terms of the Birth and Death Registration Act27 spelling out the processes and eligibility for registration. The Act also sets out other requirements for registration and it is in fact a criminal offence in terms of the Act for one to neglect to obtain a birth certificate on behalf of a child.28 The applications for registration are approved by the Minister responsible for administering the Citizenship Act and in terms of Section 16 of this Act, the Minister is not required to give reasons for his refusal to grant or approve any application in terms of the Act, including applications for citizenship by registration.29 In the event that one’s application is granted, such a person’s child or children will be entitled to be citizens as well but

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25 Section 338 of the Criminal Procedure and Evidence Act Chapter 9:07.
26 An example is the National Youth Policy (2000) facilitates the participation of young people in the mainstream development process of the country and reference can be sort in Article 62 of our Draft Constitution which seeks to enforce this right at its full measure.
27 Chapter 5:02
28 Section 27 of the Birth and Death Registration Act [Chapter 5:02]
29 Some provisions of the Zimbabwe Constitution have implications for nationality/citizenship. For instance, Section 7 of Amendment Number 19 provides for citizenship by registration for people who are not Zimbabwean citizens. Section 7 provides that anyone who has been voluntarily and ordinarily resident in Zimbabwe for at least ten years may apply to become a Zimbabwean citizen by registration.
they also have to make applications. Section 7 also provides that where a Zimbabwean citizen legally adopts a child who is not a Zimbabwean, the child shall become a Zimbabwean on the date of adoption. The issue that has occupied the centre of the debate surrounding citizenship is whether or not Zimbabwe should legalise dual citizenship. This issue is still controversial and has affected children whose parents live in different jurisdictions.

Given the stringent requirements needed for one to acquire citizenship and also lack of adequate enforcement methods, a third of all children do not possess a birth certificate, thereby having their access to public services restricted. This problem is most visible in farming and rural communities as well as for orphans and vulnerable children. One cause of non-registration is that most migrant farm labourers of foreign origin do not possess formal Zimbabwean registration papers. The Constitution guarantees a number of civil and political rights and freedoms that are of relevance to children. The issue of street children has not been fully dealt with in Zimbabwe, and it has since been noticed that there is an increasing number of street children in large cities especially Harare and Bulawayo. Thus, this can be seen as contrary to the provisions of Article 7(2) of CRC.

Section 19(1) of the Constitution of Zimbabwe 1980 guarantees the enjoyment of freedom of conscience, meaning, freedom of thought and religion, and freedom to change one’s religion or belief. These rights can be enjoyed alone or in community with others, and in public or in private, and everyone including a child has the right to manifest and propagate their religion or belief through worship, teaching, practice and observance. Sub-section 2 of section 19 of the Constitution provides that unless the consent of a child’s parent or guardian is secured, no person attending any place of education shall be required to receive religious instruction or to take part in or attend any religious ceremony or observance if that instruction, ceremony or observance relates to a religion other than his own. In this instance our laws have managed to embrace Article 14 of the CRC.

THE RIGHT TO EDUCATION, HEALTH AND PARENTAL RESPONSIBILITIES

These rights are spelt out in Article 5 (as read with Article 18) of CRC. There still exist some laws which attempt to guarantee that children grow up in an environment of their family of origin. However, “family” lacks a precise legal definition which makes it difficult to have a clear legal picture of what it really is. However, whatever definition can be adhered to, when this is impossible, these laws attempt to provide for, of course in a very limited manner, family environments for children including through

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30 “States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention”.

alternative care\textsuperscript{31}. The Maintenance Act [Chapter 5:09] provides for the making of orders for maintenance of persons, the enforcement of maintenance orders. Unfortunately, there are a number of children in the country who do not benefit from maintenance from either one or both parents as a result of a lack of effective enforcement of the Act. Of even greater importance is that in the absence of an effective welfare program, the main challenge that is facing children in Zimbabwe in the context of family environment is the HIV/AIDS pandemic which has created a lot of orphans and at the least, child headed families in Zimbabwe.

In response to this crisis, the Government of Zimbabwe called for help from other interested parties especially NGO’s and has since endorsed the urgent need for coordinated, expanded interventions by government ministries, non-governmental organisations (NGOs), community-based organisations (CBOs), faith-based organisations (FBOs) and United Nations (UN) agencies. A National Plan of Action (NPA) for Orphans and other Vulnerable Children (OVC) has been developed and continues to be implemented, albeit with limited impact. Programmes for OVC focus on psychosocial and material support, and educational and humanitarian assistance. Other programmes include children’s rights, behaviour change, youth programs, life skills training, caregiver training, HIV/AIDS information and health care. Most of these programmes have links with the government of Zimbabwe through different Ministries. However, coordination of these programmes still remains a big challenge as they all report to their specific sector ministries. It is a matter of concern that laws in Zimbabwe either do not regulate, or do not regulate adequately a number of issues related to alternative care as provided in Articles 20, 24 and 27 of the CRC. These issues include the periodic review of placement of children in alternative care, registration and supervision of orphanages, and domestic and inter-country adoption. But the question is always on the number of children who have benefited from all these programs. Indeed, the existence of the Children Welfare Fund\textsuperscript{32} has provided some funds to cater for young children who are in need of care, but, constrained by limited resources, this Fund has not managed to fully cater for the needs of the young children in alternative care institutions and this has also reduced the number of beneficiaries under this scheme as caused of limited resources.

In the Health and Disability sector, there are challenges that children in Zimbabwe face. This right is not provided for in the Constitution, thus, it has been left in the realm of subsidiary legislation which has also failed to cater

\textsuperscript{31} These laws include the Education Act, the Children’s Act, the Guardianship of Minors Act, the Maintenance Act and the Sexual Offences Act. The Matrimonial Causes Act[Chapter 5:13] exhorts judicial officers to ensure that in handing down orders for divorce or judicial separation they make provision for the custody and maintenance of children in that relationship. While the Maintenance Act seeks to ensure that minors are taken care of in terms of their material needs, regardless of whether their parents are married or not.

\textsuperscript{32} Set out in Section 75(H) of the Children’s Act.
fully for the recognition of this right. Provisions relating to health and disability should be measured against the yardstick provided for in Article 23 and 24 of the CRC. These health related issues include HIV/AIDS, immunization, and malnutrition including stunting and morbidity, and child mortality rates that are very high. Most of these issues are addressed through policies, programmes and schemes and not through legal legislative frameworks. Credit must be given, however, to some laws which are of relevance for children’s right to health and health services in the country. In line with the CRC, every child has a right to education. Starting from the attainment of independence in 1980, Zimbabwe pursued a policy of education for all and children accessed primary education free of charge. This was done despite the fact that no such provision existed in the Constitution. This practice progressed well until the introduction of the Economic Structural Adjustment in the 1990s. In a bid to enforce the rights provided for in Articles 28 and 29 of CRC, the Education Act [Chapter 25:04], provides that every child in Zimbabwe has the right to formal education and parents are obliged to send their children to a school of their choice. The Government has also set up a number of tertiary institutions to ensure that higher education is accessible to as many children as possible. However, education is not free. Section 6 of the Act requires school fees to be maintained at the lowest possible levels. Students are required to pay tuition fees as well as development levies. While tuition fees in government

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33 The Public Health Act provides for immunization of all children even in circumstances where parents object to such immunization on religious grounds. The Minister of Health and Child Welfare is mandated, in accordance with the Act, the responsibility of promoting public health and an Advisory Board on Public Health advises the Minister on all matters of health. Immunisation programmes have generally been a success in Zimbabwe with the continued assistance of stakeholders such as UNICEF. The National Health Strategy addresses issues on equity and quality of health across all ages and the location of most health facilities within 5km-8km radius is in accordance with the Primary Health Care Principles. There are policies in place that intend to ensure that people (especially persons below 5 and above 65 years) who cannot afford to pay in public hospitals are assisted. These target children whose parents are not working, orphaned children, the elderly and those affected with HIV/AIDS pandemic. These are given free medical Treatment Orders to present to the Hospitals that receive the money from the department of Social Welfare. The country has a National HIV/ AIDS Strategic Framework which includes Prevention of Mother to Child Transmission. The National AIDS Coordinating Programme as well as the National AIDS Council (NAC) is an example of responses by the Government in order to address the HIV/AIDS challenge in the country. In addition the Social Welfare Assistance Act [Chapter 17:06] has also enjoyed its seat on this band wagon and provides for health and education assistance, maintenance allowances, cash transfers, purchase of assistive technologies, importation of special equipment for the disabled, means tested criteria for assessment of poverty amongst vulnerable groups. Introduction of the National AIDS Trust Fund to mobilise resources for the prevention of infection and care of those infected and affected by HIV/AIDS remains to be one of the country’s positive developments.

34 According to article 5 of the education Act, “it is the objective in Zimbabwe that primary education for every child of school-going age shall be compulsory and to this end it shall be the duty of the parents of any such child to ensure that such child attends primary school”
schools has generally been very low, development levies at times have proved to be stumbling blocks to access to education. High costs of books and uniforms have also led to high levels of drop outs in rural areas. Since primary education is not free, in practice it is not compulsory. In fact, the presence of children on the streets in urban areas is an indictment against any claim that education in Zimbabwe is compulsory. In 2010, during the 2011 budget statement, the Minister of Finance, indicated that there was a dropout rate of 8% in 2010 among children between 6 and 17 years. Given that there are high drop-outs in rural areas, it cannot be said that all children have equal access to primary education. In Zimbabwe there are two ministries in charge of education, viz, the Ministry of Education, Sport, Art and Culture (in charge of pre-primary to secondary education) and the Ministry of Higher and Tertiary Education (responsible for post high school education). It is commendable, however, that these two Ministries received the highest allocation of Government budget in 2011. Despite all the challenges mentioned above, Zimbabwe has made some significant progress in trying to ensure as many children as possible have access to education, although there exists a challenge because of limited resources.

PROTECTION AGAINST CHILD EXPLOITATION AND VIOLENCE

Children inherently need to be protected against violence and exploitation of any sort. However, violence against children is still rampant and special protection measures should be employed. To ensure protection from sexual abuse, the Children’s Act prescribes deterrent forms of punishment for sexual offenders. The definition of a sexual offender adopted by the Act is a wider one. It includes persons who, although not directly involved, allow the abuse of children, either on their premises or elsewhere. The Children’s Act also explicitly punishes ill-treatment and neglect of children and young persons. The Criminal Law Code also criminalizes sexual abuse of children. Save for authorized personnel, such as the Medical Research Council, it is also prohibited to conduct medical and scientific experiments on human beings. Of note, however, is that these practices are still carried out in more conservative cultures in Zimbabwe.

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36 Supra.
37 Article 19 of CRC provides “1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child. 2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement”.
38 Article 7 of the Act.
Zimbabwe is a source, transit and destination country of human trafficking which is rife. However, Zimbabwean law does not prohibit all forms of trafficking in persons. While there is some progress in coming up with comprehensive anti-trafficking legislation, it still remains in to be seen how these efforts will materialise into actual legislation.\(^{39}\)

Zimbabwe has ratified both International Labour Organisation (ILO) Conventions 138 and 182 that are of relevance for child labour. A number of provisions of the Labour Relations Amendment Act (No. 17 of 2002) were designed to give effect to the ILO Conventions. The Act also prohibits forced labour and prescribes punishments of up to two years’ imprisonment.\(^{40}\) However, child exploitation is still rife in Zimbabwe especially in rural areas and mining towns.

**CONCLUSION AND RECOMMENDATIONS FOR REFORM**

It is clear that while significant progress has been achieved in relation to legislative reform, gaps still remain in the implementation of laws and policies which promote children’s rights. Conservativism, paternalism and marginalism have blocked the transformation of attitudes towards children’s rights which are lagging behind in terms of legislative reform. As already pointed out, economic instability has seen Zimbabwe lose human development gains and has presented multiple challenges for children’s organisations which are largely Non-Governmental Organisations. However, as Zimbabwe progresses, there is great potential for the children’s rights movement to influence the direction of the country so that the ideals of gender equality and children’s rights are fully realised. In the end, the question is always about the way forward. Challenges that have since culminated in Zimbabwe arise not only from the economic problems that the country is currently reeling from, but also from the socio-political context. As a recommendation, Zimbabwe must be persuaded to follow the South African approach with regards to children’s rights in which Child rights are

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\(^{39}\) The Criminal Law (Codification and Reform) Act prohibits procuring a person for unlawful sexual conduct, inside or outside of Zimbabwe, which allows for some possibility of prosecuting trafficking of children. Children are prohibited by the Penal Code from visiting or residing in a brothel, and anyone who causes the seduction, abduction, or prostitution of children is to be prosecuted. The Sexual Offenses Act too criminalises the transportation of persons across borders for sex. The Child Abduction Act, which is an Act to give effect within Zimbabwe to The Convention on the Civil Aspects of International Child Abduction (1980), and to provide for matters connected therewith or incidental thereto was enacted in 1995, but it relates to international child abduction within the context of custody rights and access rights. In trying to put into force Article 32-37 of CRC.

\(^{40}\) Moreover, while the Labour Act prohibits employers from hiring a person under 18 to perform hazardous work and the Children’s Act makes it an offence to exploit children through employment. The Domestic Violence Act (Chapter 5:16), passed in 2006, has some relevant provisions on children’s rights. For instance, it has a number of provisions relevant for the girl child in the context of physical, sexual and mental injury. It also has provisions addressing harmful traditional practices such as forced virginity testing; or female genital mutilation; or pledging of women or girls for purposes of appeasing spirits.
at the heart of the post-apartheid constitution. After ratifying the Convention on the Rights of the Child on 16 July 1995, the architects of the new South African Constitution embedded its precepts into the constitution. Section 28 of South Africa’s Bill of Rights guarantees children’s right to an identity, basic services, education and protection within the legal system. Other key legislation to protect the rights of children introduced during the post-apartheid era includes the Films and Publications Act, the Basic Conditions of Employment Act, the Domestic Violence Act, the Child Justice Act and the Sexual Offences Act. Zimbabwe has left these rights to be administered by scattered pieces of legislation of which some of them are irreconcilable and need to be patched. The government must be able to disburse enough funds to the Children’s Welfare Fund to ensure that children placed in institutional care and remand homes receive enough support for their upkeep. With the New Constitution of Zimbabwe expected to be in force in the foreseeable future, one can only hope the child rights situation in Zimbabwe improves.

41 Website on Children Rights in South Africa.
LONGING FOR THE WISDOM OF KING SOLOMON: CUSTODY AND THE BEST INTERESTS OF THE CHILD CONCEPT

Sylvia Chirawu

ABSTRACT

The best interests of the child test has been applied by courts in Zimbabwe and elsewhere to determine which parent should have custody of a child. Some states in the USA have come up with laws that can be used to make such a determination. In Zimbabwe the courts have provided guidance on the concept of best interests. The major challenge lies in the judicial discretion in determining what the best interests of a child really means. Alternative tests, namely the primary caretaker presumption and joint custody have been used and proposed as alternatives to the best interests test. Despite its shortcomings, the best interests of the minor child test still remains the best test in resolving custody disputes.
INTRODUCTION
As a young fourth grader in Zimbabwe, the writer played the part of the “nice” mother in the Biblical play of Wise King Solomon opting to give up the baby to the “cruel” mother so that the baby would live. Wise King Solomon realized who the actual mother was by that very act of concern for the child, that acting in the best interests of the child, the actual mother was prepared to give up custody to the other woman. In real life, it is rarely that easy. Custody disputes are very difficult to handle and the children or child at the centre bear the brunt. This biblical analogy was well captured by Brian J Melton as follows:

One of the most well-known examples of Solomon’s wisdom was his resolution of a dispute between two women, both of whom claimed to be the mother of a child, and both of whom desired custody. .....But Solomon’s wisdom would be lost in the modern day custody disputes. Would Solomon’s solution have been as simple if the argument for custody was between the biological mother and father? Would Solomon have had to weigh both parties’ interests to decide what was in the best interests of the child?¹

This paper will give an overview of the best interests and custody concept in Zimbabwe and the USA. Zimbabwe ratified the Convention on the rights of the child (CRC) on the 11th of September 1990. The predominant standard in handling custody disputes in CRC and the law of Zimbabwe is the best interests of the child doctrine. Significantly the proposed new Constitution² unequivocally states that in all matters relating to children, the best interests of the child concerned are paramount.³ This standard is fraught with inconsistencies as in most instances; there are no indicators or guidelines. Despite these shortcomings, the test still provides the best method of determining custody.

The paper will start off with the observation that custody disputes arise due to a variety of reasons. As a result the question will be whether or not having one standard for determining best interests is appropriate. The development of laws on custody cases will reveal that CRC did not introduce the best interests standard. It was already in existence. Zimbabwe has not domesticated CRC but it is interesting to note that it has domesticated the

¹ 73 N.D.L Rev 263
² At the time of writing the bill is awaiting Presidential assent after having been adopted by both the House of Assembly and the Senate
³ Section 19(1)
Hague Convention which does not deal with best interests of the child but jurisdiction in International kidnapping. An analysis of the practical application of the best interests standard will reveal that the issue of judicial discretion on the part of judges and judicial officers is the major criticism levelled against the test. The writer will use the DC Superior Court Family Court Act of 2001 for reference purposes which provides a model of alternative dispute resolution in child custody cases and also the cooperation between various arms of the law to ensure that the interests of children are taken into account. The writer will rely on cases from the some states in the USA for comparative purposes. Alternative tests to the best interests will be looked at to determine whether they are more appropriate and finally it will be concluded that despite the best interests of the child the standard being fraught with inconstancies, it still provides the best method of adjudicating on custody disputes. Even the alternative tests are also based on the best interests of the child.

WHY DO CUSTODY DISPUTES ARISE?

The most common cause of custody disputes is divorce. The dilemma facing children is aptly put by Trish Oleska Haas:

*When I asked him the usual question that we ask all children of divorce – if you had three wishes, what would they be? – he said, “I want to die.” Startled at this response, I said, “Why? What would happen if you died?” “If I were dead,” the little boy said in a somber tone, “I’d be in heaven. My dad would be there. My mom would be there. And we’d live in the same house.”*

The child instead of making a preference, would rather have died and be in heaven with his parents just as it used to be. This speaks volumes of the difficulties placed on children. Custody disputes have however not been entirely confined to divorce. With a rapidly evolving world, custody has taken on many dimensions and overtones. In *Ward v. Ward*, the father was black and the mother white. *Jones v. Jones* involved a Native American father and a white mother. *In re Baby Clausen*, the dispute was between adoptive and natural parents of the child. A grandparent was awarded custody in the Kentucky state case of *Mcnames v. Corum*. In the famous case of *In re Baby M*, the surrogate mother refused to give up the baby despite signing a prior contract agreeing to do so. In Zimbabwe, the court had to deal with the rights of a non-marital father in *Cruth v. Manuel*.

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4 81 U. Det. Mercy L. Rev 333  
5 216 P. 2d 755  
6 N.W 2d 119  
7 502 . N.W 2d 649  
8 683 SW 2d 246  
9 525 a.2d 1128  
10 SC 73/98
v. W, the court had to deal with the award of custody to a third party. In Domboka v. Madhumu, the child had been left in the custody of a grandparent whilst the mother went to work overseas following a divorce.

Yet still as observed by Bajpai, custody applications are not final. Parties may apply for a variation of the custody order. Although the Zimbabwean courts have not yet been called upon to deal with issues of surrogacy from a survey of cases involving custody, it is apparent that custody cases have taken many dimensions the fastest emerging one being of parents migrating from Zimbabwe and wanting to take the children with them. Given this fact, does the best interests of the child offer the best solution given the fact that one standard is being applied to different scenarios?

THE DEVELOPMENT OF CUSTODY LAWS

The USA literature and case law presents a clear history of the development of custody issue. North Dakota historically resorted to English law which gave a preference to the father. The paternal preference was replaced in 1839 by the tender years doctrine. Parliament created a presumption that custody of a child under the age of seven should go to the mother. The tender years doctrine became the yardstick of much of American law on custody. The doctrine was however applied differently. It was viewed as either weak or strong. If strong, custody was given to the mother unless she was declared unfit. If weak, a comparative analysis of the parents was required. In North Dakota, therefore the law was that if all was equal between the parents, the standard to be used was the best interests of the child. The tender years doctrine was replaced with the gender neutral best interests of the child statute.

Michigan codified the tender years doctrine in 1873 as follows:

That in the case of the separation of husband and wife having minor children, the mother of the said children shall be entitled to the care and custody of all such children under the age of 12 years, and the father of all

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11 1981 ZLR 243
12 HH-179-04
13 Child rights in India: law, policy and practice page 108
14 Domboka v Samudzimu note 12. In that case the natural father of the child sought variation of the custody and courts resorted to the best interests of the child concept to determine the case.
15 75 . N.D L. Rev 394
16 Id
17 Id page 396
18 Id 397
19 Id page 399
such children shall be entitled to the care and custody of all such children of the age of 12 years or over....\textsuperscript{20}

This provision was however a mere guideline and did not in any way inhibit “the power of the court to make such award of custody as it deemed in the child’s best interest”.\textsuperscript{21} In 1970 Michigan enacted the Child custody Act specifically providing for a best interests analysis. The best interests doctrine is usually traced to the opinion expressed by Justice Cardozo in \textit{Finlay v. Finlay} \textsuperscript{22} in which he stated that “The chancellor in exercising his jurisdiction upon petition does not precede upon the theory that the petitioner, whether father or mother has a cause of action against the other or indeed against anyone. He acts as \textit{parens patriae} to what is best for the interests of the child” The best interests doctrine though is applied differently. “In some states, the best interests of the child is said to be the exclusive factor on which a court should base its custody decisions. In other states, it is the major but not necessarily the only\textsuperscript{23} factor.

In Zimbabwe, the development of custody laws cannot be divorced from socio-cultural factors. Prior to colonization in 1896, the system of law then applicable was the customary law one. In terms of this system, a child did not belong to an individual but to the whole family. The concept of family should be understood in the context of the wider family which included the grandparents, aunts, cousins and uncles. Perhaps the most important factor then was the payment of bride price commonly known as lobola. This is a system which involves the payment of money or consideration to the family of the bride. Prior to colonization and the advent of a cash economy, payment was in the form of a hoe and cattle. If the bridegroom was unable to pay, he would spend a year at his future father in law’s place working the fields until they were satisfied that he had paid his dues. This practice has now become commercialized. \textsuperscript{24} With the payment of lobola, the rights of custody and guardianship were transferred to the father but more to his family than to him as an individual. Most custody disputes did not find their way to court but were resolved within the family. Such settlements took the interests of the child into consideration. The current Constitution of Zimbabwe recognizes the dualism of law in section 89 by providing that” Subject to the provisions of any law for the time being in force in Zimbabwe relating to the application of African customary law, the law to be administered by the Supreme Court, the High Court and by any courts in Zimbabwe subordinate to the High Court shall be the law in force in the Colony of the Cape of Good Hope on 10\textsuperscript{th} June , 1891 , as modified by

\textsuperscript{20} Mich. Comp. Laws § 722.541  
\textsuperscript{21} 81 U Det. Mercy L. Rev 335  
\textsuperscript{22} 204 NY 429 , 148 NE 624 ( 1925)  
\textsuperscript{23} Kramer T Donald : Legal rights of children page 39  
\textsuperscript{24} See Lobola: Its implications for women’s reproductive rights : Women and Law In Southern Africa
subsequent legislation having in Zimbabwe the force of law.” 25 The customary law position has been overridden by statute law in the form of section 5 of the Customary Law and Local Courts Act which provides that:

In any case relating to the custody or guardianship of children, the interests of children concerned shall be the paramount consideration irrespective of which law or principle is applied.

The effect of this provision is to make all custody matters whether falling under customary or general law, subject to the best interests of the child test. The Zimbabwean High Court confirmed this issue in Moyo v. Sithole26. It was held that the issue of lobola was irrelevant to a determination of custody, the paramount consideration being that of the best interests of the child. In contrast, in the case of Tawonanhasi v Tshuma and others,27 the applicant was the father of a boy born during the brief subsistence of an unregistered customary law union. The mother of the child left Zimbabwe and went to live abroad. As in the Domboka case, the mother left the child in the custody of it’s great–grand mother, a third party. The court held that what had happened was clearly undesirable. The mother of the child should have left the child in the custody of the applicant who happened to be the natural father. He had paid lobola. There was no need to give custody to a third party when one of the parents was still alive and available. A natural parent should not be deprived of custody unless there are strong and compelling reasons to do so. Under the old Roman Dutch law, the father’s right of custody was seen as superior as long as the marriage remained intact. On divorce, custody was awarded to the innocent spouse. Section 10 (2) (3) of the Matrimonial Causes Act of 1985 now provides that the best interests of the child shall be of paramount consideration.28 The dichotomy created by making the best interests of the child paramount from a general law perspective is that “the very act of bringing a custody case into a formal system means first that “best interests” will be decided by an institution that is not recognized by the (rules, customs and traditions of the indigenous people of Zimbabwe) and that best interests will largely be interpreted according to the general law, based on foreign “western” values”29 While Armstrong made some valid observations, she presupposes that in the indigenous system, the best interests of the child are not taken into account. This is an erroneous assumption because of paramount concern in this

25 The new Constitution preserves legal pluralism by stating that “The law to be administered by the courts of Zimbabwe is the law that was in force on the effective date, as subsequently modified.
26 HC – B – 35/85
27 HB -63-08
28 Mutetwa v Mutetwa 1993 ( 1) ZLR 176
system is that the child is well looked after and does not lose benefits she/he would have if she/he was staying with parents. Although it may not consciously be called best interests within the social framework, it certainly takes the best interests of the child into account. Despite the differentials in the development of the best interests concept in both USA and Zimbabwe, the most important thing to note is that, CRC did not introduce the best interests concept into the laws of both countries but rather confirmed what was already in existence.  

**CUSTODY OF CHILDREN AND THE HUMAN RIGHTS DISCOURSE**

As noted above, Zimbabwe signed and ratified CRC on the 11th of September 1990. That does not mean however that it becomes part of Zimbabwean law. In terms of section 111 B: Effect of international conventions:

Except as otherwise provided by this Constitution or by or under an Act of Parliament, any convention, treaty or agreement acceded to, concluded or executed by or under the authority of the President with one or more foreign states or governments or international organizations.

(a) shall be subject to approval by Parliament ; and  
(b) Shall not form part of the law of Zimbabwe unless it has been incorporated into the law by or under and Act of Parliament.

The effect of the section is that there is no automatic transmission of the rights provided for in an international instrument into the laws of Zimbabwe. Despite this seemingly drawback in the Constitution, courts are not precluded under the clock of judicial activism from incorporating international human rights instruments into judgments.  

The late Zimbabwean Chief Justice Dumbutshena put this succinctly in the case of A Juvenile v. The State:

……..the courts of this country are free to import into the interpretation of  

( the Declaration of Rights ) , interpretations of similar provisions in International and Regional Human Rights Instruments such as , among others , the International Bill of rights , the European Convention for the

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30 Colum. Hum. Rts . L. Rev 172  
31 In the proposed new Constitution, International conventions, treaties and agreements are provided for in Section 327. Section 327(2) (a) and (b) are in tandem with Section 111 but section 327 (6) states that when interpreting legislation, every court and tribunal must adopt any reasonable interpretation of the legislation that is consistent with any international convention, treaty or agreement which is binding on Zimbabwe, in preference to an alternative interpretation inconsistent with that convention, treaty or agreement.  
32 See note 28 above  
33 1989 ( 2) ZLR 61 @ 72
LONGING FOR THE WISDOM OF KING SOLOMON: CUSTODY AND THE BEST INTERESTS OF THE CHILD CONCEPT

Protection of Human Rights and Fundamental Freedoms, and the Inter – American Convention on Human Rights. In the end, international human rights norms will become part of our domestic human rights law. In this way, our domestic human rights jurisdiction is enriched.

The USA as noted infra signed the CRC on the 16th of February 1995 but has not ratified it. This has not stopped critics from suggesting that CRC “virtually mimics U.S law” 34 Those opposed to the ratification of the convention point out that it will supplant the rights of parents and destroy traditional family units because states and local authorities will become powerless to control children’s rights as they see fit.35

Both the USA and Zimbabwe domesticated the Hague Convention on the civil aspects of International Child abduction. The convention is designed to protect the rights of parents for children who have been wrongfully removed or retained. The US Congress in 1988 passed the International Child abduction Remedies Act to implement the convention. Zimbabwe passed the Child Abduction Act 12 of 1995 which came into operation as from the 1st of June 1996. USA is one of the contracting states for purposes of enforcing the act. Although the convention does not deal strictly with the best interests of the child, the fact that both countries domesticated it is proof that international instruments are being taken seriously to some extent. Non-domestication of CRC by both countries may point to hesitancy on the comprehensiveness of the convention. The major short coming of the Hague convention is the emphasis on the issue of jurisdiction and not best interests of the child.

AN ANALYSIS OF THE PRACTICAL APPLICATION OF THE BEST INTERESTS CONCEPT IN CUSTODY CASES

From the onset, it is important to describe what the best interest of the child test really is. Gayle Pollack states as follows:

The best interests of the child test, the test prescribed by statute in most states to determine child placement in custody disputes, takes a broad look at factors which impact the well-being of the child. Under this test, courts have substantial discretion to study parents closely to determine who will provide the best home for the child.36

Implicit in that statement is the overarching emphasis on judicial discretion an issue which has posed the greatest challenge to the test. Michigan has got twelve factors that a court must consider in making a custody determination.

34 Levesque Roger J.R ; Culture and family violence
35 Id 164
36 23 N.Y.U Rev. L. Soc change 604
These are:

(a) The love, affection and other emotional ties existing between the parties involved and the child.
(b) The capacity and disposition of the parties involved to give love, affection, and guidance and to continue the education and rising of the child in his or her religion or creed, if any.
(c) The capacity and the disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of the state in place of medical care, and other material needs.
(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.
(f) The moral fitness of the parties involved.
(g) The mental and physical health of the parties involved.
(h) The home, school, and community record of the child.
(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.
(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent–child relationship between the child and the other parent or the child and the parents.
(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.
(l) Any other factor considered by the court to be relevant to a particular child custody dispute.

CRC in article 3 makes best interests of the child a primary consideration. Article 9 mandates that children shall not be separated from their parents against their will unless a competent court orders so and such separation shall be in the best interests of the child. A child who is capable of forming his/her views shall freely express them and such views shall be given due weight (Article 12). On paper the Michigan law seems to take into account the relevant provisions of CRC. Eight other states have through the Uniform Marriage and divorce Act, adopted similar provisions as the Michigan Child Custody Act. In Zimbabwe, as part of a divorce settlement, parties can agree on the issue of custody and file a consent paper which also deals with other issues of ancillary relief. From the writer’s experience, courts rarely question the contents of a consent paper as consensus is invariably reached with the involvement of lawyers. Courts also play a part in a pre trial conference. All parties file summaries of evidence that will be led at the trial. A conference is held in the chambers of a Judge who will probe the matter actively with a view to the parties reaching a settlement. Parties though are not forced to reach consensus. If they do not agree, the matter will be rolled over for trial
LONGING FOR THE WISDOM OF KING SOLOMON: CUSTODY AND THE BEST INTERESTS OF THE CHILD CONCEPT

and the judge who presided over the pre trial conference will not preside over the trial. In Michigan, “Once a court exercises jurisdiction over a child custody dispute, a court may not accept a stipulated agreement reached by the parties to change custody unless the trial court determines that such a change is clearly in the best interests of the child”\textsuperscript{37}

While the goal of reaching consensus is laudable, it is the writer’s contention that interests of children may not be taken into account but rather those of the parents. In Zimbabwe, children are seldom involved in the process of reaching consensus. It is left to the two parents to decide. No guardian \textit{ad litem} is appointed for the child and inevitably, the interests of the child are not taken into account. The Michigan statute of requiring a high evidentiary burden, that of the best interests of the child test in spite of any agreement that the parents have come up with is more preferable. The best interests concept has been mired in racial overtones in the USA. Pollack argues that “Race clearly plays a role in custody disputes over biracial children, but remain vague about how the races of the child and of the parents mesh with other parenting factors to support the final custody determination”\textsuperscript{38} Judges in the USA are socialized to negatively stereotype blacks.\textsuperscript{39} In \textit{Palmore v. Sidoti}, \textsuperscript{40} which Pollack discusses,\textsuperscript{41} a Florida trial court had transferred custody of children from the natural mother to the father on the basis that the former had married a black man. The Supreme Court set aside the transfer on the basis that it discriminated on the basis of race. The difficulty even with the Michigan statute is that “the best interests test does not specify the relevance of race”\textsuperscript{42} In \textit{re Marriage of W.J.W}, the court stated that as a recognized fact of life, it is generally seen that the mother of a girl of tender years is deemed better suited to care for that child.\textsuperscript{43} The same was stated in \textit{Buntyn v. Smallwood}.\textsuperscript{44} Courts are not agreed on the effect of a child’s preferences but “the overwhelming majority of courts have concluded that the wishes of a child as to which parent he or she prefers as the primary custodial parent is helpful and important to a court in reaching a decision about a placement, but is nonetheless not binding on the court if there are countervailing reasons why custody should not be awarded to the preferred parent”\textsuperscript{45} The Uniform Marriage and Divorce Act provides that courts \textit{shall consider} the wishes of a child regarding custody. The state of Georgia gives a child who has reached the age of 14 years the right to select a custodial parent and the court is obliged to do so unless the person is not \textit{fit and

\textsuperscript{37} Haas O Trish supra 340
\textsuperscript{38} 23 N.Y.U Rev. L and Soc change 614
\textsuperscript{39} Id
\textsuperscript{40} 466 U.S 429( 1984)
\textsuperscript{41} Pollack supra 615
\textsuperscript{42} Id 612
\textsuperscript{43} 643 SW2D 85 ( Mo app 1986)
\textsuperscript{44} 412 So 2d 236 ( Miss 1982)
\textsuperscript{45} Kramer supra at 45
proper.\textsuperscript{46} Kramer lists the following factors as guiding the courts in determining the weight to be given to the wishes of a child particularly where there is no controlling statute:

1. The child’s mental capacity to make an informed and intelligent decision
2. The child’s level of maturity
3. The child’s age, often referred to as the age of discretion
4. Whether a child is a good judge of what is best for him or her
5. The strength, clarity, or sincerity of the child’s expressed preference
6. Whether a child’s wishes are motivated by a parent who suggests that he or she will apply less discipline and restraint
7. Whether the expressed preference was wrongfully induced by a parent (such as through the promise of favors or where a parent allegedly poisoned the child’s mind)
8. Whether the child’s wish is to live with a nonparent\textsuperscript{47}

The manner of eliciting views is important and generally most judges favor interviewing the children in chambers without the involvement of lawyers and parents.\textsuperscript{48} The CRC strongly favors the involvement of children in matters that concern them and that such views shall be given “due weight”. The USA laws in this regard seem to conform with CRC especially on the value of children’s views not being the only factor but falling among other factors that the courts consider as best interests. Other indicators from the USA courts include the issue of religion. In \textit{re Marriage of Gersovitz},\textsuperscript{49} custody of a Jewish boy was given to his non-Jewish mother on the basis that religious instruction should not predominate other factors. In \textit{Millard V. Millard},\textsuperscript{50} a mother who engaged in an extra marital affair was denied custody.

The Zimbabwean courts have not been consistent in the application of the best interests of the child concept. In \textit{Ryan v. Ryan},\textsuperscript{51} the custodian parent sought divorce on the grounds of cruelty. She was granted custody of the less than one year old child of the marriage. The court seemed to have been influenced by the tender years doctrine. Judicial biases are also apparent in some cases. In \textit{Zvorwadza v. Zvorwadza},\textsuperscript{52} the parties were married in terms of the Customary Marriages Act [\textit{Chapter 5:07}] that allows a man to marry more than one wife. The trial judge awarded custody of a boy child to its father despite the fact that at no point had the father even indicated that he

\textsuperscript{46} Id 47
\textsuperscript{47} Id 48
\textsuperscript{48} Id 50
\textsuperscript{49} 779 P2d 883 (Mont 1989)
\textsuperscript{50} 782 SW2d 93 (Mo App 1988)
\textsuperscript{51} 1963 R and S 356
\textsuperscript{52} 1996 (1) ZLR 404
wanted custody. He led no evidence that it would be in the best interests of the child that he be awarded custody. The judge was apparently of the view that under customary law, the custody of a male minor had to go to the father. The Supreme Court upheld the appeal filed by the mother of the child and pointed out that:

(a) It was difficult to see any proper basis for the trial court’s decision in the absence of any specific evidence from the father on the best interests of the child.

(b) Both in general and customary law, the interests of the child are the paramount consideration when it comes to custody.

(c) Courts should ascertain the child’s preferences about which parent it wishes to live with where neither parent can be said to be unsuitable to be awarded custody and the child in question is of sufficient age and intelligence to be able to express a proper opinion.

(d) The fact that one party has more earning power, which would enable him to afford superior accommodation and amenities, is not the crucial aspect in matters of this nature.

The decision in *Zvorwadza* seems to imply that it is only when both parents are suitable that the court should take the views of the child into consideration. CRC deals on the other hand with the capability of the child to freely express his/her views. Zimbabwe case law is therefore not consistent with CRC in this regard though the intention to decide where the best interests of the child lie is the same. The manner of eliciting the views of the children is often done in the Chambers of the Judge or the presiding Magistrate if the case is being heard at the Children’s Court. This is consistent with Article 12(2) of CRC which states that children give views in a non threatening environment.

*Hackim v. Hackim* 53 set out factors that the court should take into account in considering what is in the best interests of the child. These are:

(a) sex  
(b) age  
(c) health  
(d) educational needs of child  
(e) social and financial position of each parent  
(f) character and temperament of each parent  
(g) past behaviour of parent towards child  
(h) Child’s personal preferences if they have reached the age of discretion

With regards to sex, the court held that there is no principle of law that a son is better off with his father than his mother. The sex of the child is merely one of the considerations to be taken into account. And yet in a subsequent case, the court held that *prima facie*, the interests of a female child are best

53 1988 (2) ZLR 61
better served by placing them in the custody of their mother. The same decision had been reached in *Nyathi v Nyathi* that the physical and emotional development needs of a 12 year old girl would be best served if she were in the custody of her mother. The Zimbabwean courts flirtation with the tender years doctrine is revealed clearly in the treatment of custody cases upon separation. Whilst custody is joint when parties are living together, upon separation, the Guardianship of Minors Act Chapter 5: 08 provides in section 5 (1) that:

(1) Where either of the parents of a minor leaves the other and such parents commence to live apart; the mother of that minor shall have the sole custody of that minor until an order regulating the custody of that minor is made ….

If the mother is denied custody or the child is removed from her custody, she can apply to the Children’s court to have her rights restored. Although the operative statute reads that the “Children’s Court may” make an order restoring custody to the mother, it was held in the Mutetwa case that until the father brings an application and can show that it is in the best interests of the minor children that he should have custody, the mother is entitled to custody. This interpretation is also not consistent because it had been held in other cases that the courts are not there to just rubber-stamp the seemingly predominant right of the mother to custody upon separation but should look at the best interests of the child.

Political factors have also been considered in the best interest of the child test. In *Dolby v. Lewis*, the natural father applied for custody on the basis that the mother of the child has attempted to smuggle the child to then apartheid ruled South Africa. This would be detrimental to the child if she was made to grow up in a divided society. Custody has also been awarded to third parties. In *Z v Z*, the natural mother of the children subjected them to physical abuse. The natural father engaged in extramarital affairs. Custody of the children was awarded to the grandmother. In *Samudzimu v Ngwenya*, the court stated that a custodian parent is in absolute charge of the day to day needs of the children. She determines where they go to school, which church they go to, which houses they visit, which friends they play with. She does not exercise these powers in consultation with anyone. As long as these are in the best interests of the children, she cannot be impugned. In that case, the onus was placed on the respondent to show that the respondent’s

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54 Goba v. Muradzikwa 1992 (1) ZLR 212
55 HC – B 161/87
56 Section 5 (2) (b)
57 Supra
58 See Lynch v Lynch 1965 (2) SA 49 (SR); Marira v Marira HH-167-87 and Mutseriwa v Mutseriwa HH-113-85
59 SC 34/87
60 HC – B – 17/87
61 HH-92-08
relocation to another country was not in the best interests of the minor children. It therefore seems that the courts in Zimbabwe look to the custodian parent as having absolute rights over the children and this is part of the best interests of the child concept. In Berens v Berens the court stated that while the custodian parent may consult the non-custodian parent, as this would in some cases be in the best interests of the child, failure to consult would not on its own turn a good decision into an unreasonable or irrational decision.

Both the USA and Zimbabwe jurisdictions provide ample evidence of the application of the best interests of the child test in custody cases. However, the challenge is the lack of parameters or guidelines on what exactly constitutes best interests. The major challenge is that children do not have legal capacity until they reach a certain age. In Zimbabwe, it depends on the age of the child and the controlling statute. In terms of the Legal Age of Majority Act of 1982, now Section 15 of the General Law Amendment Act, a child becomes a major at 18 years. In terms of the Marriage Act, in section 22 boys can marry at 18 and girls at 16. Once a girl marries at 16 she becomes a major and this status remains unaffected even if she divorces before reaching the legal age of majority.

The basis of the attack of the best interests test is precisely the discretion given to Judges. Commenting on the factors considered, Bartlett et al postulate that “the difficulty with such factors is that they are so subjective and future looking as to leave room for wide discretion for Judges to decide what is best for the child in accordance with their own instincts and biases” Statistically, mothers get physical custody in approximately 72 % of the cases, fathers 9% and both parents 16%. These are however mostly uncontested cases.

Gender biases have been alleged in the test. In 1994, a Michigan judge courted controversy when he awarded custody of 3 year old Maranda Ireland to her father because her mother used a daycare facility while she was attending college classes. The indicators of the bias include the fact that mothers are held to a high standard of personal behavior, they make and earn less money and “in the majority of cases, women get custody because fathers do not want custody. When fathers want custody, they stand a very good chance of getting it”. The best interests test standard is described as “an indeterminable, vague standard” that is subjective.

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62 HH-28-09
63 Section 78 of the proposed new Constitution states that every person who has attained the age of 18 years has the right to found a family presumably meaning marriage. The constitution does not define family
64 Gender and the Law. Theory, doctrine, commentary page 489
65 Id
66 Id
67 13 Ga. St. U.L.R page 845
68 Id page 856
69 Id page 849
judicial discretion may actually lay the strength of the best interests test. Courts even where guidelines are set out, are given the leeway of looking at other factors that may influence their decisions. Custody cases can never be homogeneous and giving discretion allows all factors to be taken into account.

D.C SUPERIOR COURT

The DC Code on child custody specifically states that in any proceedings involving custody of children, the best interests of the child shall be the primary consideration regardless of race, colour, national origin, political affiliation, sex or sexual orientation. Furthermore, a court is empowered to make orders as to sole custody, sole physical custody, joint legal custody, joint physical custody or any other custody order which the court considers to be in the best interests of the child. A distinction is drawn between legal and physical custody. The Act empowers courts to keep frequent contact between parents and children. There is a rebuttable presumption that joint custody is in the best interests of the child unless there is evidence of abuse and parental kidnapping. The law has guidelines on what the courts should consider as the best interests. However, the courts are not limited to the factors outlined but are free to consider other factors. Among the factors listed are, the wishes of the child where practicable, the wishes of the child’s parents and the interaction and interrelationship of the child with his or her parents and siblings. The observations on the uncertainty of the best interests test therefore hold true for the DC Superior Courts.

The most important intervention however lies with the promulgation of the Family Court Act of 2001 for DC. Jurisdiction of the court includes custody of children. The family court is provided for in the act as one of the divisions of the court. More importantly the act provides for alternative dispute resolution as follows:

To the greatest extent practicable and safe, cases and proceedings in the Family Court shall be resolved through alternative dispute resolution procedures in accordance with such rules as the Superior Court may promulgate.

The act further provides that court personnel undertake training in various aspects of Family Law. This includes use of technology and child friendly atmosphere. A written report must be submitted to Congress within 90 days after the end of each calendar year. Funds may be appropriated by the Mayor of DC. On paper therefore, DC Superior Courts Family Law division
presents a classic case of the multi-disciplinary approach to deal with all issues involving children, from custody to children in conflict with the law. The Family Court Act is in conformity with CRC in going beyond just law but administrative procedures to ensure that the rights of the child are protected.

**FAMILY COURT IN ACTION**

At the DC Superior Court, the domestic relations branch which handles child custody cases falls under the Family Courts. A family court intake centre was opened in August 2004. This is a free walk in centre where persons with *inter alia* custody issues are assisted. The intake centre is colourful and adorned with art made by school children from DC public schools. In that way it provides an atmosphere which is not threatening to children. The domestic relations branch has established a rapport with the DC Bar which provides services free of charge. For example every month, volunteer attorneys and paralegals present a two session workshop to help individuals file for child custody without an attorney. The form that has been designed by the DC Bar places the best interests of the child at the center. Applicants are asked to state why they think it is in the best interests of the children that they be awarded custody.

The Multi-door dispute resolution division helps parties to settle disputes through arbitration, case evaluation and conciliation. Services at Multi door are free for anyone living in DC. According to the 2004 report filed with Congress mediation is beneficial because it is faster than adjudication; it provides faster case closure, faster settlement of cases and low recidivism rate. American Bar Association Model Standards of Practice for Family and Divorce Mediation state that mediation from experience can promote the best interests of children. However mediation is not appropriate for all families.

The case evaluation program works with experienced family law attorneys who evaluate custody cases and advise parties on the strength and weaknesses of their case. Alternative dispute resolution is not without its critics. It has been described as (1) stressful (2) expensive (3) facilitates exploitation of one party (4) produces unfair or irrational compromises (5) may subordinate women if it is made compulsory (6) the mediator is supposed to be impartial and not represent the interests of one party over the other and (7) the best interests of the child is not the primary focus but accommodation between parents. The major downside is that children are not involved. It is parents, attorneys, mediators but no children. Given these facts, the paramount question then becomes of what other alternative test

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76 A copy of the form is attached  
77 Note 62 at page 21  
78 35 Fam. L, Q 28  
79 Id  
there is to ensure that custody cases are decided in a manner that is beneficial to the child.

**ALTERNATIVE STANDARDS**

While alternative dispute resolution as practiced at the DC Superior Courts provides a non-adversarial method of handling custody disputes, one test that has been touted as a possible alternative for the best interests test is that of primary caretaker presumption. This test involves determining which parent provides day to day care of the child including (1) preparing and planning meals (2) bathing, grooming and dressing (3) purchasing, cleaning and care of clothes (4) medical care including nursing and trips to physicians (5) arranging for social interaction among peers after school (6) arranging alternative care (7) putting child to bed at night, attending to child in the middle of the night, waking the child in the morning (8) disciplining, teaching general matters and toilet training (9) educating and (10) teaching elementary skills.\(^{81}\) The primary caretaker test has been described as more determinate than the best interests test in that it links parental rights with involvement in the daily lives of children.\(^{82}\) Ronald Henry postulates that the list weighs heavily in favor of women.\(^{83}\) It also “incorporates the same kind of gender based stereotype that disadvantages women under a best-interests-of – the child test”\(^{84}\) Judge Gary Crippen criticized the primary caretaker test and found that contrary to expectations, the primary caretaker preference in Minnesota increased litigation and relied inappropriately on fault and gender stereotyping.\(^{85}\) The test may just be another attempt to return to tender years doctrine and that best interests lie with the mother.\(^{86}\) Another test is that of joint custody. Bartlett et al postulate that this trend was fueled in the 1980s by fathers who wanted the same rights of access for fathers.\(^{87}\) Indeed groups like Justice 4 Father's in the UK have raised awareness of this issue by among other things dressing up as Spiderman and climbing the walls of Buckingham Palace.\(^{88}\) As noted infra the DC Code has a presumption in favor of joint custody unless this is not in the best interests of the child. Oregon prohibits joint custody unless parties want it.\(^{89}\) Feminists argue that “…to the extent that joint custody exerts any pressure against familiar gender stereotypes, it does so by reducing the custodial rights of mothers who have acted as primary caretakers in order to

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\(^{81}\) Bartlett Supra 490
\(^{82}\) Id
\(^{83}\) Id
\(^{84}\) Id page 491
\(^{85}\) See 75 Minn. L. Rev 452-486
\(^{86}\) 73 N. D Law Rev 274
\(^{87}\) Page 491
\(^{88}\) See www.fathers-4-justice.org
\(^{89}\) Or. Rev. Stat § 107.169(3)
give custodial rights to fathers who have not earned them" 90 The North Dakota Supreme Court pointed out that the test “cannot control the relationship between parents beyond the walls of the court and that the parents will determine whether or not the relationship will work” 91 In other words, the interests that will now be paramount are those of the parents and not the children. In Zimbabwe, the concept that is used is that of access. A non-custodial parent is entitled to access so that the bond between parent and child is not broken. 92 The problems caused by access were well set out in the case of Reith vs. Antao. 93 Custody had been awarded to the mother. During access visits, the father imparted negative information to the then four year old daughter about her mother and her new husband. The mother of the child taped some of these conversations and expert reports revealed that the child was frightened and traumatized by her father. Joint custody though ideal is fraught with inconsistencies as it results in the child being shuffled between one home and another.

CONCLUSION

While is conceded that the best interests test is based on judicial discretion, it is still the ideal test as it attempts to take a holistic approach in dealing with custody matters. The alternative methods and tests all point out to the fact that ultimately, all parties are concerned with what is best for the child and not the parents. Joint custody and primary caretaker tests instead must as in most states be among the factors that courts take into account in determining best interests of the child and not as stand-alone. The last word goes to Jacobs who states aptly that, “Although the best interests of the child standard invites judicial subjectivity, most Judges do have the best interests of the child at heart and so far no alternative standard offers a better solution.” 94

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90 Bartlett supra page 492
91 Note 77 Supra page 278
92 Section 6 Guardianship of Minors Act
93 HH- 229/90
PUTTING THE CART BEFORE THE HORSE: THE NEED TO STREAMLINE ZIMBABWEAN MEDIA LAWS IN LIGHT OF THE NEW CONSTITUTIONAL DISPENSATION

Godknows Nyangwa

ABSTRACT

The paper focuses on the New Zimbabwean Constitution and its overall effect on media laws in Zimbabwe. An overview of the International framework in relation to media law is followed by thoughts on re-aligning the current media laws to be at par with the new constitutional dispensation.

* The author is a 4th year LLB student at the University of Zimbabwe. (May 2013)
A phenomenon which has evolved and taken root in the modern global body politic is the acknowledgement of the centrality of an independent and pluralist media in the institution of governance as an important plank in poverty reduction. Accordingly, the new Zimbabwean Constitution (herein ‘the COPAC Constitution’) should be viewed as the best avenue through which to streamline local media laws along international media benchmarks. The purpose of this paper is to assess the local existing media law framework in the context of international guidelines in a bid to identify those laws that may need reform.

The crux of this paper is to address the concerns raised by analysts and critics in certain quarters that the over-regulation of media activity in Zimbabwe assail at the epicentre of media independence and pluralism as well as the realisation of the right to freedom of expression and information. The following table is a collection of some the national media laws and international legal instruments and guidelines upon which specific focus will be placed and is intended to be adopted as the conceptual premise for analysis.

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1 UNDP Access to Information Practice Note 2003
TABLE 1. INTERNATIONAL LEGAL FRAMEWORK

<table>
<thead>
<tr>
<th>Title of Convention</th>
<th>Main Provisions</th>
<th>Status</th>
<th>Zimbabwe Date of Signature</th>
<th>Zimbabwe Date of Ratification</th>
</tr>
</thead>
<tbody>
<tr>
<td>Universal Declaration of Human Rights</td>
<td>Article 19 Everyone has the right to freedom of opinion and expression.</td>
<td>Hard Law</td>
<td>1984</td>
<td>1984</td>
</tr>
<tr>
<td>The International Covenant on Civil and Political Rights</td>
<td>Article 19 of the ICCPR stipulates that everyone shall have the right to hold opinions without interference; Everyone shall have the right to freedom of expression;</td>
<td>Hard Law</td>
<td>1991</td>
<td>1991</td>
</tr>
<tr>
<td>The African Charter on Human and People’s Rights</td>
<td>Article 9 of the Charter, on freedom of expression states that; ‘Every individual shall have the right to receive information; express and disseminate his opinions within the law.</td>
<td>Hard Law</td>
<td>1986</td>
<td>1986</td>
</tr>
<tr>
<td>The AU Guidelines for Electoral Observation and Monitoring Missions</td>
<td>One of the factors that the assessment team observing an election must consider is whether an independent media authority responsible for monitoring and regulating the media to allow equitable access to the public media of all contesting parties and candidates functions.</td>
<td>Soft Law</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Section 45 of the COPAC Constitution imposes a vertical obligation upon the State to ensure that the bill of rights is upheld and of particular importance is section 46(1)(c) which stipulates that, ‘...international law and all treaties and conventions to which Zimbabwe is a party’ should be taken into account when interpreting the bill of rights. This is a progressive provision that it provides for the accommodation of international sources such as soft law sources such as regional ‘guidelines’.

**Table 2**

**LOCAL LEGISLATION THAT REQUIRE RE-ALIGNMENT IN LIGHT OF THE CONSTITUTION AND THE INTERNATIONAL LEGAL FRAMEWORK**

<table>
<thead>
<tr>
<th>FREEDOM OF THE MEDIA</th>
<th>THE RIGHT TO INFORMATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sections 43 of the Postal and Telecommunications Act [Chapter 20: 05]</td>
<td>Sections 14, 15, 17, 19, 20, 22, 24 28 interalia of the Access to Information and Protection of Privacy Act [Chapter 10: 27]</td>
</tr>
<tr>
<td>Sections 3(3), 6, 8(3) 9(1) and (3), 12(2), 20 of the Broadcasting Services Act [Chapter 12:06]</td>
<td>Sections 4, 5, 6 and 16 of the Interception of Communications Act [Chapter 11:20]</td>
</tr>
<tr>
<td>Section 84(3) of the Prisons Act [Chapter 7:11],section 3 of the Courts and Adjudicatory Authorities(Publicity Restriction Act) [Chapter 7: 06]</td>
<td>Section 98 of the Postal and Telecommunications Act[Chapter 20:05]</td>
</tr>
</tbody>
</table>

It is therefore apposite to make a detailed comparative analysis so as to illustrate the necessary reforms that critically need attention so as to bring the two legal regimes into as much synchronisation as is possible.

It should be stressed at this juncture that granted these rights exist, but there are limitations thereto for as highlighted by the Supreme Court of Sri Lanka that;

>“Absolute and unrestricted individual rights do not and cannot exist in a modern state. The welfare of the individual as a member of collective society

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2 Athukorale and Others v Attorney-General of Sri Lanka (1997) 2 BHRC 610
lies on a happy compromise between his as an individual and the interests of the society to which he belongs”

The foregoing should be the underlying premise within which this research should be understood.

FREEDOM TO ESTABLISH MEDIA INSTITUTIONS

The COPAC Constitution has a more liberalized Constitutional framework as compared to the Lancaster House Constitution particularly because it specifically refers to ‘freedom of the media’ and this is a commendable innovation that should be viewed as a positive shift towards media independence and pluralism.

Section 61(4) of the COPAC Constitution provides for the freedom to establish broadcasting institutions which are independent of governmental control or other forms of political or commercial interference (compare this with section 16(1) of the South African Constitution). This provision is forthright in that it is in tandem with Article 19 of the Universal Declaration of Human Rights as well as Article 19 of the 1966 International Covenant on Civil and Political Rights.

A remarkable characteristic about section 61(4) is that it sets out the parameters within which the licensing procedures that regulate the establishment of broadcasting institutions should be framed. While state licensing procedures are apposite, they should not be a bar to the media pluralism. This, therefore, means that where the state licensing procedures are shown to be “unnecessary” they can be impugned for violating the Constitution.

This can also be viewed in the light of the freedom of expression. Freedom of expression can be defined as the right of non-interference in holding and expressing opinions, and the entitlement to receive and impart information and ideas.

Freedom of expression is a fundamental right recognised by both international customary law and major regional and international human rights treaties and is enshrined in the COPAC Constitution under its section 61 subsections 1 and 5 which provides that;

(1) Everyone has the right to freedom of expression, which includes.

a) Freedom to seek receive and communicate ideas and other information...

(5) Freedom of expression does not include.

a) Incitement to violence; or
b) Advocacy of hatred or hate speech; or
c) Malicious injury to a person’s reputation or dignity; or
d) Malicious or unwarranted breach of a person’s right to privacy
Although the limitations in the Constitution do not expressly provide for the passing of a law in their interest, they are substantially in compliance with the benchmark set out by the UN Human Rights Committee as outlined above. The limitations also reflect the common law principle of attaching importance to the individual’s dignity and reputation.

One of the glaring inadequacies in terms of section 61 of the COPAC Constitution (which provides for the right to establish media institutions) is that it does not make any references whatsoever to the press but simply refers to ‘broadcasting institutions and other electronic media of communication’ and gives the impression that the print media is excluded. This can work to the detriment of the print media when it comes to the enforcement of their media law constitutional protection.

However, it is apposite to take a look at the legislative framework that might need re-alignment with the COPAC Constitution as well as international legal instruments which cater for the right to freely establish broadcasting institutions.

**Legislation requiring re-alignment**

The legislative framework for the licensing of broadcasters is based on these primary acts:

- **Broadcasting Services Act [Chapter 12:06]** (especially Part 3 thereof)
- **Postal and Telecommunications Act [Chapter 12:05]** (e.g. look at section 33 thereof)
- **Access to Information and Protection of Privacy Act** i.e. provisions which:
  1. Provide for the statutory regulation of all media institutions and media practitioners;
  2. Criminalize the practice of journalism without registration;

These provisions place restrict certain individuals and entities from obtaining licences and lay down the procedures of how either the state broadcaster or any private commercial broadcaster is to operate or acquire a broadcasting license.

Historically, Zimbabwe has followed a monopolistic approach to television and radio broadcasting, and one state broadcaster (ZBC) has dominated Zimbabwe’s airwaves since independence in 1980 (MISA). This was inherited from the Rhodesian broadcasting system as regulated by the 1957 Broadcasting Act, which guaranteed the state a monopoly over broadcasting by providing under its section 27 that;
“No person other than the Corporation shall carry on a broadcasting service in the country. No person other than the Corporation ... shall operate a diffusion service ... otherwise than in accordance with the approval of the Minister or other consultation with the Posts Corporation.” [See also section 14 of the repealed Radio Communication Services Act]

This monopoly was eventually challenged by the private company Capital Radio and declared unconstitutional in 2000 by the Supreme Court of Zimbabwe (see Capitol Radio (Pvt) Ltd v Broadcasting Authority of Zimbabwe) SC 128/02. The court ordered that the government amend the law so as to put an end to the monopoly and create space for private and community radio stations to gain access to the airwaves thus formally ending its monopoly over broadcasting. The Supreme Court ordered that section 27 of the Broadcasting Act and section 14 of the Radio Communications Act be repealed.

The Broadcasting Services Presidential Powers (Temporary Measures) Bill, which became an Act in April 2001 (The Broadcasting Services Act), was then passed as a response to this judgement.

The Broadcasting Services Act 2001 in its section 3 establishes the Broadcasting Authority of Zimbabwe (BAZ) as the regulatory and licensing authority for the broadcasting sector. In terms of the first schedule to the Act, the Posts and Telecommunications Authority of Zimbabwe (POTRAZ) allocates all frequencies for the purposes of broadcasting services to the BAZ for planning, licensing, managing and allocating frequencies for all broadcasting systems and services in Zimbabwe.

The BAZ has the responsibility ‘to plan and advise on the allocation and distribution of the available frequency spectrum’ and ‘to receive, evaluate and consider applications for the issue of any broadcasting licence or signal carrier licence.’ The Amendment Act 2003 gives the BAZ the power to determine who is to be issued a licence and when, to set the terms and conditions applicable in each individual case and to decide on the amendment, suspension and cancellation of licences. A major cause for concern has been that the constitution and appointment of BAZ board members compromise its independence since members are Presidential appointees with no security of tenure and this obliges the members to play second fiddle to the whims of the executive.
PROTECTION OF THE CONFIDENTIALITY OF JOURNALISTS’ SOURCES OF INFORMATION

The Lancaster House Constitution did not provide for journalistic privilege or protection of journalists’ sources of information. There is a case which aptly depicts the dilemma faced by Zimbabwean journalists under the Lancaster House Constitution in the following succinct terms; ¹

“Whereas, on the one hand, if he does not give a guarantee to his source that he will not reveal the source’s identity, he is unlikely to obtain the information he is after, on the other hand, if he does not give his source that guarantee, he stands the risk of being imprisoned if the matter subsequently ends up in court and he refuses to disclose the identity of his source upon being ordered by the court to do so”

In the English case of Lion Laboratories Ltd v Evans and Others [1984] 2 All ER 417 (CA), Lord Denning added his voice and remarked that;

“...newspapers should not in general be compelled to disclose their sources of information. Neither by means of discovery before trial. Nor by questions of cross-examination at the trial. Nor by subpoena. The reason is because, if they were compelled to disclose their sources, they would soon be bereft of information which they ought to have. Their sources would dry up. Wrongdoing would not be disclosed. Charlatans would not be disclosed. Unfairness would go unremedied. Misdeeds in the corridors of power, in companies or in government departments would never be known. Investigative journalism has proved itself a valuable adjunct of the freedom of the press notably in the Watergate exposure⁴ in the United States and the Poulson exposure⁵ in this country (the UK). It should not be unduly hampered or restricted by the law...”

It is against this background that the COPAC Constitution has sought to develop the common law in this regard by providing for journalistic privilege under its section 61(2) which provides that;

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¹ Per Robinson J in Shamuyarira v Zimbabwe Newspapers (1980) Ltd & Another 1994 (1) ZLR (HC)
² The Time Magazine Report of 16 May 1977 in which the involvement of the Nixon administration in the break-in into the Watergate hotel was unearthed (the scandal led to the only resignation of an American president- i.e. that of President Richard Nixon).
³ A British corruption scandal of the 1970s wherein John Poulson; an architect of repute, was found to have paid bribes to win big architectural contracts.
“Every person is entitled to freedom of the media, which includes protection of journalists’ sources of information”

This means a journalist is no longer a compellable witness to adduce evidence pertaining to his/her sources of information in court.

Legislation that require Re-alignment

- **Section 199 of the Criminal Procedure and Evidence Act [Chapter 9: 07]** which allows the court to draw adverse inferences if an accused person refuses or fails to give information relevant to his defence. Information obtained from journalistic sources could be an exception to this general duty to disclose information.

INDEPENDENCE OF STATE MEDIA

The concept of editorial independence entails the untramelled discretion that media institutions have in as far as the determination of their media content is concerned.

The challenge in as far as editorial independence is concerned lies in the appointment system. From a legal perspective, because it is the people who own the state media, the degree of independence enjoyed by these institutions should be higher than that in the private sector.

Under **section 61(4)** of the COPAC Constitution, it is stipulated that all State-owned media of communication should be free to independently determine their editorial content of their broadcasts or communication. The mischief behind this provision seems to be the need to stem the characteristic proclivity by the executive arm of the state to exercise control over the state-owned media.

In order for this provision to achieve meaningful results on the ground, it is imperative to emphasize the need to enact legislation that inculcates ideals of independence for the state-owned media.

Legislation requiring re-alignment

- **Part 2 of the Broadcasting Services Act** and in particular section 4B of the Act which gives the Minister the power to give policy directions to broadcasting institutions.
THE RIGHT TO INFORMATION

“The right to information is a tool for promoting participatory development, strengthening democratic governance and facilitating effective delivery of socio-economic services...” 6

Section 62(1) of the COPAC Constitution provides for the right to information by stipulating that “Every Zimbabwean citizen or permanent resident, including juristic persons and the Zimbabwean media, has the right of access to any information held by the State or institution or agency of government at every level, in so far as the information is required in the interests of public accountability” section 62(1)

Under section 62(2) it is provided that the information to which the citizens have a right includes information “held by any person”

The COPAC Constitution in section 62(4) expressly makes provision for this right and goes on to state that “Legislation must be enacted to give effect to this right...”

This is a step which was designed to ensure that Zimbabweans become part of the modern trend of enlightened and empowered citizens thereby providing a launch pad for democracy and good governance.

The Declaration of Principles on Freedom of Expression in Africa states that:

“Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject to clearly defined rules established by law.”

This therefore means that the information held by public bodies in the exercise of their functions belongs to the public and the public’s access to these documents should not be unduly restricted or denied.

There was no provision for the right to access to information in the Lancaster House Constitution. This fact automatically watered down the importance of the right as it was not expressly entrenched in the highest law of the land. Despite this, the right was solely provided for in the Access to Information and Protection of Privacy Act (AIPPA).

6 M.M Ansari, Right To Information and its Relationship to Good Governance and Development
Legislation requiring re-alignment
Access to Information and Protection of Privacy Act

This piece of Legislation regulates the practice of gathering and disseminating information by the media by;

3. Providing certain restrictions on the access to public information.

Section 5 of the Act gives the right to access to information by stating that “every person shall have a right of access to any record, including a record containing personal information, that is in the custody or under the control of a public body: Provided that such access shall not extend to excluded information.”

The Act in sections 14 to 25, however goes on to prescribe information that may not be accessed and section 9(4) (c) gives heads of public bodies the power to refuse a request for information if “it is not in the public interest”.

In order for any person to have access to a record or information held by a public body, a request made in writing must be made to that public body and a prescribed fee must be paid. (Section 6 and 7)

With regards to the time frames in which the giver of the information is supposed to respond, such giver is supposed to respond within 30 days of receiving the request (section 8), however such period can be extended for a further period of no longer than 60 days in the following circumstances;

1. if the applicant does not give sufficient detail to enable the public body to identify the requested record;
2. if a large number of documents were requested and more time is needed to complete the search;
3. If more time is needed to consult a third party or another public body affected by the request.

What should be kept in mind when interpreting the provisions of the Act is the purpose behind providing for those time periods. It has to be acknowledged that information and records held by public bodies may be sensitive information and care would need to be taken in giving out such information, hence the time periods. However, this has to be balanced against the need to foster a democratic system in which the public is entitled to have access to information that affects their lives. This balancing exercise must inform the conditions under which such information is provided and the implementation of these conditions must not be hindered by undue bias.

Due consideration must also be given to the information that must not be disclosed in terms of the AIPPA. This exclusion also encompasses circumstances where the disclosure of the information lies at the discretion...
of the head of the public body concerned. In terms of the Act, such information includes the following (as laid out in sections 14-28 of the AIPPA):

- the debates of the Cabinet; advice which is related to policy;
- privileged information;
- information which if disclosed will be detrimental to national security and which will compromise the law enforcement process;
- information relating to inter-governmental relations; information concerned with the economic interests of the State;
- Information relating to personal safety and privacy and the interests of a third party.

However the non-disclosure of this information must be balanced against the need to disclose certain information particularly the following information (Section 28):

- information relating to the risk of harm to the health and safety of the public and/or the environment;
- information that threatens that is in the interests of the public;
- Information that aids the prevention and detection of a crime.

This provision acknowledges the fact that access to information needs to be provided for but limitations to this access have to exist. These limitations, however, have to be reasonable, reasonable in the sense that they do not infringe other constitutionally guaranteed rights.

The test to measure reasonableness therefore should not be left to the complete discretion of the public official but should be measured up against other rights that may be affected by the limitation. This ensures that the limitation is justifiable.

**ACCESS TO INFORMATION HELD BY THE STATE FOR THE PROTECTION OF A RIGHT**

This is an innovation brought about by the COPAC Constitutions whose main mischief is to buttress the bill of rights.

*Qualifiable Exceptions to the Right of Access to Information*

*Professor Feltoe* expressed the dangers inherent in the unfettered right to information and the need to balance the right to information against the need to protect reputation. He thus wrote;

“The paper would be obliged to take proper steps to check its stories and thus reputations would not be left to reckless or careless reporting...the
paper would not be left exposed to large scale damages if it behaved in a responsible and professional way in checking facts...”

The same principle has been recognized by the drafters of the Constitution by providing in its section 62(4) that;

“Legislation...may restrict access to information in the in the interests of defence, public security, or professional confidentiality, to the extent that the restriction is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom”

The foregoing restrictions are in consonance with the benchmark set by the **UN Human Rights Committee**, that restrictions can be deemed legitimate and justifiable if they meet a three pronged test, namely:

a) **That the restrictions or limitation must be provided by law duly passed by parliament. It cannot therefore be arbitrary and the law in question must meet certain standards of clarity and precision so that it is clear in advance exactly what expressions are prohibited. (European Court of Human Rights, 1979)**

b) **The interference must pursue a legitimate aim (i.e.) the right of privacy;**

c) **The restriction must be necessary in a democratic society: a pressing social need must be demonstrated, the restriction must be proportionate to the aim and the reasons given to justify the restriction must be relevant and sufficient.**

Legislative re-alignment required

- **Provisions in the Access to Information and Protection of Privacy act which place undue restrictions on the right of access to information as outlined above.**

**ENFORCEMENT MECHANISMS**

The new regime of **locus standi** under the COPAC Constitution is a departure from the traditional common law rule which emphasized on the existence of a real, substantial and direct interest in the subject matter of litigation. Section 85 however does away with this. The section states that it is not a requirement for one to show interest in the outcome of litigation before one can be clothed with legal standing. Under the previous Constitutional regime the courts could invoke the ‘dirty hands’ doctrine by denying legal standing to the media institutions operating ‘outside the law’.  

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7 Guide To Press Law, page 22  
8 See Associated Newspapers of Zimbabwe (Pvt) Ltd v Minister of State for Information and Publicity and Anor SC 111/04
However the COPAC Constitution introduces a new broad approach to the issue of legal standing in terms of section 85(2) thereof which states that; “The fact that a person has contravened a law does not debar them from approaching a court for relief”.

This is a significant step towards the full realisation of the media rights. Further, there is wide scope for public interest litigation under section 85 as it is no longer requirement that the person bringing a claim to court should have a personal interest in the subject matter of the litigation. For these rights to be fully realised provision is also made to ensure that courts do not adopt a restrictive model of interpretation but a broad and purposive which seeks to accord those rights provided for under the bill of rights (section 46 of the COPAC Constitution).

A further step has been provided for to buttress this right namely that of obligating all court rules to facilitate that the right to approach the courts is guaranteed to all and sundry. There is a normative stipulation for the courts to simplify their proceedings and this stems from the realisation that our adversarial system of litigation is sometimes hampered by technicalities and formalism which usually works to the detriment of the ordinary litigant. It remains to be seen how this will work out in practice but generally the spirit and tenor of the COPAC Constitution offers a liberal and broad platform for the enforcement of the bill of rights provisions under which the interrogated regime of rights falls.

The establishment of the Zimbabwe Media Commission as a constitutional body is quite positive in that it acts as a media rights watchdog. However, there is need to emphasize on the independence of this body and this loophole can compromise the proper functioning of the body.
RESTORING THE RIGHT TO BAIL AND THE PRESUMPTION OF INNOCENCE
The story about bail and the presumption of innocence in the modern world: Thoughts on reforms to the bail system

Tafara Goro*

ABSTRACT
This article provides a historical analysis of the right to bail in modern criminal justice systems of selected jurisdictions by giving a brief analysis of the bail systems of those jurisdictions. The paper is more descriptive than critical. What emerges from the paper, however, is that there is a need for a world-wide restoration of the right to bail and presumption of innocence to ensure the protection of individual liberty as part of human rights. Emphasis is always placed on the”due process clauses” which provide for the constitutional basis for the presumption of innocence and how the presumption secures at least one pre-trial right: the right to release on bail.

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INTRODUCTION

The most commonly repeated adage in modern criminal justice system is the presumption of innocence that accused persons are deemed innocent until proven guilty. Any realistic assessment of bail procedures needs to proceed on the basis that the presumption of innocence must give way to individual liberty and a deep understanding of the foundational elements of the right to be presumed innocent in all circumstances. Many scholars over centuries have argued that bail conditions have to be reconciled with the presumption of innocence and should in any circumstance ensure the vindication of this right. As such, restrictive bail conditions will invariably run foul to the presumption of innocence. This is particularly so given the fact that the right to bail is an extension of a cluster of rights that seeks to protect individual rights from potential infringement by the state: viz, the right to personal liberty, right to a fair trial, right to counsel, right to be informed of the offence, nemo debet bis vexari pro una eat eadem causa principle and indeed, the right to be presumed innocent. The importance of this understanding is that there must be no gradual erosion of the presumption in favour of bail. This article provides an examination of the due process model of the criminal process which provides for the constitutional basis for the presumption of innocence and how the presumption secures at least one pre-trial right: the right to release on bail, absent serious flight risk. One would feel that there must be a worldwide revolution of returning the presumption to its constitutional foundation in order to minimise confusion in issues of bail and to ensure a more consistent approach to pre-trial decisions. It must be noted that the purpose of bail is to ensure that one stands trial, as is in the interests of justice, and not preventing additional crimes per se. The theoretical bedrock of bail bargaining is deeply laid in two basic models, viz, crime control and the due process model. J van der Berg contends that Parker managed to distinguish between the two basic procedural models. The crime control model proceeds from the premise that the repression and constraint of criminal behaviour is the primary function of the criminal justice system having its emphasis on the interests of the society whilst the due process has a different value system. This value system has its roots in an acknowledgement that the criminal process should operate in the interests of preventing official repression of the subject whose liberty is at stake. Thus, the criminal justice system is mandated to control itself and to grant procedural rights to an accused at every possible stage of the process. In this light, it is undoubtedly clear that in criminal justice jurisprudence, the right to bail forms part of the due process of the law and requires the application of principles of rationality by the courts in order to temper the rigours of
positivism. It is necessary, thus, as the starting point of the “revolution”, to trace the bail system from its historical inception, with the practices in selected jurisdictions concluding how far the various bail systems have managed to uphold the right to bail and the presumption of innocence.

**WHAT IS BAIL?**

Bail is a way of allowing a person who has been remanded for trial at a later date to remain at liberty until the final determination of his trial\(^1\). The grant of bail is in the form of a contract in terms of which the state commits itself to the accused’s freedom while the accused undertakes to stand trial. It is, therefore, of importance to note that the contracting parties are the state and the accused and the role of the court as a third party is a decisive one which vests discretion in the judiciary to balance the interests of the two parties. From the onset, it is clear that living decisions regarding the granting of bail in the hands of the state which is, of course an interested party, would lead to unfair denial of the right to bail. Therefore, the role of the judiciary in this instance is of great importance. However, the role of the court is a flexible one, this is articulated in cases where the prosecutor and the accused person reach a consensus about the terms of the contract, the court is never bound by the terms and suggestions made therein and it may itself supplement the terms of the contract by fixing an amount or adding any terms which it deems necessary in the interests of justice. This whole process has been referred to as the “bail bargaining” process. It must be stressed that underlying the concept of bail is the presumption of innocence whereby every person is presumed to be innocent until he is adjudged to be guilty by a court of law. It is clear that pre-trial incarceration is of a penal nature, depriving the *prima facie* innocent person of his freedom. It then follows that the concept of bail, in the context of the presumption of innocence, is a human right. The bail procedure as part of the criminal procedure provides a device whereby there is a balance between the state and the accused person pending trial, at the same time protecting the interests of justice. Clearly, this is the spirit of the bail system and the rationale of the right to bail undoubtedly lies in the presumption of innocence. It is noteworthy that many modern jurisdictions have managed to entrench this right in their Bill of Rights and charters, an example being Section 35 (1) (f) of the South African Constitution.

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PRESUMPTION OF INNOCENCE IN A CONSTITUTIONAL DEMOCRACY

The bail system and its procedures must, as a matter of necessity, be assessed and applied in light of the overall constitutional legal framework consisting of fundamental principles of criminal justice and human rights values entrenched in the Constitution as well as policy considerations which form the foundations of the criminal justice system from arrest to the final appeal.

J. Van Derg describes the presumption of innocence as the “golden thread” woven throughout the web of the criminal law. The presumption is an integral part of the rule of law “Rechtsstaat” and seeks to protect personal liberty from state erosion and repression. It is trite that each court, when interpreting any legislation should promote the letter and spirit as well as the objectives of the Bill of Rights. In the American case of Stack v Boyle 342 US 1 4 it was held that the presumption of innocence accrues to the accused before trial. However, there has been a unanimous approach both in the South African and American courts that the presumption of innocence operates as a rule operating in favour of the accused’s pre-trial liberty.

Chakalson contends that “pre-trial treatment of the accused should proceed from the assumption that he is innocent and his basic rights are not to be disturbed or ignored on an unconstitutional assumption of guilt before it is proved by the state in a fair public trial before an ordinary court of the land”.

The presumption of innocence presupposes that no one must be punished until the presumption is rebutted by proof of his guilt beyond a reasonable doubt. The Diceyan formulation of the principle of legality provides the foundational elements of the principle of Reichsstaat which sets a similar prohibition against pre-trial punishment. However, case law in Zimbabwe has provided a blindfold because in most cases magistrates err by considering that the accused is probably not innocent for the simple and startling reason that he would not have been arrested by the police if he was as innocent. One is reminded of the all too common proverb of there being no smoke without fire. Whilst in proper cases the “smoke” might be the reasonable suspicion required to effect arrest, using this proverb in the criminal law is ill advised (McNally JA). It is, thus, this confusion that has seen many accused persons denied bail. It is also on these grounds that whilst

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2 Quoted by J. Van der Berg’s Bail – A Practitioner’s Guide, 2nd Edition, at page 18. This view confirmed the Pearson (1992) 77 CCC (3d) 124 (SCC) 136-1, decision in which the court held that “the principle does not necessarily require anything in the nature of proof beyond a reasonable doubt, because the particular step in the process does not involve a determination of guilt. Precisely what is required depends upon the basic tenets of our legal system as exemplified by specific Charter rights, basic principles of penal policy as viewed in the light of “an analysis of the nature, sources, rationale and essential role of that principle within the judicial process and in our legal system, as it evolves”
the law presumes the accused person as being innocent, in the court he is regarded as probably guilty of which the court has the power to grant or refuse bail. This does not in any way rebut the presumption of innocence until the accused’s guilt has been proven beyond a reasonable doubt. This principle is the true spirit of the due process of the law. The due process fertilized by the presumption of innocence provides the foundation of a constitutional democracy.

HISTORICAL UNDERSTANDING OF “BAIL BARGAINING”

The history of bail bargaining is treated as an extension of the right to be presumed innocent until proven otherwise. Shimmar Baradan offers a survey of this history in a paper entitled “Restoring the Presumption of Innocence” where the author contends that historically, the presumption of innocence and the due process principles included a presumption of bail for non-capital cases and guaranteed that guilt would not be determined before trial. The presumption of innocence came into effect when a defendant was arrested and charged. One of the most significant protections that accompanied the presumption of innocence was the constitutional right to pre-trial release through bail. While there was some discretion and bail was not always allowed for every alleged crime, it was generally presumed for all accused due largely to the presumption of innocence. English bail law presumed that defendants would be released and discussed the “bail decision” as though it were a decision of how to release the defendant, not enquiring on if he would be released. To deny bail to a person who is later determined to be innocent was thought to be far worse than the smaller risk posed to the public by releasing the accused. Some ancient English law banned pre-trial detention in all criminal cases, even murder, due to the presumption of innocence. However, by 1275 and for the subsequent 500 years, there was an exception in bail law prohibiting bail in murder cases, though those accused of murder were often released anyway. It is this foundation that has since seen most of the modern legal systems approaching the right to bail and presumption of innocence in different but reconcilable perspectives. With most of the bail systems offering conditional release on bail and some also offering without conditions release on bail and despite all these differences, the underlying rationale is to ensure that a detained individual does not lose his liberty in an unreasonable, unconstitutional and unjustifiable manner.

DUE PROCESS AND BAIL

A due process model is premised on the idea that the operation of the criminal process should be done within the bounds of respecting the rights of the accused persons which are always at stake. However, there must always be a balance between the two competing interests, and pre-trial bail must always ensure or try to balance the just demands of society that the interests of justice should not be prejudiced. Contextualisation of societal interests of course brings to light the fact that a valid consideration should be
acknowledged that an accused that will stand trial should be released on bail for him to prepare his defence without difficulty. It is, thus, in this context that the inter-relationship between the due process and the bail system is founded. Overall, the rational basis of any bail system is to promote and protect the interests of society as well as the interests of the individual. There must, of course, be a balance that must be struck to reconcile the two competing interests and there should not be any unnecessary recognition of one of the interests to the prejudice of another. This helps to explain the role of the judiciary in the bail system, except bail by police. The bail system consists of a set of rules and norms that regulate the granting of bail. It is, therefore, submitted that the proper repository of the jurisdiction over bail is the Judiciary that has the inherent jurisdiction to bridge the gulf between positivism and rationality. The presumption of innocence is one of the most familiar maxims in criminal law. The presumption protects defendants from the time of charge to trial. Grounded in the due process phenomenon, the presumption prohibits judges from predicting whether accused persons are guilty. Preventing judges from deciding defendants’ guilt before trial ensures that accused persons remain at liberty before trial and the final determination of the case. At trial, the presumption solely applies to require prosecutors to prove guilt beyond a reasonable doubt.

**ANALYTICAL CONCEPTION OF THE TWO MODELS AND THE BURDEN OF PROOF IN BAIL PROCEEDINGS**

In most bail systems in the modern world the onus lays with the accused person who has to convince the court on a balance of probabilities that the interests of justice demands that the court exercise its discretion in his favour. An analytical approach to the two models- that is the crime control model and the due process model provides a critique for this practice. With regards to due process, it provides that an accused person must be released on bail unless there are convincing reasons for denial; mainly that he would not be able to stand trial. Packer argues that “A person accused of crime is entitled to remain free until judged guilty so long as his freedom does not threaten to subvert the orderly processes of criminal justice”\(^3\). The crime control model, the accused is entitled to be granted bail only if there is sufficient indication that he will stand his trial. The logic in the criminal control model is that: If the accused goes free, there is a risk that he will not appear for trial and therefore indications that he will stand trial are required. In light of the above, it is clear that there is an acute conflict between the two models and the incidence of the onus and the elements of factors to be proved played a prominent decisive role.

\(^3\) Packer, The Limits of the Criminal Sanction (1968) page 215.
MODELS OF BAIL SYSTEMS IN THE MODERN WORLD

Samuel Kwesi Omoo exhaustively discussed the various models of bail system in modern legal systems and noted that there are three models to the right to bail as a human right. The author argues that the first model is premised on a policy and a constitutional position that makes the Legislature the repository of the determination of the right to bail and leaves the Judiciary with the implementation of broad legislative directives. The legislative directive invariably includes mandatory refusal of bail in certain offences and the Judiciary is left with the discretion to determine the grant or refusal of bail in other cases with the primary objectives of promoting the due process of law and securing the presence of the accused before the jurisdiction and judgment of the court. The second model or approach is premised on the constitutional position that grants the sole determination of the right to bail to the Judiciary, subject to a minimum degree of legislative intervention. This approach does not prescribe for bailable and non-bailable offences. The accused or arrestee has the prima facie constitutional right to apply for bail, irrespective of the seriousness of the alleged offence. The first model/approach is adopted by countries such as Zambia, Zimbabwe, Ghana, India and certain states in the United States and the second model/approach has been adopted by countries such as Namibia. The third model/approach may be described as a hybrid of the first two models/approaches. The power over determination of matters relating to bail is generally vested in the Judiciary. There is no legislative directive as to mandatory refusal of bail in certain cases; the law does not draw a distinction between bailable and non-bailable offences. However, there is a legislative intervention in the form of legislative guidelines that the Courts must follow in the exercise of their discretion to grant or refuse bail in serious or scheduled offences. This is the South African model.

THE JURISPRUDENCE OF THE RIGHT TO BAIL UNDER INTERNATIONAL LAW

Human rights advocacy has received attention in the international arena, with much concern on the potentiality of abuse of the rights of the individual in the process of the enforcement of the penal laws by the state security apparatus and law enforcement agents. The International community managed to design several articles and charters to cater for this potential abuse and the full recognition of individual rights in criminal justice systems and this has resulted in legislative intervention at both international (in the form of international covenants and conventions) and national levels aimed at protecting the rights of the individual. Many modern jurisdictions have

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4 Senior Lecturer: Head of the Department, of Private and Procedural Law and Co-ordinator the Legal Aid Clinic, Faculty of Law, University of Namibia in his paper “The Bail Jurisprudence of Ghana, Namibia, South Africa and Zambia”, Forum on Public policy.
managed to domesticate these International Bills of Rights and treaty norms in their constitutions and domestic legal systems. The right to bail is generally treated as an extension of the right to personal liberty. International instruments such as the Universal Declaration of Human Rights, the African Charter on Human and Peoples’ Rights and the International Covenant on Civil and Political Rights (hereinafter referred to as ICCPR), have provisions protecting the rights of the personal liberty of the individual both during pre-trial and trial proceedings and these provisions have been internalised in the municipal laws of most countries.

**UNIVERSAL DECLARATION OF HUMAN RIGHTS**

The Universal Declaration of Human Rights recognises the inherent dignity and the equal and inalienable rights of all members of the human family regardless of sex, race, colour, language, religion or distinction of any kind. The following provisos are essential for the purpose of this discussion.

*Article 9*
No one shall be subjected to arbitrary arrest, detention or exile.

*Article 10*
Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

*Article 11 (1)*
Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

**THE AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS**

*Article 6*
Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may arbitrarily arrested or detained. The following provisos are also important for the discussion:

*Article 7(d)*
Every individual has the right to be tried within a reasonable time by an impartial court or tribunal.

**THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)**

*Article 9 (1)*
Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his
liberty except on such grounds and in accordance with such procedure as are established by law.

**Article 9 (2)**

Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

**Article 9 (3)**

Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.

**Article 9 (4)**

Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

These international instruments provide for a general application of the basic principles of the law of treaties, parties to international treaties are States, the UN and other international organizations and such international standards and norms become binding on State parties either through the constitutional technique of legislative incorporation or in some instances, as customary international law. These international instruments guarantee the civil and political rights of every citizen as well as the democratic values of human dignity, equality and freedom. In the Bill of Rights provisions, rights such as the right to fair hearing, including the right to be heard, to appeal, to be presumed innocent, to be defended by counsel of one’s choice and to have a trial within a reasonable time by an impartial court or tribunal are both entrenched and justifiable. Therefore, these international treatises show the concern of the international community advocating for a human rights approach to all criminal processes and adherence to the rule of law and constitutionalism. The United Nations Human Rights Committee contends that neither further investigation of the charges against the accused nor the seriousness of the crime, justifies prolonged pre-trial detention.

**EXAMPLES OF BAIL SYSTEMS UNDER THE FIRST MODEL**

**ZAMBIA**

The Zambian position with regard to rules governing the grant or refusal of bail are set out in the Constitution, the Criminal Procedure Code, and the common law. In the context of the right to bail, the Constitution of Zambia encapsulates the constitutional rule that the defendant is presumed to be innocent until he is proven to be guilty. These are the fundamental provisions relating to bail and the protection of the rights of the detained person or the accused. The Zambian position was aptly captured in the case of *Chetankumar Satkal Parekh v The People* (Supreme Court of Zambia unreported). These provisions ensure that the defendant shall not be subject
to unnecessary pre-trial deprivation of his freedom. This is articulated under Article 13 (3) and 18 (1) of the Constitution; and Section 33 (1) of the Criminal Procedure Code, which provide that arrested persons are to be taken before a competent court without undue delay and if not tried within a reasonable time should be released either conditionally or unconditionally. The Criminal Procedure Code provides for the rest of the legislative principles, both substantive and procedural. In essence, the primary policy is that in the interest of the security of the community/society and guaranteeing the completion of criminal proceedings and promoting the due process of the law, a person charged with a scheduled offence such as murder, treason, aggravated robbery, rape etc. is not eligible for bail. The Zambian legislature has accordingly legislated for bailable and non-bailable offences. The Courts are mandated to refuse bail under section 123 of the Criminal Procedure Code. The right to bail is, therefore, guaranteed under Zambia’s Constitution. However, Section 123 of the Criminal Procedure Code provides for specific offences that may not be bailable. The effect of this is that the accused person in such an instance is condemned unheard. The provisions in the Criminal Procedure Code curtailing the discretion of the courts to grant bail in specified instances can be considered to be unconstitutional when measured against Articles 13 (3) and 18 (1) of the Constitution which require any accused person charged with an offence to be afforded a fair hearing before an independent tribunal within a reasonable time. The automatic denial of bail, thus, negates the spirit of the provisions of the Constitution by allowing that an accused person be denied the opportunity to appear before an impartial tribunal and to state reasons why he believes he should be granted bail.

In addition, the provisions can also be regarded as unconstitutional as they attempt to curtail the unlimited jurisdiction of the High Court to hear all civil and criminal matters, which is guaranteed under Article 94 (1) of the Constitution. In summary, under Zambian bail jurisprudence, the determination of whether or not an accused has the right to apply for bail depends on the classification of the offence. The courts have unfettered discretion to entertain applications for bail in offences prescribed as bailable and make determinations on the applications taking into consideration various factors. However, in cases involving serious offences prescribed as non-bailable, the Courts are mandated to refuse such applications. Under the so-called Constitutional bail concept, an accused is entitled to bail if the trial does not take place within a reasonable period through no fault of the accused. However, as stated earlier under this bail regime, the rights of the accused stand compromised and susceptible to be violated.

ZIMBABWE

The question must be asked whether Zimbabwe’s bail system is based upon a due process model or a crime control model and upon whom does the onus lie in a bail application? Section 18 of the Constitution promotes the values
underlying a democratic society based on human dignity, equality and freedom. The right to liberty in Section 13 of the Constitution entails that no one must be deprived of his liberty despite by lawful means. In terms of Section 18 (3) of the Zimbabwean Constitution, every accused person has the right to a fair trial, which includes the right to be presumed innocent until “legally” proven guilty. Several provisions in the Criminal Procedure and Evidence Act shows a tilt towards the crime control model rather than the due process model. However, case law in Zimbabwe has provided a blindfold because in most cases magistrates err by considering that the accused is probably not innocent for the simple and startling reason that he would not have been arrested by the police. Bail proceedings are provided for in Part IX of the Criminal Procedure and Evidence Act [Chapter 9:07]. Section 117 of the act provides that:

(1) “Subject to this section and section 32, a person who is in custody in respect of an offence shall be entitled to be released on bail at any time after he or she has appeared in court on a charge and before sentence is imposed, unless the court finds that it is in the interests of justice that he or she should be detained in custody.”

After a brief survey of the history of the bail system coupled with the presumption of innocence as practiced in several jurisdictions it is now at this point that the discussion turns to analyse the Zimbabwe bail system and compare the practice with other jurisdictions in order to have a clear cut conclusion whether or not the bail system in Zimbabwe is justifiable in a constitutional democracy. The Zimbabwean Constitution 1980 does not entrench the right to bail. In Zimbabwe, any detained individual is entitled to bail pending trial in one of the three circumstances, viz, police bail as provided in Section 132 of the Criminal Procedure and Evidence Act with the limitations provided in that section, by a magistrate or by a judge of the High Court. The power of the magistrate to grant bail is limited as provided for in Section 116 (b) of the Criminal Procedure and Evidence Act. A magistrate can exercise his discretion subject to jurisdiction and is not allowed to grant bail where an accused has committed any offence specified in the Third Schedule. The offences in the Third Schedule are:

1. Treason.
2. Murder otherwise than in the circumstances referred to in paragraph 1 of Part I.
3. Attempted murder involving the infliction of grievous bodily harm.
4. Malicious damage to property involving arson.
5. Theft of a motor vehicle as defined in section 2 of the Road Traffic Act [Chapter 13:11].
6. Any offence relating to the dealing in or smuggling of ammunition, firearms, explosives or armaments, or the possession of an automatic or semi-automatic firearm, explosives or armaments
7. A conspiracy, incitement or attempt to commit any offence referred to in paragraph 4, 5 or 6.
8. Any offence where the Attorney-General has notified a magistrate of his intention to indict the person concerned in terms of section 66.

However, where a person is charged with any of these offence, the prosecutor should, if the docket does not indicate what the Attorney-General’s attitude is, ascertain from the Attorney General’s Office whether the Attorney consents to the accused’s admission to bail.

There are no limitations on the High Court’s power to admit an accused to bail. It can admit a person to bail regardless of the nature of the offence as outlined in Section 116 (a) of the Criminal Procedure and Evidence Act. However, despite this inherent and unlimited jurisdiction, the limitations are provided in Section 117 (2) of the Act. A careful scrutiny of these provisions in light of the two theoretical models of bail articulated by Parker, it is clear that Zimbabwe’s bail system is biased towards criminal control rather than the due process. This view is premised on the fact that due process model is premised on the idea that the operation of the criminal process should be done within the bounds of respecting the rights of the accused persons which are always at stake whilst the just demands of society that the interests of justice should not be prejudiced. Contextualisation of societal interests, of course, brings to light the fact that a valid consideration should be acknowledged that an accused who will stand trial should be released on bail for him to prepare his defence promptly and effectively. It is, thus, in this context that the interrelationship between the due process and the bail system should be found. It must be noted that the accused has a constitutional right to his liberty and that the court must therefore favour liberating him, and thus, it is for the prosecution to persuade the court that it is necessary to deprive the accused of his right to liberty.

Overall, the rationale basis of any bail system is to promote and protect the interests of society as well as the interests of the individual. This is clear when considering the reverse onus required in bail procedures in Zimbabwe. Zimbabwe’s bail system juxtaposed with the Canadian system bring to light that the primary consideration should be release of a detained individual unless there are pertinent reasons for denial of which these reasons have to be entertained on secondary grounds.

Section 117 (2) of the Criminal Procedure and Evidence Act, bring to oblivion the spirit of the right to bail and presumption of innocence. Coupled with the confusion aptly noted by Kriegler in the South African case of *S v Dlamini 1999 (2) SACR 51 (CC)*, whenever, there is a point of departure in a criminal control bail system; the accused will be granted bail *only if* there are sufficient indications that he will stand trial. Thus, it is here that the onus is
placed on the accused to prove on a balance of probabilities that the risk of releasing him was acceptable. However, of note is that this practice is not unique to Zimbabwe, see the case of *S v Mtatsala*, 1948 (2) SA 585 (E) 592. It is noted that Zimbabwe can be forgiven in this instance but the credit does not go as far as freeing Section 117A (5) (a) of the Criminal Procedure and Evidence Act where the accused is compelled to inform the court whether or not he has been previously convicted of “any offence”. It is, thus, the confusion confirmed by Kriegler in the *Dlamini case, supra* that has since swerved the Zimbabwean bail system into a misconception of the real purpose of bail; which is to return to court and not preventing additional crimes. The usefulness of this provision is doubted as it serves little purpose than to erode the accused person’s right to be presumed innocent.

There Criminal Procedure and Evidence Act also provides for instances where either the accused or the prosecution is aggrieved by the decision of either a magistrate or judge in granting bail with the procedure outlined in Section 121. An appeal from the decision of the magistrate only lies with the High Court and an appeal from a decision of a judge lies with the Supreme Court.

In summary, under Zimbabwean bail jurisprudence, the determination of whether or not an accused has the right to apply for bail depends on the interests of justice clause and on the classification of the offence. The courts have unfettered discretion to entertain applications for bail in offences prescribed as bailable and make determinations on the applications taking into considerations a mix of factors. However, as stated earlier under this bail regime, the rights of the accused stand compromised and susceptible to be violated. This is prominent in a country modelled under a first model bail system.

**SECOND MODEL**

**CANADA**

Under the Canadian model/approach, the bail system is underpinned by human rights values of the new dispensation. Consequently, the Constitution provides the basic human rights of the right to liberty and due process of the law but the procedural aspects of the principles relating to bail are contained in the relevant legislation, the Criminal Code. In all cases involving bail applications the Courts are guided by certain considerations and factors in assessing the promotion of the interests of justice and the protection of the right of the individual. Below is an extract of the Constitution Act, 1982.\(^5\)

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\(^5\) Enacted as Schedule B to the *Canada Act, 1982*, (U.K.) 1982 c. 11 which came into force on April 17, 1982.
Legal Rights

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

....

9. Everyone has the right not to be arbitrarily detained or imprisoned.

10. Everyone has the right on arrest or detention

   (a) To be informed promptly of the reason therefore;

   (b) To retain and instruct counsel without delay and to be informed of that right; and

   (c) To have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.

11. Any person charged with an offence has the right

   (a) To be informed without unreasonable delay of the specific offence;

   (b) To be tried within a reasonable time;

   (c) Not to be compelled to be a witness in a proceedings against that person in respect of the offence;

   (d) To be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

   (e) Not to be denied reasonable bail without cause;

The extract of the Canadian Constitution, highlights how the Canadian Constitution has managed to entrench the right to bail and presumption of innocence in their jurisprudence. In Canada, Section 515 of the Criminal Code provides that an accused has to be released in the least onerous manner possible. Section 151 (1) provides for a presumption in favour of the release without conditions, and Section 151 (2) provides for conditional release. In terms of Section 515 (5), if an individual is denied bail, the reasons thereof must be stated and recorded. It is also provided in Section 515 (6) which creates a reverse onus where an accused is charged with an indictable offence while on bail for another indictable offence or having committed a serious drug offence. Section 515 (10) of the Criminal Code provides that an accused’s detention is only justified on two grounds:
“(a) on the primary ground that his detention is necessary to ensure his attendance in court in order to be dealt with according to the law; and 
(b) on the secondary grounds (the applicability of which shall be determined only in the event that and after it is determined that his detention is not justified on the primary ground referred to in paragraph (a)) that his detention is necessary in the public interest or for the protection or safety of the public, having regard to all of the circumstances including any substantial likelihood that the accused will commit an offence or an interference with the administration of justice”

To summarise the Canadian bail system, the determination of whether or not an accused has the right to apply for bail is deeply rooted in due process model. This ensures that under this bail system, the rights of the accused are fully acknowledged and the Canadian approach struck a clear balance in that the need for a strict adherence to the criminal control model is only provided in exceptional circumstances. The Canadian bail system is overall a second model bail system premised on the constitutional position that grants the sole determination of the right to bail to the Judiciary, subject to a minimum degree of legislative intervention. This approach does not prescribe for bailable and non-bailable offences. The accused or arrestee has the prima facie constitutional right to apply for bail, irrespective of the seriousness of the alleged offence. It is here submitted that this approach is in parity with Article 9 (3) of the International Covenant on Civil and Political Rights.

THIRD MODEL

SOUTH AFRICA

As highlighted above, the South African bail system is an amalgamated one (combination of the first and second bail system models). The South African Constitutional Court exhaustively discussed the bail system in South Africa in S v Dlamini 1999 (2) SACR 51 (CC), where the court summarised the South African bail system and stated that the point of departure is Section 35 (1) (f) of the South African Constitution which provides to the effect that “Everyone who is arrested for allegedly committing an offence has the right. To be released from detention if the interests of justice permit, subject to reasonable conditions”. It is pertinent that in South Africa, the foundations of this right is premised in Section 12 of the Constitution which guarantees the right to liberty but the right is subject to the “reasonable limitations clause” that the individual may be arrested in the public interest. The limitation is, however, circumscribed in that the detained individual is entitled to be released on bail coupled with reasonable conditions prior to conviction; while the later right is also limited by the requirements of the interests of justice.

In para 55-6 of the cyclostyled judgment, the constitutional court also noted that “There is a widespread misunderstanding regarding the purpose and
effect of bail. Manifestly, much must still be done to instil in the community a proper understanding of the presumption of innocence and the qualified right to freedom pending trial under Section 35(1) (f) [of the Constitution. The ugly fact remains, however, that public peace and security are at times endangered by the release of persons charged with offences that incite public outrage.... Experience has shown that organised community violence, be it instigated by quasi-political motives or by territorial battles for control of communities for commercial purposes, does subside while ringleaders are in custody. Their arrest and detention on serious charges does instil confidence in the criminal justice system and does tend to settle disquiet, whether the arrestees are war-lords or drug-lords”.

From the above quoted passage, it is clear that the court’s assumptions and speculations are elevated to the status of fact by virtue of judicial notice which is, however, debatable. Nevertheless, it is clear that the right of a detained individual is to be weighed against the interests of justice, so that there exist a balance between the two competing interests, viz, state interests and the individual right to liberty. In South Africa, the approach of the courts has been to view the bail application as just another application in which the applicant had to show *prima facie* (and in some cases on a balance of probabilities) that he was entitled to relief. In these courts the fundamental rights transcending the procedural formalities of the civil law has never been fully considered in the proper perspective that is the idea that human rights can only be infringed in exceptional circumstances on good cause shown. However, despite this simplistic approach, in the South African Courts, there is no rigid application of the bail provisos, as noted in the case of *S v Mtatsala 1948 (2) SA 585 (E) 592* where the onus was placed on the prosecution in respect of some issues.

Conclusively, the South African Constitution makes three things clear.

1. It expressly acknowledges and sanctions that people may be arrested for allegedly having committed an offence(s) and may for that reason be detained in custody (Section 12 of the Constitution).
2. Notwithstanding the lawful arrest and detention the person concerned has the right to be released from custody subject to reasonable conditions.
3. A set of the normative pattern of the bail system. It is that criterion for release is whether the interests of justice permit it. This requires the judicial evaluation of different factors that make up the criterion of the interests of justice, and the basic objective ascribed to the institution of justice, namely the maximisation of personal liberty snagged into a normative system of the Bill of Rights.
CONCLUSION

Bail systems involve balancing the fundamental rights of an accused person and those of the security of the community guided by due process considerations meant to protect the liberty of the individual. What is required in each case would be a proper and considered determination of the factors relevant in determining the granting of bail rather than a court, as it is the case in jurisdictions that adopt the first model, giving up its judicial role and allowing it to be replaced by the legislative guidelines or the sentiment of the community and the public. Important as these factors are, they do not relieve the judicial officer of applying his or her mind to all the relevant facts and making an appropriate determination and thereby bridging the gulf between positivism and rationality. It is clear from the discussion above that there is an urgent need for urgent reform and constitutionalization of the bail system in many jurisdictions which limits the individual right to bail and the presumption of innocence. This can be done by a full acknowledgement of international human rights treatise especially the International Covenant on Civil and Political to ensure a full realisation of the inherent human right to personal liberty which should not in any circumstance be unreasonably limited. Countries like Zambia and Zimbabwe have to reconcile their laws to fully cater for this or at least follow the South Africa approach which is an amalgamation of the first and second bail model system. It is, thus, in this context that the article calls for reforms targeted at restoring the right to bail and presumption of innocence in modern legal systems. The author calls for a revolution in the criminal justice system of these jurisdictions. Laws of modern legal systems must endorse to the full measure the provisions of several international instruments in order to ensure a full scale respect of human rights in particular the right to personal liberty and the right to fundamental fairness.
The State v. Madzokere and Others SC-08-12

Subject: Criminal Procedure; Bail Appeal

Before Malaba DCJ, in Chambers, Supreme Court of Zimbabwe

Introduction
This was an appeal against the entire judgement of the High Court in 2011, refusing bail in respect of the seven appellants. The appellants prayed that the judgement of the High Court be set aside and substituted with an order that they be admitted to bail with appropriate conditions.

Facts
The appellants faced charges of contravening s 47 of the Criminal Law (Codification and Reform) Act [Cap. 9:23] (“the Act”), it being alleged that, on 29 May 2011, they killed an inspector in the Zimbabwe Republic Police (ZRP). This was after the police officer was called to disperse an unlawful gathering of members of the youth league of the Movement for Democratic Change (MDC-T) party at Glen View 3 shopping centre. The same group of about 50 youths had earlier on been dispersed by other police officers from Glen View 4 shopping centre. The deceased and his team in uniform arrived at the shopping centre where the youths were participating in an “MDC (T) T-shirt visibility day” campaign strategy. They all wore MDC red and white t-shirts and chanted slogans and sang party songs. The youths were also braaing meat and drinking beer at Munyarari Night Club. The deceased and five other police officers entered the night club to tell the leaders that the gathering had to disperse, because it had not been authorised by the police.

It is alleged that the group then shouted “matatya ngaurawe” which when literally translated mean: “kill the frogs”. The police were then attacked with various missiles including stones, bricks and bar stools. They were forced to run out of the night club. The deceased mistook a Nissan Hardbody motor vehicle allegedly being driven by the fourth appellant for the police vehicle. He ran to it for cover. When the deceased tried to open the door to the car to seek refuge, the fourth appellant is alleged to have driven away from the deceased for about 4 metres. That is when the deceased was struck on the head with a half brick and fell to the ground and the mob of youths set upon him kicking and trampling his body until he lost consciousness and died. All the appellants were arrested at different times and places within 48 hours of the death. Together with thirteen co-accused persons the appellants appeared before the High Court and they applied for bail. After hearing arguments from counsel, the High Court granted bail on conditions to twelve accused persons. Bail was refused to eight accused with one of them later being granted bail.
The decision of the High Court

In the determination of the application the High Court applied s 117 of the Criminal Procedure and Evidence Act (“the CP & EA”) which provides:

“117. Entitlement to bail

(1) Subject to this section and section 32, a person who is in custody in respect of an offence shall be entitled to be released on bail at any time after he or she has appeared in court on a charge and before sentence is imposed, unless the court finds that it is in the interests of justice that he or she should be detained in custody.

(2) The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established-

(a) where the likelihood that the accused, if he or she were released on bail will –

(i) endanger the safety of the public or any particular person or will commit an offence referred to in the First Schedule; or

(ii) not stand his or her trial or appear to receive sentence; or

(iii) attempt to influence or intimidate witnesses or to conceal or destroy evidence; or

(iv) undermine or jeopardise the objectives or proper functioning of the criminal justice system, including the bail system; or

(b) Where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine public peace or security.”

In its interpretation of the provisions of s 117 of the CP & EA, the High Court said:

“This section makes it clear that an accused person is entitled to be released on bail, unless the court finds that it is in the interests of justice that he or she be detained in custody. The detention of the accused person in custody can only be in the interests of justice if one or more of the factors mentioned in section 117 (2) is or are established against him. The release of an accused person on bail is aimed at enabling him to attend trial while out of custody. It does not mean that he or she has no case to answer. On the other hand the detention of an accused person in custody is meant to secure his or her attendance to stand trial, if there are genuine grounds for believing that the
factors set out in section 117 (2) have been established against him. That is why the seriousness of the charge that the accused is facing is not on its own enough to deny an accused person bail.”

The High Court went on to state that the court must seek to strike a balance between the interests of justice and the liberty of the accused. It indicated that section 117 leans towards the liberty of the accused person, hence the use of the words…’shall be entitled to be released on bail, at any time after he or she has appeared before a court on a charge, and before sentence is imposed, unless the court finds that it is in the interests of justice that he or she should be detained in custody.” The court affirmed that the intention of the legislature was obviously to make section 117 consistent with the presumption of innocence until proven guilty. The proof or lack of it can only be established at trial. The High Court also stated that it was satisfied that with stringent bail, applicants who have not shown a propensity to abscond can be granted bail. The High Court also stated that it was satisfied that those who have shown a propensity to abscond should not be granted as they are flight risks.

The High Court found that each of the seven accused had shown a propensity to abscond. They were found to be flight risks and not suitable candidates for admission to bail.

Grounds of appeal
The appellants challenged the decision of the High Court with leave in terms of s 121 of the CP & EA as read with s 44 (5) of the High Court Act [Cap 7:06]. The grounds of appeal were that:

1. The court a quo erred by finding that appellants were flight risks, there being insufficient evidence showing any inclination to abscond

2. The court a quo grossly misdirected itself by making findings which were not supported by the facts and evidence placed before the court.

3. The distinctions drawn by the court for granting bail to other jointly charged applicants and denying others are improper distinctions. Where there is an improper distinction there is no distinction at all. The court ought to have treated like-accused-alike.

4. The first, sixth and seventh appellants were denied bail for the reason that they were hiding at lodges to avoid arrest, and as such were flight risks. This finding was not supported by the facts and evidence placed on record. The court a quo mistook the facts.

5. The court a quo erred in coming to the conclusion that the second appellant’s assurances to give up his employment in Botswana was not sufficient if he could not explain how he would survive without a
job. In doing so the court allowed extraneous matter to guide or affect it.

6. The court a quo erred in coming to the conclusion that because of second appellant’s experience travelling outside the country and his contacts outside Zimbabwe he could be tempted to avoid trial. In doing so the court failed to treat the second appellant like other applicants who were granted bail but had travel documents and travelling experience outside the country.

7. The court a quo erred in accepting the allegations of the State as fact. In doing so it allowed extraneous matters to guide or affect it.

8. The court a quo erred in finding that the video evidence strengthened the respondent’s case and would induce the first appellant to abscond. In that regard the court a quo erred in taking all the allegations of the State to be factual truths, even where there was insufficient evidence to support them.

9. The court a quo erred in concluding that the third appellant lied that he had no connection outside the country when he had a brother in Botswana. It failed to consider that the brother was no contact at all as he was in custody together with him.

10. The court a quo misdirected itself as to the evidence. The finding that the State case is “fairly strong” was not supported by evidence placed on the record.

11. The court a quo erred in failing to treat like accused alike. The third appellant and his brother had both stated in their application that they had no connection outside the country when they had a brother in Botswana. Yet the court granted bail to the brother and refused to grant bail to the third appellant.

12. The court was wrong in denying the fourth appellant bail. The court could not have taken it as proven fact that fourth appellant was at the scene and that he drove off at high speed. Such allegations were not proved and as such they could not be a basis for denying bail.

13. The court a quo failed erred by failing to come to the conclusion that by going to the police station to give food to those who had been arrested, the fourth appellant had not exhibited any evasive tendencies.

14. The court a quo denied the fifth appellant bail on the basis of an allegation by a police officer that the fifth appellant had deserted his home to stay at his work place and that he bragged to his workmates
about beating the police. This finding was not based on any evidence. The court seriously misdirected itself on the facts which amount to a misdirection in law.

15. The court a quo failed to consider that whatever the State’s fears were in regard to the seven appellants, they could be taken care of by the imposition of appropriate bail conditions. In fact all those denied bail were not shown to possess any special means which would enable them to breach stringent bail conditions.

The decision of the Supreme Court

The Supreme Court divided the appellants who were admitted to bail for the purpose of examination of the facts on which the High Court found that there was likelihood that the accused if he or she were released on bail will not stand his or her trial. The categories were:

a) Those who were found to have been hiding at a lodge and at the workplace in order to evade arrest;

b) Those who were found to have contacts out of Zimbabwe.

c) Those who fled the scene of crime in motor vehicles to evade law enforcement agents and allegedly aided and abetted other alleged perpetrator.

The Supreme Court then went on to reiterate that bail involves an exercise of discretion by the court of first instance and that it is trite that an appellate court will not interfere with the exercise of the discretion by a lower court or tribunal unless there is a misdirection. The court emphasised that it is not enough that the appellate court thinks it would have taken a different course from the lower court. It was further reiterated that it must appear from the record of proceedings that there has been an error made in the exercise of the discretion such as that the lower court acted on a wrong principle; allowed extraneous or irrelevant considerations to affect its decision or made mistakes of fact or failed to take into consideration relevant matters in the determination of the question before it.

The Supreme Court affirmed that the purpose of the exercise of the discretionary power vested in the court under s 117 of the CP & EA is to secure the interest of the public in the administration of justice by ensuring that a person charged with a criminal offence upon a reasonable suspicion of having committed it will appear on the appointed day to stand trial. It is for that purpose, according to the Supreme Court, that s 117 of the CP & EA provides in effect that upon sufficient evidence being available to justify it, a finding that an accused person is likely not to stand trial when released on bail is a relevant and sufficient ground for ordering continued detention of him or her pending trial.
The Supreme Court also affirmed that s 117 is also based on the principle that, regard being had to the presumption of innocence which is a fundamental right guaranteed under the Constitution to an accused person awaiting trial, he or she must be released on bail on appropriate conditions if the same object of ensuring his or her appearance at trial can be achieved. The court then went on to identify the question for determination at page 22 as the following:

“The question for determination is whether on the facts available and regard being had to the presumption of innocence to which the appellants are entitled, was the court a quo justified in finding that there was a likelihood that they would not stand trial if released on bail even with stringent measures to ensure close monitoring by the police. Only if the finding is justified by the available evidence can it be said that the likelihood of the appellants not standing trial if released on bail is a relevant and sufficient ground for depriving the appellants of their liberty pending trial in terms of s 117 of the CP & EA.”

Quoting the case of Aitken & Anor v. Attorney General 1992 (2) ZLR 249 (SC), the court held that in deciding whether an accused would abscond if released on bail the following factors constituted a useful guide:

- The nature of the charge and the severity of the punishment likely to be imposed on the accused upon conviction.
- The apparent strength or weakness of the state case.
- The accused previous ability to reach another country and the absence of extradition facilities from that country.
- the accused’s previous behaviour when previously released on bail; and
- The credibility of the accused’s own assurance of his intention and motivation to remain and stand trial.

In applying the above principle to the facts, the court agreed with the High Court that the first, sixth and seventh appellants were hiding at a lodge to avoid arrest. The court added that this was confirmed by a test message which the first appellant admitted sending to his wife by cell phone to tell anyone, including the police, who came home looking for him that he was in Mabelreign. The court also agreed that the evidence showed that the first appellant was housing the sixth and seventh appellant such that it was not misdirection on the part of the court a quo to conclude that they were acting in pursuit of a common purpose to avoid arrest by the police.
The same conclusion was not arrived at in respect of the finding by the High Court that the fifth appellant was avoiding arrest when he was found by the police at his work place as a place of work is where an employee is compelled by the contract of employment to be. There was no allegation that the fifth appellant was at his work place at a time when he was not expected to be there. The fact of avoiding arrest was not the only one that could reasonably be inferred from the presence of the fifth appellant at his place of work. The state conceded on appeal that there was no evidence to support that the fifth appellant was avoiding arrest. As this was the only basis upon which the fifth appellant was refused bail, the court held that the fifth appellant was entitled to be released on bail. The state also made a concession in respect of the sixth and seventh appellants on the ground that the court a quo erred in finding that from the single incident of avoiding arrest that they had a propensity to abscond. The same concession which the court finds was properly made was not extended to the first appellant.

The court stated that when considering the case of the first appellant it is necessary to consider that the substantive grounds on which the misdirection by the court a quo was conceded in respect of the sixth and the seventh appellants apply to him. The principle of equality of treatment which requires that those who are in like circumstances must be treated alike would apply. The court found that this was particularly so when regard is had to one of the appellants who was arrested by the police at night whilst hiding in a wardrobe at his home and was granted bail by the court a quo. The court concluded that hiding in a wardrobe to avoid arrest was in no way different from hiding at a lodge to avoid arrest and that both places served the same purpose in as far as their occupants are concerned. The court, therefore found no reasonable basis for differentiating the first appellant from the sixth, seventh and the accused who was found hiding in a wardrobe.

In relation to the second and third appellants who were brothers, there was a concession that they be granted bail. The court found that the concession was properly made. The court a quo had refused the second appellant bail on the ground that he would be induced by the desire to go back to his work in Botswana to abscond if released on bail. The court a quo was also of the view that the seriousness of the offence would induce the second appellant to abscond. The important factor which the High Court overlooked, according to the Supreme Court, is that the second appellant had always travelled to Botswana lawfully. He had a passport which had been taken into the custody of the police. There was no evidence to suggest that a person who had always sought to abide by the laws of going out and coming into the country would be induced by the desire to go back to work in a foreign country to abscond from judicial process. Going to a foreign country without travelling documents has its own serious hazards. The court reminded itself that there is an extradition arrangement between Zimbabwe and Botswana. The court
found that it was not shown that the second appellant was prepared to risk the hazards attendant upon unlawful exit to a foreign country. The appellant had been in custody for a month at the time he appeared before the court a quo on an application for bail. The court a quo did not address its mind to the question whether the job he had in Botswana would still be available to him anyway.

In respect of the third appellant the Supreme Court found that the High Court had refused him bail on an erroneous view of the facts. The second appellant was in custody together with the third appellant. The court a quo however placed the second appellant in Botswana and said that he was available to assist the third appellant if he absconded to that country. The Supreme Court found that this was a clear misdirection by the court a quo which entitles the third appellant to an order granting him bail.

There was a concession in respect of the fourth appellant which the court found to have been properly made. The court also found that the principle of equality of treatment applied to the fourth appellant. The allegation against her was that after the deceased had been killed she allowed the assailants to get into her car and drove off the scene with them at high speed. The same allegation was made against an accused who was granted bail by the court a quo. The vehicles did not belong to the drivers but according the Vehicle Registry, they belonged to the party to which the appellants were members. One of the appellant was granted bail but the fourth appellant was refused bail. In light of the concession and the fact that there were no substantial grounds on which the case of the appellant granted bail in the court a quo and that the fourth appellant can be treated differently he is entitled to be released on bail.

The Supreme Court indicated that the fact that a police officer was lost in the course of executing his duty of enforcing the law is an important factor to be considered in striking the balance between the interest of the individual in personal liberty pending trial and the interests of society in having those accused of crime on reasonable suspicion tried and punished if convicted. The interests of fairness and justice, according to the Supreme Court, require that the matter be approached dispassionately in accordance with the law.

The Supreme Court went on to grant the appeal with no order as to costs.
Unregistered customary law unions are not recognised marriages under our law such that section 7 of the Matrimonial Causes Act [Chapter 5:13] does not apply to them. In general, the courts have always been prepared to help women who are married in terms of an unregistered customary union and would eagerly divide property acquired during the subsistence of an unregistered union. However, that can only be done where well-grounded claims for a share of the estate are made and an appropriate cause of action is pleaded and certainly not on the basis of the union per se. Section 11(b) (iv) of the Magistrates Court Act [Chapter 7:10] allows magistrates to preside over divorce cases of persons married under the Customary Marriages Act [Chapter 5:07] but it has no application to unregistered customary law unions. The existence of an unregistered customary law union does not on its own give the Magistrates Court jurisdiction to distribute the matrimonial property, the union not being a marriage. Other recognised causes of action, such as joint ownership, tacit universal partnership, unjust enrichment or equity, should be pleaded if the plaintiff is to succeed.
The applicant was a German national who married the deceased, a Zimbabwean woman in Germany, where the applicant was then domiciled. They lived together in Germany for 27 years and moved to Zimbabwe when the applicant retired. The movable property acquired by the two which included household goods, farming implements, industrial equipment and other assets, was shipped to Zimbabwe. The bills of lading and customs clearance certificates were in the appellant’s late wife's name to facilitate easy access. In Zimbabwe, the couple acquired various immoveable properties, which were registered in the wife's name. The applicant had been informed that as a foreign national he could not have immovable property registered in his name or the joint names with his wife. An offshore bank account had also acquired in the wife's name. The wife executed a will, in which she bequeathed her entire estate to the second respondent, her daughter by a previous relationship. The appellant’s wife died about six years after the couple had settled in Zimbabwe. The applicant then sought an order claiming five-eighths of the estate. He claimed that it was German law that governed their marriage and that in the absence of an ante-nuptial contract; such a marriage was in community of property. Under German law, when the wife bequeathed her entire estate to her daughter, it could only have been in respect of her one half of the joint estate. He claimed that under German law, he was entitled to the other half of the joint estate; and, on the basis of the principle of forced heirship, since his late wife disinherited him in terms of the will, he could only lay claim to a quarter of her half which would have a final figure of one eighth of the joint estate. In support of his claims as to the provisions of German law, he annexed a declaration by an official in the German Embassy in Harare and a legal opinion by a practising German attorney. The respondents argued, inter alia, that the marriage was one of convenience. On the merits, the main issues were the law governing the proprietary rights of the applicant and his late wife and whether the applicant had proved what German law applied in the instance. The Court held that the marriage had lasted for 33 years and had only been terminated by the death of the wife. There was, as such, no basis to suggest that this was a troubled marriage or that it was one entered into for the purpose of dodging the immigration laws in Germany or Zimbabwe or that the couple had no intention of living together as husband and wife. The court affirmed that it is an accepted principle of private international law that, where there is no ante-nuptial contract, the proprietary consequences of a marriage are governed by the husband's domicile at the time of the marriage, in this case Germany. The court remarked that the rule is absolute and admits of no exceptions. In relation to whether or not the applicant had proved what
German law was on the matter, the requirements of s 25(3) (a) to (c) of the Civil Evidence Act [Chapter 8:01], although not mandatory, were viewed to be instructive. The annexed papers from the German lawyer did not state his qualifications and experience as an attorney, and his opinion was not supported by any relevant material like German case law, statutes, text books or German common law. As to the format of the letter and its contents, the court concluded that they were of such a nature that the court could not rely on it as sufficient proof of German law on the point in issue. The court concluded that while the order sought could not be granted, it would be grossly unjust to dismiss the application on this point alone. The matter should be referred to trial so that proper and sufficient evidence on the position of German law on the point could be presented to the court.

Nyathi & Anor v Ncube NO & Ors HB-123-11

Family Law

The applicants were the surviving children of the deceased who had died intestate. A few months after his death, his wife, the applicants' stepmother, who had been appointed as executor of the estate also died intestate. In terms of the first and final distribution account she had prepared before her death, she was to inherit a house and the two applicants were to receive a child's share of the deceased's estate. The deceased's widow was survived by her parents. The first applicant and the first respondent were appointed executors of the deceased's widow's estate. The latter prepared a distribution account in terms of which the bulk of the property from both estates would devolve to the deceased's widow's parents. The applicants argued that the widow's estate could not inherit from the deceased's estate, and that they should be declared the rightful heirs. The court held that intestate heirs are in all cases to be ascertained at the date when the intestacy occurs. In the instance, this occurred when the deceased died. In terms of section 3A of the Deceased Estates Succession Act [Chapter 6:02], his widow became entitled to receive from the free residue of his estate the effects set out in that provision. She had even set in motion the winding up process which was to result in the effects being transferred to her name and produced a distribution account which was filed with the Master before she died. This situation was distinct from that where an estate inherits intestate from another as would happen if the intestate heir dies before the intestacy occurs. It was improbable that after the legislature gave the widow an incontrovertible right to inherit from her husband's estate; such right would be wiped away by her death as to allow the applicants to inherit from their father as if his wife had pre-deceased him. Such a construction would make nonsense of the legislative intent to empower spouses to inherit, uninterrupted, from the estates of their deceased spouses.
S v Mapanzure & Anor HH-141-11

Criminal Procedure

The accused were convicted of stock theft with the offence having been committed before but the convictions occurring after an amendment to the Stock Theft Act [Chapter 9:18] came into operation in 2004. The Stock Theft Act was repealed by the Criminal Law Code in 2006, which re-enacted the provisions of that Act in section 114. The amendment had introduced a mandatory minimum sentence of imprisonment unless special circumstances were found. The magistrate based his various sentences on the assumption that the mandatory minimum sentence was applicable, having found no special circumstances to exist. The court held that the general rule at common law is that statutes are not to operate retrospectively, unless it is expressly enacted that an enactment shall be retrospective in its operation or it is a necessary implication from the language used. This court concluded that this was not the case in the instance. If the legislature intended the section to have retroactive effect it would have expressly said so but it did not. In any event, it was fundamentally increasing the punishment for the theft of a bovine or equine animal. In addition, the legislature repeated the same wording which was held in a 1976 decision to have no retrospective effect. The legislature is assumed to have been aware of that decision when it promulgated the present section in similar terms.
LEGISLATION REVIEW
Editorials
Indigenisation and Economic Empowerment Act [Chapter 14:33]

Introduction
The Act, which commenced operation on 17 April, 2008, sets out in its preamble that it is, “AN ACT to provide for support measures for the further indigenisation of the economy; to provide for support measures for the economic empowerment of indigenous Zimbabweans; to provide for the establishment of the National Indigenisation and Economic Empowerment Board and its functions and management; to provide for the establishment of the National Indigenisation and Empowerment Fund; to provide for the National Indigenisation and Empowerment Charter; and to provide for matters connected with or incidental to the foregoing.”

Interpretation of terms
The Act defines Empowerment as the creation of an environment which enhances the performance of the economic activities of indigenous Zimbabweans into which they would have been introduced or involved through indigenisation. Indigenisation under the Act means a deliberate involvement of indigenous Zimbabweans in the economic activities of the country, which they previously had no access, so as to ensure the equitable ownership of the nation’s resources. An indigenous Zimbabwean is under the Act, any person who, before 18 April, 1980 (Zimbabwe Independence Day), was disadvantaged by unfair discrimination on the grounds of his or her race, and any descendant of such person, and includes any company, association, syndicate or partnership of which indigenous Zimbabweans form the majority of members or hold the controlling interest. The Act goes on to define a business as any company, association, syndicate or partnership of persons that has for its object the acquisition of gain by it or its members, whether the business is registered under the Companies Act [Chapter 24:03] or otherwise. The Act also defines a controlling interest in relation to a company as the majority of the voting rights attaching to all classes of shares in the company. In relation to any other business other than a company, a controlling interest is defined as any interest which enables the holder thereof to exercise, directly or indirectly, any control whatsoever over the activities or assets of the business.

The Act defines an employee share ownership scheme or trust as an arrangement the dominant purpose is to enable employees of a company to participate in or receive profits or income arising from the acquisition, holding, management or disposal of the stock, shares or debentures of the company concerned. The Minister responsible for administering the Act is the Minister of State for Indigenisation and Empowerment or any Minister to whom the President may, from time to time, assign administration of the Act.
Objectives and Measures

Part II of the Act sets out the objectives which Government must uphold in making regulations or other measures under the Act. These include securing that at least fifty-one per centum of the shares of every public company and any other business shall be owned by indigenous Zimbabweans, barring any merger or restructuring of shareholding unless fifty-one per centum in the merged or restructured business is held by indigenous Zimbabweans and that the indigenous people of Zimbabwe are equitably represented in the governing body of such resultant business. A further objective is that no relinquishment by a person of a controlling interest in a business, if the value of the business is at or above a prescribed threshold, shall be approved unless the controlling interest is relinquished to indigenous Zimbabweans.

Further, no projected or proposed investment in a prescribed sector of the economy available for investment by domestic or foreign investors for which an investment licence is required in terms of the Zimbabwe Investment Authority Act [Chapter 14:30] shall be approved unless a controlling interest in the investment is reserved for indigenous Zimbabweans. Another objective is that all Government departments, statutory bodies and local authorities and all companies shall procure at least fifty per centum of their goods and services required to be procured in terms of the Procurement Act [Chapter 22:15] from businesses in which a controlling interest is held by indigenous Zimbabweans and that where goods and services are procured in terms of the Procurement Act [Chapter 22:14] from businesses in which a controlling interest is not held by indigenous Zimbabweans, any subcontracting required to be done by the supplier shall be done to the prescribed extent in favour of businesses in which a controlling interest is held by indigenous Zimbabweans.

National Indigenisation and Economic Empowerment Board

Part III of the Act establishes the Board which shall be a Board to be known as the National Indigenisation and Economic Empowerment Board, consisting of the chief executive officer ex officio and not less than eleven and not more than fifteen members appointed by the Minister after consultation with the President, of whom one member shall be the Secretary of the Ministry for which the Minister is responsible; and at least one member shall represent any organisation which the Minister considers to be representative of women or women’s organisations; and at least one member shall represent any organisation which the Minister considers to be representative of youths or youth organisations; and at least one member shall represent any organisation which the Minister considers to be representative of disabled persons or disabled persons’ organisations; and at least one member shall be a legal practitioner registered as such in terms of the Legal Practitioners Act [Chapter 27:07]; and at least two members shall be persons whom the Minister considers to be knowledgeable or experienced in issues of indigenisation and economic empowerment; and three shall be
nominated by the heads of Ministries that the Minister considers to be the most important Ministries for the purposes of advancing indigenisation and economic empowerment. The Minister shall designate one member to be the chairperson of the Board and another to be the Vice-chairperson and the vice-chairperson shall exercise the functions and powers and perform the duties.

The functions of the Board are to advise the Minister on the Government’s indigenisation and economic empowerment strategies; and to advise the Minister on appropriate measures for the implementation of the objectives of this Act; and to administer the Fund in terms of section 15; and to oversee compliance with the Charter; and to perform such other functions as may be imposed or conferred upon the Board under this Act or any other enactment.

**National Indigenisation and Economic Empowerment Fund**

Part IV of the Act establishes the fund whose objects are to provide financial assistance to indigenous Zimbabweans for any of the financing of share acquisitions; and the warehousing of shares under employee share ownership schemes or trusts; and management buy-ins and buy-outs; and to provide finance for business start-ups, rehabilitation and expansion; and to finance market research in connection with the objectives of the Act; and to finance capacity-building projects on behalf of indigenous Zimbabweans; and any other purpose which the Minister considers will promote the economic empowerment of indigenous Zimbabweans.

**Appeals of Ministerial decision under the Act**

According to section 20 of the Act, any person is aggrieved by a decision by the Minister to disapprove a transaction in terms of section 4(2); or an order issued by the Minister in terms of section 5(2), (4) or (5); or his or her liability to pay any levy imposed under Part V; he or she may, within thirty days after being notified of the decision or of the action being taken, appeal to the Administrative Court. The noting of an appeal in terms of this section shall not, pending the determination of the appeal, suspend the decision, order or other action appealed against unless the Administrative Court directs otherwise.

**National Indigenisation and Economic Empowerment Charter**

The Fourth Schedule to the Act contains a Charter aimed to achieve all the objectives stated in the Act and lays out a code of ethics which all stakeholders undertake to uphold. The values set out in the Charter include Corporate Governance, Behavioural Responsibility, Production Responsibility, Employment Responsibility, Safety and Health Responsibility, Environmental Responsibility, Legal Responsibility and Social Responsibility.
RECOGNITION OF CUSTOMARY MARRIAGES ACT 1998 [SOUTH AFRICA]

Introduction
The Recognition of Customary Marriages Act was enacted by the South African Legislature in 1998 to “make provision for the recognition of customary marriages; to specify the requirements for a valid customary marriage; to regulate the registration of customary marriages; to provide for the equal status and capacity of spouses in customary marriages; to regulate the proprietary consequences of customary marriages and the capacity of spouses of such marriages; to regulate the dissolution of customary marriages; to provide for the making of regulations and to providing for matters generally related to customary marriages. This summary of the Act is meant to provide thoughts on how Zimbabwe can adopt a similar framework in an effort to recognise Unregistered Customary Law Unions (UCLU). The Act defines Customary Law as the customs and usages traditionally observed among indigenous African peoples of South Africa and which form part of the culture of those people. A customary marriage is defined as a marriage concluded in accordance with customary law.

Recognition of customary marriages
The Act provides that a marriage which is a valid marriage at customary law and existing at the commencement of the Act as being, for all purposes, recognised as a marriage. A customary marriage entered into after the commencement of the Act, is also for all purposes recognised as a marriage if it complies with the requirements of the Act. The Act provides that if a person is a spouse in more than one customary marriage, all such marriages entered into after commencement of the Act, which comply with the provisions of the Act are for all purposes recognised as marriages.

Requirements for the validity of customary marriages
The Act provides that for a customary marriage entered into after the commencement of the Act to be valid, the following must be satisfied.

a) The prospective spouses – i) must be both above the age of 18 years; and ii) must both consent to be married to each other under customary law; and

b) The marriage must be negotiated and entered into or celebrated in accordance with customary law.

The Act requires that if either prospective spouses is a minor, both his or her parents, or if he or she has no parents, his or her legal guardian, must consent to the marriage. If the consent of the parent cannot be obtained, the Act provides that section 25 of the Marriages Act which makes it competent for
the High Court to grant such consent will apply. The Act also provides that the
Minister may grant written permission for a person who is below the age
of 18 years to enter into a customary marriage if he or she considers such
marriage desirable and as being in the interests of the parties concerned.
Such permission, however, shall not relieve the parties from complying with
other requirements prescribed by law. The Act also provides that if a person
who is a minor has entered into a customary marriage without the written
permission of the Minister, the Minister may, if he or she considers the
marriage to be desirable and in the interests of the parties in question, and if
the marriage was in every other respect in accordance with the Act, declare
the marriage in writing to be a valid customary law marriage.
The Act affirms that the prohibition of a customary marriage between
persons on account of their relationship by blood or affinity is determined by
customary law.

Bar against a spouse in a Customary Marriage from contracting a marriage under
the Marriage Act 1961

The Act bars a spouse in a customary marriage from entering into a marriage
under the Marriage Act, 1961 (Act No. 25 of 1961) during the subsistence of
such customary marriage.

Registration of customary marriages

The Act provides that the spouses of a customary marriage have a duty to
ensure that their marriage is registered. According to the Act, either spouse
may apply to the registering officer in the prescribed form for the registration
of his or her customary marriage and must furnish the registering officer with
the prescribed information and any additional information which the
registering officer may require in order to satisfy himself or herself as to the
existence of the marriage. The Act provides that a customary marriage
entered before the commencement of the Act which is not registered in terms
of any other law must be registered within a period of 12 months after the
commencement of the Act. A customary marriage entered after the
commencement of the Act, must be registered within a period of three months
after the conclusion of the marriage or within such longer period as the
Minister may from time to time prescribe.
The Act states that a registering officer must, if satisfied that the spouses
concluded a valid customary marriage, register the marriage by recording the
identity of the spouses, the date of the marriage, any lobola agreed to and any
other particulars prescribed. The registering officer must then issue to the
spouses a registration certificate, bearing the prescribed particulars. The Act
provides that if for any reason a customary marriage is not registered, any
person who satisfies a registering officer that he or she has a sufficient
interest in the matter may apply to the registering officer in the prescribed
manner to enquire into the existence of the marriage. The Act further
provides that if the registering officer is satisfied that a valid customary
marriage exists or existed between the spouses, he or she must register the marriage and issue a certificate of registration as contemplated in the Act and that if a registering officer is not satisfied that a valid customary marriage was entered into by the spouses, he or she must refuse to register the marriage. In addition, the court is given power, upon application and upon investigation instituted by that court, to order the registration of the marriage or the cancellation or rectification of any registration of a customary marriage effected by a registering officer. It is provided for that a certificate of registration of a customary marriage issued under the Act or any other law providing for the registration of customary marriages constitutes *prima facie* proof of the existence of the customary marriage and of the particulars contained in the certificate. The Act affirms that failure to register a customary marriage does not affect the validity of such marriage.

**Determination of age of minor**

In determining the age of a person who is allegedly a minor, a registering officer may accept a birth certificate, an identity card, a sworn statement of a parent or relative of the minor or such other evidence as the registering officer deems appropriate as proof of that person’s age. If the age of a person who allegedly is a minor is uncertain or is in dispute, and that person’s age is relevant for purposes of the Act, the registering officer may in the prescribed manner submit the matter to a magistrate’s court established in terms of the Magistrates’ Court Act, 1944 (Act No. 32 of 1944) which must determine the person’s age and issue the prescribed certificate in regard thereto, which constitutes proof of the person’s age.

**Equal status and capacity of spouses**

The Act provides that a wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law.

**Proprietary Consequences of customary marriages and contractual capacity of spouses**

The Act provides that the proprietary consequences of a customary marriage entered into before the commencement of the Act continue to be governed by customary law. It is further provided that a customary marriage entered into after the commencement of the Act in which any spouse is not a partner in any other existing customary marriage is a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouses in an antenuptial contract which regulates the matrimonial property system of their marriage. The Act provides that Chapter III and sections 18, 19, 20 and 24 of Chapter IV of the Matrimonial Property Act 1984 (Act No. 88 of 1984), apply in
respect of any customary marriage which is in community of property as contemplated in those provisions (the provisions deal with distribution of property upon dissolution of a marriage). Spouses in a customary marriage entered into before the commencement of the Act may apply to a court jointly for leave to change the matrimonial property system which applies to their marriage or marriages and the court may, if satisfied that - (i) there are sound reasons for the proposed change; (ii) sufficient written notice of the proposed change has been given to all creditors of the spouses for amounts exceeding R500 or such amount as may be determined by the Minister of Justice by notice in the Gazette; and (iii) no other person will be prejudiced by the proposed change, order that the matrimonial property system applicable to such marriage or marriages will no longer apply and authorise the parties to such marriage or marriages to enter into a written contract in terms of which the future matrimonial property system of their marriage or marriages will be regulated on conditions determined by the court. In the case of a husband who is a spouse in more than one customary marriage, all persons having a sufficient interest in the matter, and in particular the applicant’s existing spouse or spouses, must be joined in the proceedings.

**Contracting a further customary marriage**

A husband in a customary marriage who wishes to enter into a further customary marriage with another woman after the commencement of the Act must make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriages. When considering the application, the court must in the case of a marriage which is in community of property or which is subject to the accrual system, terminate the matrimonial property system which is applicable to the marriage and effect a distribution of the matrimonial property, ensuring an equitable distribution of the property; and taking into account the relevant circumstances of the family groups which would be affected if the application is granted. The court may allow further amendments to the terms of the contract; grant the order subject to any condition it may deem just; or refuse the application if in its opinion the interests of any of the parties involved would not be sufficiently safeguarded by means of the proposed contract. All persons having a sufficient interest in the matter, and in particular the applicant’s existing spouse or spouses and his prospective spouse, must be joined in the proceedings instituted in terms of subsection the Act. If a court grants an application contemplated in subsection in the Act, the registrar or clerk of the court, as the case may be, must furnish each spouse with an order of the court including a certified copy of such contract and must cause such order and a certified copy of such contract to be sent to each registrar of deeds of the area in which the court is situated.
Dissolution of customary marriages

The Act provides that a customary marriage may only be dissolved by a court through a decree of divorce on the ground of the irretrievable breakdown of the marriage. A court may grant a decree of divorce on the ground of the irretrievable breakdown of a marriage if it is satisfied that the marriage relationship between the parties to the marriage has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between them. The Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987) and section 6 of the Divorce Act, 1979 (Act No. 70 of 1979), apply to the dissolution of a customary marriage. A court granting a decree for the dissolution of a customary marriage has the powers contemplated in sections 7, 8, 9 and 10 of the Divorce Act. 1979, and section 24(1) of the Matrimonial Property Act, 1984 (Act No. 88 of 1984); must, in the case of a husband who is a spouse in more than one customary marriage, take into consideration all relevant factors including any contract, agreement or order made in terms of section 7(4), (5), (6) or (7) and must make any equitable order that it deems just; may order that any person who in the court’s opinion has a sufficient interest in the matter be joined in the proceedings; may make an order with regard to the custody or guardianship of any minor child of the marriage; and may, when making an order for the payment of maintenance, take into account any provision or arrangement made in accordance with customary law. Nothing in the Act may be construed as limiting the role, recognised in customary law, of any person, including any traditional leader, in the mediation, in accordance with customary law, of any dispute or matter arising prior to the dissolution of a customary marriage by a court.

Age of Majority

Despite the rules of customary law, the age of majority of any person is determined in accordance with the Age of Majority Act, 1972 (Act No. 57 of 1972).

Change of marriage system

A man and a woman between whom a customary marriage subsists are competent to contract a marriage with each other under the Marriage Act, 1961 (Act No. 25 of 1961) if neither of them is a spouse in a subsisting customary marriage with any other person. When a marriage is concluded as contemplated in this manner, the marriage is in community of property and of profit and loss unless such consequences are specifically excluded in an antenuptial contract which regulates the matrimonial property system of their marriage. Chapter III and sections 18, 19, 20 and 24 of Chapter IV of the Matrimonial Property Act, 1984 (Act No. 88 of 1984), apply in respect of any marriage which is in community of property as contemplated in the manner above. Despite this provision, the Act provides that no spouse of a
marriage entered into under the Marriage Act, 1961, is, during the subsistence of such marriage, competent to enter into any other marriage.

Regulations
The Act gives the Minister of Justice, in consultation with the Minister of Home Affairs, the power to make regulations relating to the requirements to be complied with and the information to be furnished to a registering officer in respect of the registration of a customary marriage; the manner in which a registering officer must satisfy himself or herself as to the existence or the validity of a customary marriage; the manner in which any person including any traditional leader may participate in the proof of the existence or the registration of any customary marriage; the form and content of certificates, notices, affidavits and declarations required for the purposes of this Act; the custody, certification, implementation, rectification, reproduction and disposal of any document relating to the registration of customary marriages or of any document prescribed in terms of the regulations; any matter that is required or permitted to be prescribed in terms of this Act; and any other matter which is necessary or expedient to provide for the effective registration of customary marriages or the efficient administration of the Act; and prescribing the fees payable in respect of the registration of a customary marriage and the issuing of any certificate in respect thereof. Any regulation made under the Act must, before publication in the Gazette, be submitted to Parliament. A regulation made under the Act which may result in financial expenditure for the State or regulations made under the Act must be made in consultation with the Minister of Finance. Any regulation made under the Act may provide that any person who contravenes a provision thereof or fails to comply therewith shall be guilty of an offence and on conviction be liable to a fine or to imprisonment for a period not exceeding one year.

Thoughts on Reform
The University of Zimbabwe Student Journal – Law Review suggests that the legislature of Zimbabwe harmonises the law relating to customary marriages. It is suggested that an Act be enacted which has the effect of amalgamating the law relating to unions contracted under customary law. The Act will effectively bring into one Act the system regulating unions contracted at customary law – including those under the current Customary Marriages Act [Chapter 5:07]. Such an Act will live us with two recognised forms of marriages, viz, a civil law marriage under the Marriages Act [5.11] and the customary law marriage under a new Customary Law Marriages Act. A draft of the Act now follows:
CUSTOMARY LAW MARRIAGES ACT

ARRANGEMENT OF SECTIONS

Section

1. Short title
2. Interpretation
3. Recognition of marriages contracted at customary law
4. Requirements for the validity of customary law marriages
5. Equality of spouses in customary law unions
6. Proprietary consequences of customary law unions
7. Provisions for the registration of customary law marriages
8. Marriage register
9. Pledging of girls and women in marriage prohibited
10. Legality of marriages between persons within certain degrees of affinity or consanguinity
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AN ACT to consolidate and amend the law relating to marriages contracted and celebrated at customary law, to re-enact certain provisions of the Customary Marriages Act [5:07]; to make provision for the validity of unregistered customary law unions, to specify the requirements for a valid marriage contracted at customary law, to regulate the registration of marriages contracted at customary law, to provide for the equal status and capacity of spouses in customary marriages, to regulate the proprietary consequences of such marriages and the capacity of spouses of such marriages; to regulate the dissolution of customary marriages, to repeal certain provisions of certain laws; and to provide for matters connected therewith.
1. **Short title**

This Act may be cited as the Customary Law Marriages Act [Chapter 5:07]

2. **Interpretation**

   In this Act –

   “customary law” means the customs and usages traditionally observed among the indigenous people of Zimbabwe which form part of the culture of those peoples;

   “customary marriage” means a marriage between Africans concluded in accordance with customary law whether or not it has been subsequently solemnised under the Customary Marriages Act [Chapter 5:07];


   “Marriage Act” means the Marriage Act [Chapter 5:11] and includes, where appropriate, the Marriage Act [Chapter 177 of 1963];

   “Minister” means the Minister of Justice, Legal and Parliamentary Affairs or any other Minister to whom the President may, from time to time, assign the administration of this Act;

   “marriage consideration” means the consideration given or to be given by any person in respect of the marriage of an African woman, whether such marriage is contracted according to customary law or solemnized in terms of the Marriage Act.

   “Unregistered customary law union” means any union between a man and woman contracted and celebrated under customary law but which has not been registered under the Customary Marriages Act [5:07];

3. **Recognition of marriages contracted at customary law**

   (1) A marriage which was a valid marriage under the Customary Marriages Act [5:07] at the commencement of this Act is for all purposes recognised as a marriage.

   (2) An unregistered customary law union contracted and celebrated according to customary law, before or after the commencement of this Act, shall for all purposes be valid as a marriage from the date of commencement of this Act.

   (3) If a person is a spouse in more than one customary marriage, whether or not registered under the Customary Marriages Act, all such unions
contracted and celebrated at customary law before the commencement of this Act are for all purposes recognised as marriages.

(4) If a person is a spouse in more than one customary marriage, all such marriages entered into after the commencement of this Act, which comply with the provisions of this Act, are for all purposes recognised as marriages.

4. Requirements for the validity of customary marriages

(1) For a customary marriage entered after the commencement of this Act to be valid –

(a) the prospective spouses –
   (i) must both be above the age of 18 years; and
   (ii) must both consent to be married to each other under customary law; and
(b) the marriage must be entered into and celebrated in accordance with customary law

(2) Save as provided in this Act, no spouse in a customary marriage shall be competent to enter into a marriage under the Marriage Act [5:11]. during the subsistence of such customary marriage.

(3) (a) If either of the prospective spouses is a minor, both his or her parents, or if he or she has no parents, his or her legal guardian, must consent to the marriage.

(b) If the consent of the parent or legal guardian cannot be obtained, section 20 (2) and (3) of the Marriage Act [5:11] applies.

(4) (a) Without derogation from subsection (1) (a) (i), the Minister may in writing grant to a person under the age of 18 years, permission to enter into a customary marriage if the Minister considers such marriage desirable and in the interests of the prospective spouses.

(b) Such permission shall not relieve the parties to the proposed marriage from the obligation to comply with all the other requirements prescribed by law.

(c) If a person under the age of 18 years has entered into a customafy marriage without the written permission of the Minister, the Ministers may, if he or she considers the marriage to be desirable and in the interests of the parties in question, and if the marriage was in every other respect in accordance with this Act, declare the marriage in writing to be a valid customary marriage.
5. **Equality of status and capacity of spouses**

A wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law.

6. **Proprietary consequences of customary marriages**

(1) A customary marriage entered into before or after the commencement of this Act in which a spouse is not a partner in any other existing customary marriage, is a marriage out community of property, unless such consequences are specifically excluded by the spouses in an antenuptial contract which regulates the matrimonial property system of their marriage.

(2) Section 7 of the Matrimonial Causes Act [5:13] applies in respect of every customary law marriage whether or not entered before or after the commencement of this Act.

7. **Registration of Customary Marriages**

(1) The spouses of a customary marriage have a duty to ensure that their marriage is registered.

(2) Either spouse may apply to the registering officer in the prescribed form for the registration of his or her customary marriage and must furnish the registering officer with the prescribed information and any additional information which the registering officer may require in order to satisfy himself or herself as to the existence of the marriage.

(3) An unregistered customary law union –

(a) entered into before the commencement of this Act, and which is not registered in terms of the Customary Marriages Act [5:07], must be registered within a period of 12 months after that commencement or within such longer period as the Minister may from time to time prescribe by notice in the *Gazette*; or

(b) entered into after the commencement of this Act, must be registered within a period of three months after the conclusion of the marriage or within such longer period as the Minister may from time to time prescribe by notice in the *Gazette*. 
(4) (a) A registering officer must, if satisfied that the spouses concluded a valid customary marriage, register the marriage by recording the identity of the spouses, the date of the marriage, any lobola agreed to and any other particulars prescribed.

(b) The registering officer must issue to the spouses a certificate of registration, bearing the prescribed particulars.

(5) If a registering officer is not satisfied that a valid customary marriage was entered into by the spouses, he or she must refuse to register the marriage.

(6) A court may, upon application made to that court and upon investigation instituted by that court, order-

(a) the registration of any customary marriage; or
(b) the cancellation or rectification of any registration of a customary marriage effected by a registering officer.

(7) A certificate of registration of a customary marriage issued under this section or any other law providing for the registration of customary marriages constitutes prima facie proof of the existence of the customary marriage and of the particulars contained in the certificate.

(8) Failure to register a customary marriage does not affect the validity of that marriage.

8. Marriage Register

(1) Immediately after the registration of a marriage, an entry thereof shall be made in ink in a marriage register to be kept for that purpose by the customary marriage officer in the form or to the effect of the specimen set forth in the Schedule, and every such entry shall be signed by the customary marriage officer.

(2) Before the parties depart, there shall then and there be made on a separate piece of paper a duplicate original register of the entry referred to in subsection (1) in which the same matter shall be entered and signed by the customary marriage officer in manner or to the effect of the specimen set forth in the Schedule, and the customary marriage officer shall deliver such duplicate original register to the woman.

(3) Every extract from a marriage register which purports to be certified as a true copy therefrom by the customary marriage officer who for the time being has the custody of the marriage register and every duplicate original register shall respectively be good evidence of the facts therein recorded in
and before all courts and in criminal and civil proceedings therein and shall be admissible upon its mere production by any person.

9. **Pledging of girls and women in marriage prohibited**

Any agreement in which a person, whether for consideration or otherwise, pledges or promises a girl or woman in marriage to a man shall be of no effect.

10. **Legality of marriages between persons within certain degrees of affinity or consanguinity**

The prohibition of customary marriage between persons on account of their relationship by blood or affinity is determined by customary law.

11. **Appointment of customary marriage officers**

The Minister may appoint any person employed by the State or a local authority or any chief to be a customary marriage officer for the purposes of this Act.

12. **Dissolution of Customary Law Marriages**

(I) A customary marriage may only be dissolved by a court by a decree of divorce on the ground of the irretrievable breakdown of the marriage.

(2) A court may grant a decree of divorce on the ground of the irretrievable breakdown of a marriage if it is satisfied that the marriage relationship between the parties to the marriage has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between them.

(3) Sections 4, 5, 6 of the Matrimonial Causes Act [5:13] applies to customary law marriages.

(4) (a) A court granting a decree for the dissolution of a customary marriage has the powers contemplated in sections 7, 8, 9 and 10 of the Matrimonial Causes Act [5:13].

(b) A court must, in the case of a husband who is a spouse in more than one customary marriage, take into consideration all relevant factors including any contract, agreement or order made in terms of this Act and must make any equitable order that it deems just;
(c) A court may order that any person who in the court’s opinion has a sufficient interest in the matter be joined in the proceedings; may make an order with regard to the custody or guardianship of any minor child of the marriage; and may, when making an order for the payment of maintenance, take into account the best interests of the child involved.

13. **Age of majority**

(1) Despite the rules of customary law, the legal age of majority of any person shall be determined by the General Law.

14. **Change of marriage system**

(1) A man and a woman between whom a customary marriage subsists are competent to contract a marriage with each other under the Marriage Act [5:11], if neither of them is a spouse in a subsisting customary marriage with any other person.

(2) When a marriage is concluded as contemplated in subsection (1) the marriage is out of community of property unless such consequences are specifically excluded in an antenuptial contract which regulates the matrimonial property system of their marriage.


(4) Despite subsection (1), no spouse of a marriage entered into under the Marriage Act [5:11], is, during the subsistence of such marriage, competent to enter into any other marriage.

15. **Repeal of laws**

The Customary Marriages Act [5:07] is hereby repealed in its entirety.
Road Traffic (Construction, Equipment and Use) Regulations
2010 [SI-154-2010]

Introduction
The regulations came into force on 1 December 2010 replacing the regulations set forth in 1972 [Chapter 13:11] which had last been amended in 1988. The regulations seek to give legal effect to provisions in the Highway Code and the Vehicle Inspection Department Handbook. The regulations impose minimum compliance requirements for motor vehicles construction and equipment. Other regulations relating to the use of vehicles are also set out in the statutory instrument.

General Provisions
The regulations lay out a number of limitations including the limitation of length of motor vehicles and trailers (sec 4) with a maximum of eighteen comma five metres for ordinary vehicles and twenty metres for buses. No person shall drive on any road any motor vehicle and trailer or other combination of vehicles, if the overall length of the combination exceeds twenty-two metres. In terms of width, sec 5 sets out that no person shall drive a motor vehicle registered on or after 1st December 2010, other than a construction vehicle, if the width of the motor vehicle or trailer exceeds two comma six five metres. The regulations in sec 6 also prohibit driving vehicles or trailers if the height exceeds four comma six metres. For an omnibus, the height should not exceed three comma two metres. For buses, the overall height must not exceed three comma seven metres.

Other general provisions include the following:

A. Rear View Mirror: Mandatory

B. Tyres: Minimum tread depth on any part of the tyre stated as 1mm, Regrooving of non-regroovable tyres prohibited

C. Tyres with exposed cords, lumps / bulges consistent with ply separation, tread lift prohibited, Adherence to tyre load and speed indices a must, Tyres must be of the right size and correctly inflated as per manufacturer’s specifications - Tyres on the same axle must be of the same size, type and construction - Retreaded tyres outlawed on front axles of passenger public service vehicles and heavy vehicles and passenger service vehicles without dual tyres - Serviceable Spare Wheel, working jack and appropriate wheel spanner
mandatory.

D. Tail Lights: White lights prohibited hence tail lights with broken lenses will not be allowed - Headlamps, Tail Lights and “park” lights: Defective lamps prohibited - Height lamps: Heavy vehicles to be fitted with Height lamps front and rear.

E. Reflectors: White reflectors in front, red reflectors at the rear. Heavy vehicles to have reflectors on the side as well. Detailed specifications available in the regulations.

F. ‘Breakdown’ Triangle: Two reflective breakdown triangles per vehicle and with serial numbers, name of manufacturer and year of manufacture and conforming to Standards Association of Zimbabwe standards will be mandatory. A pair is also required for each trailer. These must be placed one in front and one at the rear of a vehicle (30 to 50m) when it is stationery on any road at a place not designated for stopping.

G. Fire Extinguishers: All vehicles to carry an appropriate and SAZ approved fire extinguisher in the CAB of the vehicle - Light vehicles (750g) and heavy vehicles (1,5kg).

H. Direction Indicators: Functional requirements specified and mandatory - Suspension and Axles: Must be properly maintained.

I. Seats: Must be secured - Doors and Panels: Driving of a car with defective locking mechanisms, hinges or catches, malfunctioning window winding mechanism prohibited. Doors must be functional from both the inside and outside.

J. Speedometer: Working speedometer mandatory for vehicles capable of at least 40km/h.

K. Speed Monitoring and Speed limiting Devices: All heavy vehicles and passenger public Service vehicles must have a speed monitoring device e.g. tachograph, data recorder.

L. Gross mass: Pick-ups and other commercial vehicles must display the gross and net Mass in kilograms.
N. Maintenance of Engines: Vehicles with defective exhausts, silencers, emissions outside SAZ specifications; oil, grease and fuel leaks prohibited.

Failure to observe any of the regulations will constitute an offence punishable by a fine not exceeding level five or to a period of imprisonment not exceeding 6 months or both.