

1 Introduction

Admark Moyo*

This book examines the nature and scope of selected aspects of the 2013 Zimbabwean Constitution and the Declaration of Rights. Composed of 19 chapters examining the constitutional landscape for the protection of human rights in Zimbabwe, the book is designed for a broad audience ranging from undergraduate and postgraduate students, academia, civil society organisations, legal practitioners, judges, key government ministries, institutions and agencies, among many others. The book explains the scope of several provisions of the Constitution and their implications for the conduct of both state and non-state actors. While it does not, for instance, explain the nature and content of all the rights in the Declaration of Rights, this book acts as a prelude to a more comprehensive book to be developed by many authors from different legal backgrounds in the near future. Nonetheless, the chapters that form part of this volume provide invaluable guidance to its readers.

The book is divided into five parts. Part I consists of three chapters: this introduction; a discussion on the basic tenets of Zimbabwe's new constitutional order; and an analysis of the relationship between constitutional values, national objectives and the Declaration of Rights. Part II of the book unpacks three key concepts that are central to the vindication and application of human rights. These include the relationship between international and national law and its relevance to the interpretation of fundamental rights and freedoms; the role of foreign law in the development of domestic law – as viewed primarily from the perspective of domestic courts – and an analysis of the constitutional provisions governing the limitation of rights under the Constitution. In Part III, the book discusses the rights of selected vulnerable groups such as women, children, persons with disabilities and linguistic minorities in four respective chapters. This selection of specific vulnerable groups does not necessarily imply any rank ordering thereof. While we acknowledge the rights of other vulnerable groups such as veterans of the liberation struggle, the elderly, ethnic, religious and linguistic communities and many others, the selection of the specific groups under study was influenced both by the availability of authors and the explicit constitutional protection of the rights of a particular group.

Composed of three chapters, Part IV locates and discusses some of the emerging issues under the 2013 Zimbabwean Constitution. These include the constitutional protection of socio-economic rights; the protection of environmental rights under the Constitution; children's environmental rights; the interaction and tension between foreign investment and the property rights of indigenous communities; and the relationship between the constitutional state and traditionalism. In Part V, the book examines some of the mechanisms that can be used to enforce the fundamental rights and freedoms protected in the Constitution. This includes an analysis of the provisions governing standing or access to court, the role of the Zimbabwe Human

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Rights Commission in the protection and promotion of human rights and an overview of the African human rights system. Part V also concludes the discussion with forward-looking remarks on the future of constitutional and human rights law.

Having given a general outline of the parts and chapters of the book, it is now imperative to explore, in some detail, the scope of each chapter in this book.

Summary of Chapters

In **chapter 2**, Admark Moyo explains the meaning and reach of the basic legal principles that are relevant to a fuller understanding of the provisions of the new constitutional dispensation. These include the principles of the supremacy of the Constitution, the rule of law, democracy and accountability, the separation of powers and checks and balances. The discussion of the separation of powers and the independence of the judiciary takes place against the backdrop of the centrality of impartial courts in the enforcement of the Constitution and the enjoyment of fundamental rights and freedoms by the citizenry. Arguably, the provisions of the Declaration of Rights can only be properly understood as an integral part of the Constitution as a whole, hence the need for a detailed explanation of the basic tenets of the new constitutional order. Both the Declaration of Rights and the entire Constitution are important ingredients of the new constitutional project of transforming Zimbabwean society as well as the country's social, political and economic systems and institutions.

In **chapter 3**, Admark Moyo explores the relationship between constitutional values, national objectives and the Declaration of Rights. Chapter 3 serves as the background to the analysis, interconnectedness and operationalisation of the founding values and principles, national objectives and the Declaration of Rights. It begins with an exploration of the meaning and scope of constitutional values and principles, particularly the founding values and principles referred to in section 3(2) of the Constitution. The chapter demonstrates that constitutional values and principles perform a pivotal function in the interpretation, application and limitation of the fundamental rights and freedoms entrenched in the Constitution. In addition, it is also shown that constitutional values and principles guide courts, albeit indirectly, in the interpretation of legislation and the development of the common law or customary law. At this level, these values and principles perform a secondary role, but they still inform the interpretive or analytical processes of the courts.

Apart from serving as an introduction to constitutional values and principles law and the manner in which they are relevant to the enforcement of fundamental rights, chapter 3 also explores the nexus between fundamental human rights and the so-called national objectives. It is shown that a proper engagement with the applicable provisions tends to suggest the existence of a symbiotic relationship between fundamental human rights proper and national objectives that are not strictly enforceable. The relevant constitutional provisions – particularly sections 8(2) and 46(1)(d) of the Constitution – appear to imply that regard must be had to the national objectives when interpreting the fundamental rights or freedoms in the Declaration of Rights. Furthermore, chapter 3 also investigates the relationship between

fundamental rights and the values that underlie a democratic society based on human dignity, justice, equality and freedom. While the Constitution does not expressly govern this relationship, the interpretation and limitation clauses make constant reference to values and imply that they are an important consideration in constitutional adjudication.

More importantly, chapter 3 introduces the Declaration of Rights as an important part of the Constitution, an epitome of the constitutional revolution that took place during the final years of the inclusive government. The provisions of the Declaration of Rights are meant to facilitate social and economic transformation and to ensure that the state rescues poor citizens from poverty, degradation and marginalisation. Apart from largely grounding the Constitution's transformative vision, the Declaration of Rights codifies monumental milestones that range from the indivisibility and interconnectedness of human rights; the protection of social and economic rights; the liberalisation of *locus standi*; the horizontal application of the Declaration of Rights and the demise of the public-private divide; substantive equality and the positive duty to address the injustices of the past; and the protection of the rights of vulnerable groups. Together, these monumental milestones make the Declaration of Rights an epitome of Zimbabwe's constitutional revolution.

In **chapter 4**, Admark Moyo explores the interaction between international law and national law, from the standpoint of the constitutional provisions governing this interaction. The chapter starts by unpacking the foundational tensions between the doctrines of monism and dualism, including the manner in which these doctrines have influenced the two theories – incorporation and transformation – that continue to shape the manner in which international human rights law is applied in domestic courts. Further, the chapter analyses the different ways in which international law influences the outcome of cases at the domestic level. This is achieved through domestic provisions that require courts to take into account international law that is binding on Zimbabwe; the principle of consistent interpretation; and the rise of 'worldly' judges who 'embrace' the obligation to apply international law, sometimes with limited or no awareness of what this obligation entails. Further, the chapter explores the ways in which the Constitution anticipates conflicts between domestic law and international law to be resolved and fully explains the ambit of the applicable constitutional provisions. This inquiry is generated by the fact that the Constitution treats different types of international law differently with regards to their legal position in the realm of domestic law.

In **chapter 5**, Nkosana Maphosa provides a synopsis, examines the utility, breadth and pitfalls of section 46(1)(e) of the Constitution in an open and just democratic society founded on values such as dignity, equality, freedom and justice. Accordingly, chapter 6 examines the contribution and discontents of foreign law in constitutional interpretation, especially of the Declaration of Rights. Cast against a burgeoning constitutional framework, both foreign and comparative law possesses enormous interpretive value, and could therefore engender better constitutional rights protections. Arguments for the practical contributions of foreign law abroad are emphasised in the scholarship and are also indicated in the Constitution's text. By virtue of section 46 of the 2013 Constitution, courts have discretion to apply foreign

law. This provision creates a tremendous window of opportunity to amplify constitutional meaning and contemporaneously bolster the protection of fundamental human rights and freedoms. The emerging body of constitutional jurisprudence indicates that the apex Court has relied extensively on foreign decisions, particularly from South Africa, Canada and India, to develop its own jurisprudence. Although this makes sense given the embryonic nature of our constitutional system, the approach of the Court nonetheless calls for evaluation.

Chapter 5 illuminates the foundations and role of foreign law in constitutional interpretation and provides a framework for further legal examination. Importantly, it creates a useful epoch to evaluate the 'good' and the 'bad' of foreign law in constitutional interpretation. Also, the chapter discusses the topic under the general guise of constitutional borrowing or transplantation. Thus, it emphasises the point that the application of foreign precedent should generally be qualified given differences in culture, history, ideology, economy, politics and many other factors. Importantly, it deploys selected case studies to demonstrate that courts seem to apply foreign law as if it is binding at the domestic level notwithstanding its discretionary nuance envisaged in the Constitution. The main argument is that the Constitutional Court should consider developing canons on the application of foreign decisions. Lastly, the chapter reiterates the importance of evaluating some of the troublesome uses of foreign law such as aggression.

In **chapter 6**, Valentine Mutatu unpacks the concept of limitations of rights under the Zimbabwean Constitution and distinguishes between internal and external limitations. Limitations are internal when they are contained in the very provision that protects the right. They are often characterised by the use of the words 'as prescribed by the law', 'arbitrarily or without just cause', 'in accordance with the law', 'subject to any other provisions of this Constitution', 'progressive realisation within available resources' and many more. In the realm of socio-economic rights, internal limitations are often manifested by the textual claim that these rights are to be realised 'progressively' and 'within available resources'. These claw back clauses determine how far the interpretation and application of a particular right can go. External limitations occur when rights are limited or restricted by means of provisions that fall outside of the 'right enabling clause'. As seen in section 86(2) of the Constitution, external limitations are usually sheltered under the roof of a general limitation clause that provides that all the rights protected in a particular instrument or Constitution can be limited only in terms of a law of general application. This means that the law must be sufficiently clear and precise that those affected by it can ascertain the extent of their rights and obligations; must be publicised so that it is known and must apply to the generality of the population, instead of a targeted person or group.

In addition, the chapter emphasises that the limitation of rights should be fair, necessary, reasonable and justifiable in an open and democratic society based on a range of values. It broadly unpacks what these constitutional adjectives mean and discusses the factors that should be considered in determining whether a limitation is fair, necessary, reasonable and justifiable in an open and democratic society.

These factors include the nature of the right or freedom concerned, the purpose of the limitation; the nature and extent of the limitation; the relationship between the limitation and its purpose; the need to ensure that the enjoyment of rights and freedom by any person does not prejudice the rights and freedom of others; and the availability of less restrictive means to achieve the purpose of the limitation. Ultimately, these factors call for a proportionality enquiry or value judgment that balances the legitimate government purpose sought to be achieved and the means used to achieve it. In determining the proportionality between the harm done by the infringing law and the benefits thereof, a court weighs up competing values and interests. In this exercise, the court must determine whether the means used by the state to limit a right or freedom are the least restrictive for the achievement of the legitimate objective being pursued. Accordingly, it is justifiable for the state to limit a right if there is no risk of direct, serious and proximate harm to compelling interests such as national defence or security, public safety, public morality, public order, public health, regional or town planning, or the general public interest.

In **chapter 7**, Rosalie Katsande and Tariro Tandii navigate the legal landscape for the promotion of gender equality and women's rights in Zimbabwe. They argue that the adoption of the 2013 Zimbabwean Constitution heralded the dawn of a new era with regards to gender equality. This claim draws support from the 'new' Constitution which clearly espouses values and principles of gender equality in a manner that signals a departure from the retrogressive provisions of the Lancaster House Constitution that allowed discrimination in areas governed by personal law. One of the key values clearly stipulated is that the Constitution is the supreme law of the land and any law that is inconsistent with it is void to the extent of the inconsistency. This is referred to as trumping sense constitutional supremacy, meaning that the Constitution takes precedence over all other laws, customs and practices that perpetuate the marginalisation of women. Chapter 7 also explores the manner in which women's rights are secured in Zimbabwe and draws upon legislation at local, regional and international level. The chapter is located within equality and non-discrimination and the broader human rights discourses. It outlines the major areas that are significant to the enjoyment by women of their rights. The critical areas of the chapter include an analysis of the foundations of gender equality and non-discrimination, the nexus between gender equality, women's rights and feminism and a comparative analysis of gender equality provisions under the old and the current Constitution. In doing so, the chapter examines the right to equality and non-discrimination as important principles that should be observed in a society that strives for the promotion and protection of human rights.

In **chapter 8**, Christina Peta and Admark Moyo discuss the legal status of the rights of persons with disabilities (PWDs) in Zimbabwe. To begin with, the authors explore the broad social and historical context within which the disability discourse should take place. This includes an analysis of the historical development of the rights of PWDs both at the international plane and in the Zimbabwean context. The chapter is located within a conceptual framework of the intersectional model, as well as the other key models of disability (charity, medical, social and human rights models). The authors argue that intersectionality is important because it helps us to

understand that disability does not function in isolation, but is always intimately interconnected with other identity markers such as culture, age, sexuality and gender to frame the experiences of PWDs. It is shown that intersectionality addresses the issue of difference, and that in domesticating international human rights conventions, there is need to pay close attention to all relevant facets of the local context.

In the human rights discourse, models of disability are important because they represent structures that assist us to explain the ways in which public thinking and responses to disability are framed as well as to assess the pertinence of such responses. Thus, the authors also discuss the charity, medical, social and human rights models of disability and thereafter discuss the subject of intersectionality. In addition, the authors discuss measures that need to be taken by the state to promote the rights of PWDs in relation to the provisions of section 83 of the Constitution, albeit referencing the Convention on the Rights of Persons with Disabilities (CRPD) at a broader level. Section 83 of the Constitution articulates the commitment of the state to addressing some of the major barriers that result in PWDs not being able to be self-reliant, to live with their families, to be protected from exploitation and abuse, to have access to medical treatment and to enjoy access to quality education.

In **chapter 9**, Admark Moyo discusses the constitutional protection of children's rights in Zimbabwe. Historically, the Lancaster House Constitution did not help at all in efforts made towards dismantling the idea that children are merely objects of social and parental control. This is because it shielded oppressive customary laws from constitutional provisions designed to advance equality and therefore ensured the ongoing observance of traditional norms that violate children's rights. The new Constitution – adopted in 2013 – calls for a change of perspective as it portrays children as ends entitled to protection, provision and participation rights. It also constitutionalises a number of children's socio-economic rights. More importantly, it is clear that the constitutionalisation of children's rights is a direct response to legal developments at the international level. Whilst the exact scope and meaning of the rights entrenched in the new Constitution has not been fully, if at all, explored, it is beyond doubt that these rights have significant implications for the protection, participation and autonomy of children. Due to space constraints, sporadic reference is made to equivalent provisions of international and regional instruments entrenching children's rights to ensure that readers have full knowledge of positive developments at the international and domestic levels.

Chapter 9 is divided into several broad sections and begins by identifying and discussing various categories of children's rights in national and international law. These categories include protection, provision and participation rights. It then proceeds to identify participation and protection as dominant or overarching themes in children's rights and demonstrates that the concept of the evolving capacities of the child can be used to reconcile these seemingly oppositional themes. It is demonstrated that the degree to which every child is entitled to protection or autonomy largely rests on the evolving capacities of the child. The most substantive section of chapter 9 describes in great detail the scope and legal content of each of the rights enumerated in section 81(1)–(3) of the Constitution. All the rights of the child set out in section 81(1)–(3) of the Constitution are examined in the order in

which they appear in the Constitution. In doing so, the chapter analyses whether the manner in which the courts have interpreted children's rights is consistent with the letter and spirit of the relevant constitutional provisions.

Innocent Maja analyses the constitutional framework for the protection of language rights of linguistic minorities in Zimbabwe in **chapter 10** of this textbook. He underlines the significance of language rights by observing that language reflects one's cultural identity and constitutes a means of the transfer of knowledge from one generation to the next. Language rights also prevent discrimination against linguistic minorities and curb linguistic assimilation or loss. Given that most linguistic minorities are numerically inferior, politically non-dominant, marginalised and poor, these vulnerable groups need the 'hand' of the law to protect their language rights in a functioning multilingual democracy. Finally, the constitutional protection of language rights contributes towards the preservation of the identity of linguistic minorities and, if supported by concrete measures, makes it possible for linguistic minorities to communicate effectively with government authorities.

At international law, argues the author, the protection of language rights takes many forms. First, the prohibition of language based discrimination outlaws language preferences that unreasonably or arbitrarily exclude individuals from taking part in certain public activities. States should be guided by the principle of proportionality in designing their language legislation, policies and practices. Proportionality demands that states be guided by principles of inclusion and reasonableness in their language preferences. However, substantive equality also demands that states undertake affirmative action to correct historical disadvantage and discrimination on the basis of language. The second premise casts language as a marker of the identity of linguistic minorities as communities and, depending on a range of factors, the right to use one's language in the private and public spheres of activity. At the domestic level, the language rights of linguistic minorities are embodied in the founding values and principles of the Constitution. The Constitution entrenches, among others, the principles of accommodation of cultural diversity (of which language is an intrinsic part), fundamental human rights and freedoms, and equality. It also explicitly obliges the state to consider diversity of languages in fostering national unity and recognises the rights of linguistic groups as a foundation of good governance.

More importantly, chapter 10 argues that the conferral of 'official language' status on 16 languages – at least 13 of which are used by ethnic and linguistic minorities – is an important step in the right direction. Further, section 6(3) of the Constitution provides that "agencies of government at every level must (a) ensure that all officially recognised languages are treated equitably; and (b) take into account the language preferences of people affected by governmental measures or communications". The author argues that this provision confirms the language history of Zimbabwe in terms of which there has never been equal treatment of official and non-official languages. It also allows the state to adopt affirmative action to promote the use of historically marginalised languages. This interpretation is supported by section 6(4) of the Constitution which binds the state to promote and advance the use of all languages used in the country, including sign language, and to create conditions for the development of those languages. In addition, the Constitution protects language

related rights such as equality and non-discrimination in the context of language use; freedom of expression (which is largely through language use); the right to use one's language and to participate in the cultural life of one's choice; the right of an accused person to have trial proceedings interpreted into a language that they understand; and language rights in the context of education.

Regardless of these transformative provisions, the challenge is that the Constitution neither expressly mentions anything about the use of the 16 languages in the business of government nor establishes any criteria for the determination of how official languages ought to be used in the country. In addition, the Constitution merely obliges the state to promote the use of all languages, not to actually use all official languages. On the one hand, the duty to promote is very permissive and confers on the political organs of the state wide discretion to decide when, how and to what extent to promote particular languages. On the other hand, the duty to use an official language is peremptory and leaves no room for politicians to delay the use of the language concerned. On the whole, while there exists constitutional protection of the rights of linguistic minorities, gaps still exist in the implementation of the relevant provisions of the Constitution. The equitable use of historically marginalised languages remains a pipe dream.

Penned by Khulekani Moyo, **chapter 11** discusses a wide range of socio-economic rights as provided for in the Constitution. These include the rights to freedom from arbitrary eviction,¹ access to health care,² sufficient food, clean water³ and education.⁴ The Declaration of Rights also protects select socio-economic rights of vulnerable groups such as children,⁵ women,⁶ the elderly,⁷ persons with disabilities⁸ and veterans of the 1970s liberation struggle.⁹ The author does not attempt to explain in detail the scope and content of all these rights but discusses general themes and approaches to the enforcement of socio-economic in the Zimbabwean context. The chapter is divided into three parts. The first part provides an overview of the socio-economic rights protected in sections 74 to 84 of the Constitution. Second, the chapter discusses and evaluates the role of international and comparative law as interpretive guides in giving meaning to the socio-economic rights protected in the Declaration of Rights. This is followed by a discussion of the institutional competence concerns and their impact in the judicial enforcement of socio-economic rights.

In addition, chapter 11 focuses on the horizontal application of the Declaration of Rights, especially with regard to its meaning and implications for the enforcement of socio-economic rights. The fourth section analyses the models of reviewing the

¹ Section 74 of the Constitution.

² Section 76 of the Constitution.

³ Section 77 of the Constitution.

⁴ Section 75 of the Constitution.

⁵ Section 81 of the Constitution.

⁶ Section 80 of the Constitution.

⁷ Section 82 of the Constitution.

⁸ Section 83 of the Constitution.

⁹ Section 84 of the Constitution.

positive duties imposed by socio-economic rights, namely the reasonableness approach and the minimum core approaches. Further, the chapter also explores the role of concepts impacting the enforcement of socio-economic rights, namely the 'progressive realisation' and 'availability of resources' and a recommendation on the proper interpretation of such concepts in enforcing socio-economic rights. It also evaluates the framework provided for under the Constitution for remedying human rights infringements and the role of the courts in crafting appropriate remedies.

In **chapter 12**, James Tsabora builds on the general discussion in the previous chapter and makes a critical analysis of the scope of the environmental rights clause in Zimbabwe's 2013 Constitution. First, the author begins the analysis by noting that environmental rights and duties are constitutionally extended to 'everyone', meaning that these rights can be enjoyed by natural or juristic persons. Further, environmental rights require state and non-state actors not to create conditions or circumstances that would negate other persons' enjoyment of the same rights. Accordingly, these rights address not only the relationship between the state and a person (vertical relationship), but also the relationship between private persons (horizontal application) and prohibits private actions that adversely impact on other persons' environmental rights.

Second, chapter 12 identifies and discusses five constitutive elements of environmental rights. These include the prevention of pollution; intra-generational equity; sustainable development; the principle of wise use of natural resources; and, finally, the progressive realisation of environmental rights. These norms and principles guide the development of the content of laws at all levels of government and are largely reflected in the legislation giving effect to the environmental rights clause. Clearly, these critical norms or principles are specifically mentioned for purposes of guiding the content and outputs of environmental laws. In unpacking the scope and relevance of these principles, the author also demonstrates linkages between the norms embedded in the constitutional environmental rights clause and the standards in the framework legislation, the Environmental Management Act (EMA). The author emphasises that the EMA, as sectoral specific legislation, comprehensively expands the scope of environmental rights by, among others, entrenching public participation, sustainable management of resources, sustainable development, pollution prevention, intra-generational equity and access to environmental information.

There are a number of key takeaways from chapter 12 of this anthology. To begin with, it recognises the importance of conducting business in a manner that protects the rights of present and future generations, generally known as the principle of intergenerational equity. This ensures that future generations are not exposed to extreme risks of environmental harm. In addition, it demonstrates that the Constitution codifies central normative concepts to guide the formulation and content of national environmental conservation framework legislation. Framework legislation should achieve prevention of pollution and ecological degradation; promote conservation; secure ecologically sustainable development; and secure equitable use of natural resources whilst promoting economic and social development. To be valid, environmental laws and regulations must incorporate these important norms.

Before closing, the author discusses in some bit of detail the circumstances under which environmental rights may be limited and the constitutional provisions regulating the limitations exercise.

Globally, environmental degradation disproportionately affects vulnerable groups, thereby causing short, long term and potentially irreversible impacts. In **chapter 13**, Rongedzayi Fambasayi, Josephine Chiname and Rejoice Katsidzira argue that environmental degradation is a human rights crisis predominantly affecting children. Accordingly, all actions to address its impacts on children should be viewed from a child rights perspective. Chapter 13 also explores whether and, if so, how the Zimbabwean environmental legal and policy frameworks, as governance instruments, conform to normative child rights standards and protect children's rights as prescribed by international law. The analysis is carried out against the backdrop of international and African regional law and constitutional imperatives to respect, promote, protect and fulfil children's rights, particularly in the context of environmental governance.

The central hypothesis of chapter 13 is that integrating a child rights perspective into environmental management could better inform and guide environmental and climate change responses, thereby enhancing the respect, protection, promotion and fulfilment of children's rights, specifically the right to an environment that is not harmful to health. The chapter observes that environmental governance institutions such as the Environmental Management Agency and processes such as Environmental Impacts Assessments are not sensitive to children's rights, and few or no mechanisms exist to ensure children's participation in environmental governance. It argues that the constitutionalisation of children's rights in Zimbabwean presents children with a powerful tool to require the government to take precautionary measures to ensure respect for and protection of children's rights from environmental harm and climate change.

James Tsabora and Mutuso Dhlwayo examine, in **chapter 14**, the interaction between indigenous land tenure systems and other competing claims from the side of foreign investment. They argue that the human rights framework created by the Constitution has important implications for the security of rights of both domestic and foreign investors interested in conducting business in the country. Similarly, the constitutional regime also impacts on the security of the land rights of indigenous communities held under customary law systems of tenure in Zimbabwe, particularly in view of the manner in which such rights are usually suppressed in favour of other investment projects. From a contemporary economic perspective, the legal protection of property and business interests has been hailed as a critical component in attracting investment and instilling business confidence in a country's economic system. Against this background, the authors interrogate the essence and substance of the constitutional clauses governing property rights of foreign investment and the rights of indigenous communities. The ultimate aim is to explore whether the constitutional framework reconciles the conflicting land rights and interests of foreign investment and indigenous communities.

Apart from the introduction and conclusion, chapter 14 is divided into seven sections of which the first deals with the constitutional regulation of property rights. The second section addresses issues relating to the land rights and interests of indigenous communities in areas that usually host large scale investment projects. Large scale investments occupy and make use of huge tracts of land to set up physical and technological infrastructure for operational purposes. In the third section, the authors demonstrate that the mere use, possession or occupation of land without freehold title to such land can grant the user, possessor or occupant a legally recognisable and enforceable right or interest in land. The fourth section briefly discusses the constitutional regime regulating compensation for compulsory acquisitions of property, including land, and the fifth section analyses the legal regime governing compensation for compulsory acquisition property under the Mines and Minerals Act. Using the diamond mining consolidation case as an entry point, the sixth section discusses the protection of mining investments from seizure by the state. The seventh section identifies and briefly explains the main findings of the research and, in some instances, proposes the way forward.

The authors argue that in the dust created by the rush to attract foreign investment most African governments deliberately ignore the security of land tenure of indigenous communities that host such investments. Large investment projects in sectors such as mining, road and dam construction and other infrastructure developmental projects have huge impacts on the land rights and interests of indigenous communities. Investment projects are therefore known to bring not only social, economic and environmental cost to host communities but also introduce land tenure insecurity in such areas. As such, one of the greatest issues generated by the presence of foreign investment projects in host communities directly relates to the insecurity of land rights of indigenous community groups. Ordinarily customary based tenure systems provide holders with a very weak level of protection of land rights and interests. In contrast, the investment licenses and special grants held by mostly foreign investment are strongly backed by legislative provisions that trump, in most instances, rights granted under customary law. African governments have struggled to strike the requisite, albeit delicate, equilibrium between rights of indigenous communities hosting foreign investment projects and the rights of foreign investors.

In **chapter 15**, James Tsabora unpacks the relationship between, on the one hand, the modern constitutional state and, on the other, traditional political systems and institutions. The author portrays the 2013 Constitution of Zimbabwe as a compromise between traditionalism and the new constitutionalism. The Constitution establishes the traditional institutional governance system under Chapter 15 of the Constitution, which in turn engenders opportunities for antagonism and adversity. For this reason, the nexus between the republican state and the governance system created by Chapter 15 of the Constitution demands scrutiny. The fact that 17 of the 18 chapters of the 2013 Constitution are reserved for the modern state system, with only one dedicated to traditional political institutions, seems to suggest the superiority of the modern state system. The major assumption that underpins chapter 15 is that the structural relationship between the modern state system and

the traditional political institutional system is shaped and influenced by the need to align the interests of traditional institutions with the national constitutional value system.

Apart from the introduction and conclusion, chapter 15 is divided into three sections. To begin with, the chapter explores the pre-colonial, colonial and post-independent traditional political governance system as an indigenous value system that existed prior to, during and after colonialism. The main argument sustained in this part is that the interactive relationship between the modern state and traditional institutions is born out of Zimbabwe's political and social history, and is a necessary part of modern governance. In the second section, the author analyses the place and role of the traditional institutions in the 2013 Constitution, and the extent that these institutions interact, relate and compete with those of the modern state system. This part thus evaluates the contribution of traditional political structures and customary legal regimes to the functions and responsibilities of modern government in general and the arms of the state in particular. The third and final part is an overview of the main findings from the analyses in the three parts. This is followed by a conclusion on the general implications of the relationship between the traditional political governance system and republican system of state and government envisaged in the Constitution.

In **chapter 16**, Admark Moyo explores the relationship between the provisions governing standing and access to court, on the one hand, and the enjoyment of human rights and fundamental freedoms, on the other. There has been a significant paradigm shift, especially in light of the broad provisions of section 85(1) of the Constitution, towards the liberalisation of *locus standi* in Zimbabwe. The liberalisation of standing allows a wide range of persons who can demonstrate an infringement of their rights or those of others to approach the courts for relief. It is intended to enhance access to justice by individuals and groups without the knowledge and resources to vindicate their rights in the courts. To this end, the drafters of the Declaration of Rights acknowledged that restrictive standing provisions defeat the idea behind conferring entitlements upon the poor and the marginalised. The majority of the people intended to benefit from the state's social provisioning programmes often do not have the resources, the knowledge and the legal space to drag powerful states, transnational corporations or rich individuals to court in the event that a violation of their rights occurs.

Chapter 16 is composed of seven substantive sections. It begins by discussing, in some detail, the meaning of access to justice and delimits the reach of the research by confining the term to mean access to courts as the primary dispute resolution forum. This entails an inquiry into the scope of constitutional provisions governing access to courts and the right to a fair hearing. It is shown that the right of access to court is an essential ingredient of access to justice and human rights in modern democracies. In the second section, the chapter briefly explains the scope of the standing provisions of the Lancaster House Constitution and the extent to which they limited access to justice and the rule of law. The third section critically analyses the scope of section 85 of the Constitution, including its limitations, strengths and implications for access to justice in Zimbabwe. The author argues that the

liberalisation of standing, particularly the constitutionalisation of public interest litigation, represents a major shift from restrictive standing rules and evidences an intention to widen the pool of citizens who exercise the right of access to court in this country.

The fourth section is devoted to a discussion of the dirty hands doctrine and the positive changes brought by the current Constitution. In the sixth section, the chapter describes the constitutional provisions regulating the formulation of rules of all domestic courts. These provisions lay out principles which should guide the formulation and content of all court rules. In this section, the author discusses the extent to which the applicable principles promote access to justice, the rule of law and the enjoyment of human rights in Zimbabwe. Referral by lower courts of constitutional issues, which arise in the course of litigation, to the Constitutional Court is discussed in the sixth part of the chapter. It is argued that the conditions governing referral of constitutional issues that arise during court proceedings are stringent and are seemingly inconsistent with the spirit and purpose behind the broad standing provisions entrenched in the Constitution. This is particularly so because whether or not the Court hearing the matter gives a litigant leave to take up the matter with the Constitutional Court, the litigant ordinarily has the right of direct access to the Constitutional Court.

Intersections and overlaps between standing, access to justice and human rights are explored in the seventh part of the chapter. The author argues that a liberal approach to standing requires courts to place substantial value on the merits of the claim and underlines the centrality of the rule of law by ensuring that unlawful decisions are challenged by ordinary citizens and straightened by the courts. When a court refuses to entertain a matter on the basis that the petitioner does not have standing in terms of the applicable rules, the same court is essentially both neglecting its duty to assess the validity or constitutionality of the impugned conduct or legislation and undermining the rule of law.

Christopher Munguma analyses, in **chapter 17**, the role of the Zimbabwe Human Rights Commission (ZHRC) in the protection, promotion and enforcement of fundamental human rights and freedoms. Human rights commissions are important entities in the democratic space of many countries. They play the role of a watchdog, educator and at times they also have powers of enforcement. Such commissions can take up cases, investigate them, resolve complaints and refer some cases to courts for judicial pronouncement. Chapter 17 starts with a brief discussion of the history of the ZHRC, with particular focus on the developments that led to its formation. It proceeds to identify and explain the international normative framework and standards governing national human rights institutions under international law, with a view to establishing whether or not the ZHRC complies with these standards. After this, the chapter analyses the legal framework establishing Ghana's Commission of Human Rights and Administrative Justice and points out some of the lessons to be derived by ZHRC from the Ghanaian experience. Chapter 17 also analyses the structure and functions of the ZHRC. This part of the chapter discusses the provisions governing the independence of the ZHRC (including financial independence); security of tenure for commissioners; and accessibility,

accountability and mandate of the ZHRC. The discussion takes a comparative stance as the author investigates whether or not the relevant provisions comply with the Paris Principles as the main benchmarks at the international level. This is followed by an evaluation of the achievements of the ZHRC since its establishment.

In **chapter 18**, Tarisai Mutangi gives a general overview of the African human rights system. The author begins by noting that Africa continues to deal with insurmountable human rights violations, which call for a robust system of human rights protection that can adequately respond to these challenges across the continent. It is against this background that one of the aims of the chapter is to review the African human rights system with a strong focus on demonstrating the legislative and institutional framework for the protection of human rights on the continent. The chapter begins with an outline of the history of the African human rights system, and moves on to examine the legislative framework of the system – with a focus on the African Charter on Human and Peoples' Rights, the African Charter on the Rights and Welfare of the Child and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (Maputo Protocol). The discussion of the most important treaties is followed by a comprehensive examination of the soft law principles contained in non-binding documents.

The final part of the chapter focuses on the institutional frameworks that make it possible to interpret and expand on the binding treaties (frameworks) and principles contained in the non-treaty documents. The African Commission on Human and Peoples' Rights (the African Commission) and the African Court on Human and Peoples' Rights (the African Court) are mandated to oversee the implementation of the African Charter and the Maputo Protocol. To this end, the chapter discusses some of the important decisions that have been made by these institutions with a view to analysing whether or not there is progress being witnessed on the ground. Particular focus is also placed on the importance of complementarity between the African Commission and the African Court. Apart from the exposition of the developments that have taken place in the African Commission and the African Court, the chapter also analyses the roles of the African rapporteurs, working groups and committees in the enforcement of human rights.

Authored by Admark Moyo, **chapter 19** concludes the discussion by raising some of the key issues set to shape the development of constitutional and human rights law in Zimbabwe. It is forwarding looking and seeks to highlight key opportunities and challenges in the enjoyment of human rights in the future.