

# Strengthening Locus Standi in Human Rights Litigation in Zimbabwe: An analysis of the Provisions in the New Zimbabwean Constitution

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## Abstract

Zimbabweans have been both victims of and witnesses to serious human rights violations over the years. Though there is wide agreement and speculation that the state and its agencies are the perpetrators of these atrocities, they have largely remained unprosecuted and unpunished. Such impunity is *inter alia* the result of ineffective law enforcement mechanisms and institutions as well as the lack of capacity and legal knowledge of victims to approach the courts and seek redress. These factors negatively affected the protection of human rights and access to justice in Zimbabwe.

Although the *Lancaster House Constitution* contained a Declaration of Rights, its enforcement mechanisms, particularly those relating to *locus standi* (legal standing), posed a great challenge to human rights litigation in Zimbabwe. This is so because the *Lancaster House Constitution* adopted the traditional common law approach to standing. Under this approach it was required that an individual must have a "personal, direct or substantial interest" in a matter in order to have standing. The Lancaster House Constitution failed to recognise the importance of broader rules of standing, which would accommodate public interest litigation, specifically for protecting human rights. Contrary to this, the new *Constitution of Zimbabwe* (2013) broadens the rules of standing in order to enhance access to the courts. This paper analyses the new approach to standing under the new constitutional dispensation in Zimbabwe.

To this end, the discussion commences with an elucidation of the concept of *locus standi* and its link to access to justice. This is followed by an analysis of *locus standi* under the *Lancaster House Constitution*. Since the new approach in Zimbabwe is greatly informed by the South African approach to *locus standi*, a brief analysis of standing in South Africa is made. The paper concludes with a discussion of the approach to *locus standi* under the new constitution with a view to demonstrating how the new approach is likely to impact on the right of access to justice and human rights protection.

## Keywords

Zimbabwe; locus standi; human rights litigation.

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## 1 Introduction

Zimbabweans have been both the victims of and the witnesses to serious human rights violations over the years.<sup>1</sup> Though there is wide agreement and speculation that the state and its agencies are the perpetrators of these atrocities, they have largely remained unprosecuted and unpunished.<sup>2</sup> Such impunity is *inter alia* the result of the ineffectiveness of the law enforcement mechanisms<sup>3</sup> and institutions as well as the lack of capacity and legal knowledge of victims, who are therefore unable to approach the courts and seek redress. These factors have negatively affected the protection of human rights and access to justice in Zimbabwe.

Although the *Lancaster House Constitution* contained a Declaration of Rights, its enforcement mechanisms, particularly those relating to *locus standi* (legal standing), posed a great challenge to human rights litigation in Zimbabwe. This is so because the *Lancaster House Constitution* adopted the traditional common law approach to standing.<sup>4</sup> Under this approach it was required that an individual must have a "personal, direct or substantial interest"<sup>5</sup> in a matter in order to have standing. The *Lancaster House Constitution* failed to recognise the importance of broader rules of standing, which would accommodate public interest litigation, specifically for protecting human rights. In contrast, the new *Constitution of Zimbabwe* (2013) broadens the rules of standing in order to enhance access to the courts. This paper analyses the new approach to standing under the new constitutional dispensation in Zimbabwe.

To this end, the discussion commences with an elucidation of the concept of *locus standi* and its link to access to justice. This is followed by an analysis of *locus standi* under the *Lancaster House Constitution*.<sup>6</sup> Since the

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<sup>1</sup> Human Rights Watch 2011 <http://bit.ly/1qwVpX2> 3.

<sup>2</sup> Zimbabwe Human Rights NGO Forum 2012 <http://bit.ly/1TmA4Yx> 9-11.

<sup>3</sup> Human Rights Watch 2011 <http://bit.ly/1qwVpX2> 3.

<sup>4</sup> The words *locus standi* and standing are used interchangeably in this paper.

<sup>5</sup> See s 24(1) of the *Lancaster House Constitution*, 1979.

<sup>6</sup> An analysis of the *locus standi* provision under the *Lancaster House Constitution* is necessary in order to ascertain how its *locus standi* provisions affected access to justice and human rights litigation in Zimbabwe. It is also important in that the paper

new approach in Zimbabwe is greatly informed by the South African approach to *locus standi*, a brief analysis of standing in South Africa is provided.<sup>7</sup> The paper concludes with a discussion of the approach to *locus standi* under the new constitution with a view to demonstrating how the new approach is likely to impact on the right to access to justice and human rights protection.

## 2 *Locus standi*

*Locus standi* relates to whether a particular applicant is entitled to seek redress from the courts in respect of a particular issue.<sup>8</sup> Standing determines whether an individual or group of individuals or an entity has the right to claim redress on a justiciable matter before a tribunal authorised to grant the redress sought. Abebe notes that standing is a preliminary issue that does not include the consideration of or any form of determination over the merits of the case.<sup>9</sup> *Locus standi* may be regarded as an essential tool for the realisation of human rights.

The concept of standing is intertwined with the right of access to justice. Furthermore, effective access to justice is considered as the most basic requirement of a legal system, which purports to guarantee legal rights.<sup>10</sup> Access to justice is a right recognised under major international and regional human rights instruments.<sup>11</sup> It guarantees that every person has access to an independent and impartial court or tribunal and the opportunity to receive a fair and just trial when that individual's liberty or property is at stake. However, it has been noted that access to justice does not always involve judicial recourse but also the availability of accessible, affordable and effective means for redress.<sup>12</sup>

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seeks to bring out how the departure from the *Lancaster House Constitution* position seeks to improve access to justice and human rights litigation in Zimbabwe.

<sup>7</sup> The comparative analysis with the *locus standi* provision in the *Constitution of the Republic of South Africa*, 1996 is made because of the influence of the South African provision had in the drafting of the *locus standi* provision in the new Zimbabwean Constitution. It is therefore crucial that an analysis of the South Africa position is made to effectively bring out how the standing position in South Africa has positively influenced human rights litigation in South Africa and how the inclusion of the same provision can bode well for human rights litigation in Zimbabwe.

<sup>8</sup> Loots 1989 SALJ 131.

<sup>9</sup> Abebe 2010 AHRLJ 408.

<sup>10</sup> Cappelletti *Judicial Process* 36.

<sup>11</sup> See for example arts 7 and 8 of the *Universal Declaration of Human Rights* (1948); art 14 of the *International Covenant on Civil and Political Rights* (1966); also see art 7 of the *African Charter on Human and Peoples Rights* (1981).

<sup>12</sup> *Committee on Economic, Social and Cultural Rights General Comment 9: The Domestic Application of the Covenant* UN Doc E/C 12/1998/24 (1998) para 2.

Access to justice is crucial to the realisation of human rights. To enhance such access, it is important that rules of standing are not overly strict or narrow to the extent that potential litigants are unduly denied access to relevant judicial bodies. This view is supported by Kay who is of the opinion that liberal standing rules enhance an active enforcement of human rights, whilst excessively strict rules stultify the opportunity of review for constitutionality.<sup>13</sup> In some African jurisdictions, including Zimbabwe, it has been observed that strict rules of standing can be a major barrier to the protection of human rights.<sup>14</sup>

## **2.1 *Locus standi* under the Lancaster House Constitution**

The *locus standi* rules under the *Lancaster House Constitution* adopted the common law approach, which provided for the traditional narrow rules of standing. The question of *locus standi* (the traditional narrow rules of standing) under the *Lancaster House Constitution* provided a challenge to human rights litigation in Zimbabwe. Linington notes that the problem with regards to *locus standi* under the *Lancaster House Constitution* was further compounded by the language used under section 24 of the *Lancaster House Constitution* (as it set out a number of options for enforcing constitutional rights) and by the judiciary's understanding (or lack of understanding) of the provision.<sup>15</sup>

The *Lancaster House Constitution* provided for two ways in which a case involving the violation of rights could be brought before the courts. A person could approach the Supreme Court directly for redress if he or she alleged that the Declaration of Rights had been, was being or was likely to be contravened in relation to him or her. Section 24(1) of the *Lancaster House Constitution* stated that:

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

Thus, section 24(1) sought to provide direct access to the Supreme Court to any person who alleged personal violation of their rights. The purpose of

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<sup>13</sup> Kay "Standing to Raise Constitutional Issues" 1.

<sup>14</sup> See the example of Nigeria in Obiagwu and Odinkalu "Combating Legacies of Colonialism and Militarism" 233.

<sup>15</sup> Linington "Developing a New Bill of Rights" 49.

section 24(1) in human rights litigation was to provide speedy access to the Supreme Court, which was the final court under the *Lancaster House Constitution*.<sup>16</sup>

In terms of section 24(1) of the *Lancaster House Constitution* it was, therefore, not enough that one had an interest in a matter when seeking to approach the Supreme Court directly, as the applicant's own rights must have been affected.<sup>17</sup> This approach was reiterated in the case of *United Parties v Minister of Justice, Legal and Parliamentary Affairs*.<sup>18</sup> In this case, the applicant, a political party, wanted to challenge the constitutionality of provisions of the *Electoral Act*.<sup>19</sup> The provisions gave constituency registrars the right to object to the registration of voters, as well as the right to desist from having to take any action in respect of objections lodged by voters regarding the retention of their names on the voters' roll. The Supreme Court held that the political party had no *locus standi in judicio* to challenge the provisions of the *Electoral Act*, which it alleged contravened the right to the freedom of expression of voters, such as the right protected under section 20 of the *Lancaster House Constitution*.<sup>20</sup> Gubbay CJ stated that:

[T]hus section 24(1) affords the applicant *locus standi in judicio* to seek redress for a contravention of the Declaration of Rights only in relation to itself (the exception being where a person is detained). It has no right either on behalf of the general public or anyone else. The applicant must be able to show a likelihood of itself being affected by the law impugned before it can invoke a constitutional right to invalidate the law.<sup>21</sup>

Although the *Lancaster House Constitution* provided for an automatic right of direct access to the Supreme Court, an applicant had to satisfy the

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<sup>16</sup> See *Mhandirwhe v Minister of State* 1986 1 ZLR 1 (S) where Baron JA stated, "Section 24(1) provides access to the final court in the land. The issue will always be whether there has been an infringement of an individual's rights or freedoms, and frequently will involve the liberty of the individual: constitutional issues of this kind usually find their way to this court, but a favourable judgment obtained at the conclusion of the normal and sometimes very lengthy, judicial process could well be of little value. And even where speed is not of essence there are obvious advantages to the litigants and to the public to have an important constitutional issue decided directly by the Supreme Court without protracted litigation".

<sup>17</sup> Linington "Developing a New Bill of Rights" 52.

<sup>18</sup> *United Parties v The Minister of Justice, Legal and Parliamentary Affairs* 1998 2 BCLR 224 (ZS).

<sup>19</sup> *Electoral Act* [Chapter 2:01].

<sup>20</sup> Section 20 of the *Lancaster House Constitution*, which protected the right of freedom of expression.

<sup>21</sup> *United Parties v The Minister of Justice, Legal and Parliamentary Affairs* 1997 2 ZLR 254 (S) 258B-E. Also see *Retrofit (Pvt) Ltd v Posts and Telecommunications Corporation* 1995 2 ZLR 199 (S) 207H-208A.

requisite *locus standi* test<sup>22</sup>. It was therefore not enough that one had an interest in a matter when approaching the Supreme Court directly. In addition, the applicant's own rights must have been affected in order for the applicant to be able to approach the Court directly.

The second way of bringing cases involving the Declaration of Rights was provided under section 24(2) of the *Lancaster House Constitution*. This section stated that:

If in any proceedings in the High Court or in any court subordinate to the High Court any question arises as to the contravention of the Declaration of Rights, the person presiding in that court, may, and if so requested by any party to the proceedings shall, refer the question to the Supreme Court unless, in his opinion, the raising of the question is merely frivolous or vexatious.

In accordance with the *Constitution*, any court, and if so requested by any party to the proceedings, had the power to refer matters involving any alleged breach of the Declaration of Rights to the Supreme Court. The exception to the aforementioned rule was if the court viewed the raising of the question as merely frivolous or vexatious. Any failure by a lower court to refer such a matter to the Supreme Court was viewed as a breach of the Declaration of Rights, unless the court viewed the raising of the question as frivolous or vexatious.<sup>23</sup> The Supreme Court held that a referral under section 24(2) should not take place unless an answer was material to the decision that the lower court had to make.<sup>24</sup> It was therefore important that the question had to be raised in the lower court so that the referral could be done.<sup>25</sup> A referral could not be done after the lower court had reached its decision; and the avenue for dealing with such a constitutional issue was through the appeal process.<sup>26</sup>

The narrow rules on standing under the *Lancaster House Constitution* posed a serious problem in terms of access to justice. The rules failed to

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<sup>22</sup> The *locus standi* test under s 24(1) of the *Lancaster House Constitution* as described on the previous page.

<sup>23</sup> *Martin v Attorney-General* 1993 1 ZLR 153 (SC) 158. In delivering his judgment in this case, Gubbay CJ stated that "[s]uppose that a judicial officer, solely due to the animosity towards an accused, in bad faith and without any warrant, were to rule that the question raised by him was frivolous or vexatious and so order his remand in custody pending trial. Could it be then said that the accused was only entitled to approach the Supreme Court for relief under section 24(3)? I think not. Such action by the judicial officer concerned would, as mentioned before, itself constitute an infringement of the accused's entitlement to the protection of the law. Moreover, and most importantly, since at the conclusion of any remand proceedings there is no right of appeal, no remedy under section 24(3) would be available to that accused".

<sup>24</sup> *S v Mbire* 1997 1 ZLR 579 (SC); *Jesse v Attorney-General* 1999 1 ZLR 121 (SC).

<sup>25</sup> *S v Mbire* 1997 1 ZLR 579 (SC); *Jesse v Attorney-General* 1999 1 ZLR 121 (SC).

<sup>26</sup> *Muchero v Attorney-General* 2000 2 ZLR 286 (SC).

recognise the practical barriers that prevented marginalised and vulnerable groups from accessing the courts. Groups from indigent communities were at a disadvantage in this regard, as they lacked the financial means and the knowledge to access courts. Thus, the narrow approach appears to have been an obstacle in human rights litigation in Zimbabwe. The discussion below seeks to emphasise this point.

### 3 The judiciary and *locus standi* under the *Lancaster House Constitution*

In a country where human rights abuses have been prevalent for many years, the narrow approach adopted in the *Lancaster House Constitution* concerning *locus standi* was a further major obstacle in addressing human rights violations. This was particularly true for the indigent groups.

Mapfumo notes that due to the narrow rules on standing under the *Lancaster House Constitution*, the judiciary under Gubbay CJ developed a conservative position and developed some flexibility in human rights litigation to enhance human rights protection in Zimbabwe.<sup>27</sup> For example, the Supreme Court under Gubbay CJ arguably adopted some flexibility in human rights litigation by extending standing to a human rights organisation<sup>28</sup> and the law society.<sup>29</sup> In the *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General*<sup>30</sup> case, the Supreme Court allowed a human rights organisation to challenge the constitutionality of the death sentence. The Court noted that the organisation's "avowed objects" were "to uphold human rights, including the most fundamental right of all, the right to life", and that it was "intimately concerned with the protection and preservation of the rights and freedoms granted to persons in Zimbabwe by the Constitution".<sup>31</sup> These factors persuaded the Court that the organisation was an appropriate body to assert the claim in question and concluded that:

...it would be wrong to fetter itself by pedantically circumscribing the class of persons who may approach it for relief to the condemned prisoners themselves; especially as they were not only indigent but, by reason of their

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<sup>27</sup> Mapfumo *Whither to, the Judiciary in Zimbabwe?* 22.

<sup>28</sup> See the case of *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General* 1993 4 SA 239 (ZS).

<sup>29</sup> See the case of *Law Society of Zimbabwe v Minister of Finance (Attorney-General Intervening)* 1999 2 ZLR 231 (SC).

<sup>30</sup> *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General* 1993 4 SA 239 (ZS).

<sup>31</sup> *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General* 1993 4 SA 239 (ZS) 246H.

confinement, would have experienced practical difficulty in timeously obtaining interim relief from the Court.<sup>32</sup>

However, there were instances where the Supreme Court under Gubbay CJ adopted the view that it was not enough for an applicant to have an interest in a matter when seeking to approach the Supreme Court directly in terms of section 24(1) of the *Lancaster House Constitution*. An applicant had also to show that his or her rights had been affected. This approach was followed in the case of *United Parties v Minister of Justice, Legal and Parliamentary Affairs*,<sup>33</sup> where the applicant was denied *locus standi*. In denying the applicant standing, the Supreme Court held that the impugned provisions affected the rights of voters and since political parties were not voters, *locus standi* could not thus be granted to political parties. In criticism of the judgment of the Supreme Court, Madhuku argued that the applicant had to be granted *locus standi* as electoral issues that affected the public also affected political parties.<sup>34</sup> Thus, the approach by the courts provided a missed opportunity for the judges to enhance public interest litigation in Zimbabwe.

Subsequent to Gubbay CJ's leadership of the judiciary, there has been no noticeable or significant effort to develop the rules on standing. The judiciary has adopted a strict interpretation of the traditional rules applying to standing, which has frequently resulted in the dismissal of human rights cases on mere technicalities. Thus, the Supreme Court (the majority) has, for example denied *locus standi* to challenge laws relating to the presidential elections to the leading opposition candidate in that election.<sup>35</sup> However, in a dissenting judgment Sandura JA noted that:

Quite clearly, the entitlement of every person to the protection of the law, which is proclaimed in section 18(1) of the Lancaster House Constitution, embraces the right to require the legislature, which in terms of section 32(1) of the Constitution consists of the President and parliament, to pass laws, which are consistent with the Constitution. If, therefore, the legislature passes a law, which is inconsistent with the Declaration of Rights, any person who is adversely affected by such a law has the *locus standi* to challenge the constitutionality of that law by bringing an application directly to this court in

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<sup>32</sup> *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General* 1993 4 SA 239 (ZS) 246H-247A.

<sup>33</sup> *United Parties v The Minister of Justice, Legal and Parliamentary Affairs* 1997 2 ZLR 254 (S).

<sup>34</sup> Madhuku 1998 *Legal Forum* 48.

<sup>35</sup> See the case of *Tsvangirai v Registrar General of Elections* (76/02) 2002 ZWSC 20 (4 April 2002). In this case the litigant contended that the *Electoral Act (Modification) Notice*, Statutory Instrument 41D of 2002 published three days before the 2002 Presidential election by the President (the laws restricted postal voting to only members of the uniformed forces) violated his rights to protection of law and freedom of expression as envisaged under the *Lancaster House Constitution*.



terms of section 24(1) of the Constitution. Thus, in the present case, the applicant had the right to demand that the presidential election be conducted in terms of the Electoral Law passed by parliament as required by section 28(4) of the Constitution. In the circumstances, he had the right to approach this Court directly in terms of section 24(1) of the Constitution and had the *locus standi* to file the application.<sup>36</sup>

In supporting the position of Sandura JA, De Bourbon notes that the approach of the majority to deny a candidate in the election the right to challenge laws, which directly affected the manner in which the election was conducted, could not be justified.<sup>37</sup> He notes that the approach by the majority was too narrow.<sup>38</sup>

A number of cases, post Gubbay CJ's leadership of the judiciary denote that the issue of standing had been used to limit access to courts in cases where human rights violations had been alleged. In the case of *Capital Radio (Pvt) Ltd v Broadcasting Authority of Zimbabwe*,<sup>39</sup> the Court denied the litigant access to the court on the basis that it was not licensed in terms of the *Broadcasting Services Act*,<sup>40</sup> an Act that the litigant was challenging. The Court failed to realise that the litigant was asking it to protect its rights, which it averred were being infringed upon by the impugned Act. The Court wanted the litigant to submit to this legislation before challenging its constitutionality.

The narrow interpretation of the rules of standing adopted by the judiciary became an impediment to human rights litigation in Zimbabwe. It limited litigants' right to access courts for the protection of their fundamental rights and freedoms. In an effort to improve human rights litigation and access to justice, the new constitutional dispensation in Zimbabwe, with great influence from the South African legal system, has adopted a more liberal approach to standing. As a result, the discussion below makes a brief analysis of the South African constitutional position on standing. The discussion will show how the liberal approach has enhanced the realisation of human rights.

#### 4 Standing in South Africa

The post-apartheid legal framework in South Africa provides an environment conducive to public interest litigation. The South African *Constitution* has adopted a liberal approach to *locus standi* as it provides

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<sup>36</sup> *Tsvangirai v Registrar General of Elections* (76/02) 2002 ZWSC 20 (4 April 2002).

<sup>37</sup> De Bourbon 2003 AHRLJ 201.

<sup>38</sup> De Bourbon 2003 AHRLJ 201.

<sup>39</sup> *Capital Radio (Pvt) Ltd v Broadcasting Authority of Zimbabwe* (162/2001) (Pvt) 2003 ZWSC 65 (25 September 2003).

<sup>40</sup> *Broadcasting Services Act* [Chapter 12:06].

various forms of public interest standing for the protection of rights in the Bill of Rights.<sup>41</sup> Liebenberg notes that section 38 of the *Constitution* makes broad and generous provision for persons who allege that a right in the Bill of Rights has been infringed or threatened to approach a court for appropriate relief.<sup>42</sup> Liebenberg further argues that the Constitutional Court has adopted an objective approach to standing in Bill of Rights litigation. It is not required that an applicant be personally adversely affected by an alleged human rights violation in order to have standing. It suffices if, objectively, a right in the Bill of Rights has been infringed or threatened, and the applicant can demonstrate, with reference to section 38(a)-(e), that he or she has "a sufficient interest" in obtaining the remedy sought.<sup>43</sup>

Crucially section 38(d) grants standing to "anyone acting in the public interest". Although there is no universally accepted definition of public interest, the South African Law Commission defined an action in the public interest as:

...an action instituted by a representative in the interest of the public generally, or in the interest of a section of the public, but not necessarily in that representative's own interest. Judgment of the court in respect of a public interest action shall not be binding on the persons in whose interest the action is brought.<sup>44</sup>

Cote and Van Garderen note that it was evident from the report of the Law Reform Commission that there was confusion at the time regarding what the scope of public interest litigation would be in South Africa.<sup>45</sup> In order to enhance public interest litigation, the criteria for determining whether one acted "genuinely in the public interest" were laid down in the case of *Ferreira v Levin*.<sup>46</sup> In this case, O'Regan J stated that:

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

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<sup>41</sup> See s 38 of the *Constitution of the Republic of South Africa*, 1996 that states, "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are-

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of person;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interests of its members."

<sup>42</sup> Liebenberg "Reflections on the Drafting a Bill of Rights" 40.

<sup>43</sup> This approach was established by the Court in *Ferreira v Levin* 1996 1 SA 984 (CC).

<sup>44</sup> SALC 1998 <http://bit.ly/1W4lqtG>.

<sup>45</sup> Cote and Van Garderen 2011 *SAJHR* 178.

<sup>46</sup> *Ferreira v Levin* 1996 1 SA 984 (CC).

reasonable and effective manner in which the challenge can be brought.; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the Court and the opportunity that those persons or groups have had to present evidence and argument to the Court.<sup>47</sup>

In *Lawyers for Human Rights v Minister of Home Affairs*,<sup>48</sup> the Constitutional Court stated what would be required for a person or organisation to be judged to be acting in the public interest when they were not directly affected by the case. In addition to the criteria laid down in *Ferreira v Levin*,<sup>49</sup> the Court added the degree of the vulnerability of the people affected; the nature of the right said to be infringed; and the consequences of the infringement of the right as crucial elements to be considered.<sup>50</sup> Abebe believes that this criterion is aimed at ensuring the genuineness of the applicants' motives by stifling cases brought for personal or publicity or political reasons under the guise of the public interest.<sup>51</sup>

The *Constitution* of South Africa enhances access to justice and stipulates that everyone has the right to have any dispute that can be resolved by the application of the law decided in a fair public hearing in a court or, where appropriate, another independent and impartial forum.<sup>52</sup> The aim of the sections discussed above is to make courts accessible to the ordinary citizen either by self-representation or through public interest groups and individuals.<sup>53</sup>

Despite challenges such as a lack of funding and a lack of experienced and skilled staff, the liberal rules on standing in South Africa have successfully enabled human rights litigation by members of civil society, particularly human rights non-governmental Organisations (NGOs).<sup>54</sup> Human rights groups have used these liberal rules to initiate court cases and have at times intervened on behalf of disadvantaged groups and individuals in human

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<sup>47</sup> *Ferreira v Levin* 1996 1 SA 984 (CC) para 234.

<sup>48</sup> 2004 4 SA 125 (CC).

<sup>49</sup> 1996 1 SA 984 (CC).

<sup>50</sup> *Lawyers for Human Rights v Minister of Home Affairs* 2004 4 SA 125 (CC) paras 16-18.

<sup>51</sup> Abebe 2010 *AHRLJ* 414.

<sup>52</sup> See s 34 of the *Constitution of the Republic of South Africa*, 1996.

<sup>53</sup> It should be noted that the *Superior Courts Act* 10 of 2013 was enacted in an effort to restructure the judiciary and the courts and thus to improve access to justice in South Africa. The enactment of the Act seeks to ensure equal access to justice through the provision of easy access to the courts in all provinces.

<sup>54</sup> Abebe 2010 *AHRLJ* 413.

rights litigation.<sup>55</sup> Several interest groups such as the Society for the Abolition of the Death Penalty,<sup>56</sup> The Women's Legal Centre,<sup>57</sup> Christian Education South Africa,<sup>58</sup> the AIDS Law Project<sup>59</sup> and the Community Law Centre<sup>60</sup> have over the years successfully initiated or intervened in litigation in protecting the rights of selected groups. A number of these cases have made an impact on the lives of disadvantaged South Africans.<sup>61</sup>

## 5 *Locus standi* under the new Zimbabwean Constitution

### 5.1 *Declaration of Rights*

The Declaration of Rights in Chapter 4 of the new *Constitution of Zimbabwe* contains a broader protection<sup>62</sup> of human rights, which include first generation,<sup>63</sup> second generation<sup>64</sup> and third generation<sup>65</sup> human rights. Section 44 of the *Constitution* places a duty on the State and every person, including juristic persons, to respect, protect, promote and fulfil the rights and freedoms in the Declaration of Rights. Section 45(1) goes further to

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<sup>55</sup> See the *Minister of Health v Treatment Action Campaign* 2002 5 SA 721 (CC), where the Constitutional Court found in favour of the Treatment Action Campaign that the government had a legal duty to provide anti-retroviral drugs to HIV-positive pregnant women.

<sup>56</sup> Intervention in *S v Makwanyane* 1995 6 BCLR 665 (CC) and in *Mohamed v President of the Republic of South Africa* 2001 7 BCLR 685 (CC).

<sup>57</sup> Intervention in *Moseneke v The Master* 2001 2 SA 18 (CC).

<sup>58</sup> Applicants in *Christian Education South Africa v Minister of Education* 1998 12 BCLR 1449 (CC) and *Christian Education South Africa v Minister of Education* 2000 10 BCLR 1051 (CC).

<sup>59</sup> Intervention in *Hoffman v South African Airways* 2000 11 BCLR 1211 (CC).

<sup>60</sup> Intervention in *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC).

<sup>61</sup> It should also be noted that public interest litigation strategies and interventions in courts by organised civil society have resulted in tremendous victories for disadvantaged groups in other parts of the world such as Canada and India. In Canada, amongst many other issues, courts have recognised the rights of farm workers to bargain collectively, due to public interest litigation brought on their behalf: (*Frasier v Ontario (Attorney General)* 2008 OJ No 1219 (CA)). In India, public interest litigation has been used to protect the rights and interests of marginalised populations, which include, amongst many others, children and migrant labourers. For more, see the following cases: *Laxmi Kant Pandey v Union of India* 1984 SC 469; *Sheela Barse v Secretary, Children's Aid Society* 1987 SC 659.

<sup>62</sup> Broader than the protection provided by the *Lancaster House Constitution*, which catered for only first-generation rights.

<sup>63</sup> These include, amongst many other rights, the right to personal liberty (s 49 of the *Constitution of Zimbabwe*); s 51 the right to human dignity; s 53 the freedom from torture or cruel, inhuman or degrading treatment or punishment; s 52 the right to personal security; and s 67 political rights.

<sup>64</sup> These include amongst many other rights, s 71 the right to health care; s 75 the right to education; and s 77 the right to food and water.

<sup>65</sup> See s 73 of the *Constitution of Zimbabwe*.

state that the Declaration of Rights binds the executive, legislature,<sup>66</sup> judicial institutions<sup>67</sup> and agencies of government at every level.<sup>68</sup> The direct vertical application of the Declaration of Rights, therefore, gives an individual the power to challenge the conduct of any of the organs of state for any breach of their duties under the Declaration of Rights. On the other hand, section 45(2), like section 8(2) of the *Constitution of the Republic of South Africa*,<sup>69</sup> recognises that private bodies may also perpetrate the abuse of human rights and seeks to protect individuals against the abuse of their rights by other individuals.

## **5.2 Standing under the Constitution of Zimbabwe**

Under the new *Constitution*, standing (in the Declaration of Rights) has been expanded substantially with a view to improving the protection of human rights. As was noted earlier, the revised position on standing in the new *Constitution* is modelled on the analogous South African provision, and thus includes a wide range of forms of public interest standing.

In the enforcement of fundamental human rights and freedoms, section 85(1) of the *Constitution* states that:

[a]ny of the following persons, namely (a) any person acting in their own interests; (b) any person acting on behalf of another person who cannot act for themselves; (c) any person acting as a member, or in the interests, of a group or class of persons; (d) any person acting in the public interest; (e) any association acting in the interests of its members; is entitled to approach a court, alleging that a fundamental right or freedom enshrined in this Chapter

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<sup>66</sup> See the South African example of *De Lille v Speaker of the National Assembly* 1998 3 SA 430 (CC).

<sup>67</sup> In the course of adjudicating legal disputes, judges and magistrates are therefore required to conduct themselves in a way that complies with the Declaration of Rights provisions. Thus, courts must promote the values and principles that underlie a society and that are recognised under the *Constitution*, which are based on the supremacy of the constitution, the rule of law, openness, justice, human dignity, equality and freedom. (See s 3 of the *Constitution of Zimbabwe*).

<sup>68</sup> Section 45 of the *Constitution of Zimbabwe*, which states that "(1) This Chapter binds the State and all executive and judicial institutions and agencies of government at every level. (2) This Chapter binds natural and juristic persons to the extent that it is applicable to them, taking into account the nature of the right or freedom concerned and any duty imposed by it. (3) Juristic persons as well as natural persons are entitled to the rights and freedoms set out in this Chapter to the extent that those rights and freedoms can appropriately be extended to them." On the other hand, also see s 8(1) of the *Constitution of the Republic of South Africa*, 1996 that states, "The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state".

<sup>69</sup> Section 8(2) of the *Constitution of the Republic of South Africa*, 1996 states: "A provision of the Bill of Rights binds a natural and juristic person if and to the extent that, it is applicable, taking into account the nature of the right and the nature and duty imposed by the right".

has been, is being or likely to be infringed, and the court may grant appropriate relief, including a declaration of rights and an award of compensation.

The above section provides for the enforcement of rights where the right has been violated, where the violation is under way, and where the violation is imminent or likely. This means that people do not have to wait for their rights to be violated first before seeking redress before the courts. Individuals can now approach the court for the enforcement of their rights even in cases where their rights are only threatened. In terms of the *Constitution*, where a court finds that an applicant's rights have been violated or threatened, the court can make an order for compensation or a declaration of rights. The court has the discretion to determine the appropriate relief as dictated by the particular circumstances.

Section 85 of the *Constitution of Zimbabwe* also identifies a number of litigants that may have standing when alleging that a right in the Declaration of Rights has been infringed or threatened.<sup>70</sup> Section 85 has considerably expanded the traditional rules of *locus standi*. Section 85 allows class actions/public interest actions and thus enhances human rights litigation. As has been noted in other jurisdictions,<sup>71</sup> litigation brought by an individual or organisation on behalf of third parties who are unable to access the courts has proven successful at protecting the rights of marginalised groups. The broadening of such rules therefore seeks to address past problems relating to access to courts by ensuring that no individuals are denied standing to litigate on constitutional issues. The broader rules of standing seek to advance the goals and values of a participatory democracy by permitting the participation and involvement of socially and economically disadvantaged individuals who may be unable to assert their rights through the political process. Thus, the various forms of public interest standing will serve as a tool to achieve social change through the law and as a vehicle for social reform for those with commitments to social justice and the rule of law.<sup>72</sup>

It is also important that, since the new *Constitution* now provides for various types of public interest litigation, criteria must be put in place by the courts and used to determine whether or not one proposes to act "genuinely in the

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<sup>70</sup> Section 85 of the new *Constitution of Zimbabwe* still includes the traditional approach to standing (those acting in their own interest); anyone acting on behalf of another person who cannot act for themselves (representative standing); anyone acting as a member of, or in the interest of, a group or class of persons (class actions); anyone acting in the public interest (public interest standing); and an association acting in the interest of its members (organisational standing).

<sup>71</sup> An example is that of South Africa, as discussed earlier in this paper.

<sup>72</sup> Hershkoff and McCutcheron "Public Interest Litigation" 96.

public interest". Such criteria can be informed by South African jurisprudence, as discussed previously in this paper. The criteria will thus ensure the genuineness of the applicants' motives by stifling cases brought for personal or publicity or political reasons under the guise of the public interest.

The value of the broader rules of standing in Zimbabwe will be enhanced if the courts are generally accessible and if all litigants are guaranteed fair hearings. This will be in line with the obligations created under the *Constitution*.<sup>73</sup> The independence and impartiality of the judiciary in Zimbabwe will play an important role in ensuring that the rights of litigants are protected.

### **5.3 Rules of Court with reference to section 85(1) of the Constitution of Zimbabwe**

Section 85(3) of the *Constitution of Zimbabwe* mandates that the rules of every court must provide for the procedure to be followed in cases where relief is sought under section 85(1). Section 85(3) states that:

The rules of every court must provide for the procedure to be followed in cases where relief is sought under subsection (1), and those rules must ensure that- (a) the right to approach the court under subsection (1) is fully facilitated; (b) formalities relating to the proceedings, including their commencement are kept to a minimum; (c) the court, while observing the rules of natural justice, is not unreasonably restricted by procedural technicalities; and (d) a person with particular expertise may, with the leave of the court, appear as a friend of the court.

The *Constitution* demands that rules must be put in place to facilitate constitutional litigation under section 85(1) (a)-(e) and to ensure that in the handling of cases, courts are not restricted by "procedural technicalities". The above section also seeks to improve access to justice and to remove any delays in the hearing of cases. This will ensure the protection of rights and ensure that such cases are speedily resolved, with formalities kept to a minimum. In order to guarantee access to the courts for constitutional litigation, the *Constitution* stipulates that the absence of the rules in section

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<sup>73</sup> Section 69 of the *Constitution of Zimbabwe* states, "... (2) In the determination of civil rights and obligations, every person has a right to a fair, speedy and public hearing within a reasonable time before an independent and impartial court, tribunal, or other forum established by law. (3) Every person has the right of access to the courts or to some other tribunal or forum established by law for the resolution of any dispute..."

85(3) will not limit the right to commence proceedings under section 85(1) and to have the case heard and determined by a court.<sup>74</sup>

#### **5.4 *Amicus curiae* procedure and rules**

Section 85(3)(d) of the *Constitution of Zimbabwe* allows for an *amicus curiae*, a person with a strong interest in or views on the subject matter of an action, but not a party to the action, to petition the courts and advise the court on some matter of the law that directly affects the case in question. It is important that rules providing guidelines as to who can act as *amicus curiae* in all courts as anticipated by section 85(3) be drafted along the same lines as those of the Zimbabwean Constitutional Court (which are discussed in the following paragraphs).<sup>75</sup>

It is also important that since the *Constitution* allows an *amicus curiae* to petition the courts, that Constitutional Court rules should be drafted to recognise the role of such an *amicus curiae*. Perhaps the example set by South Africa can be used as a guiding tool in drafting legislation that will encompass the *amicus curiae* rules. It should be noted that the participation of *amicus curiae* is a well-established practice in South African legal history. Brickhill and Du Plessis note that South African courts are increasingly recognising that certain matters must necessarily involve the perspectives and voices of organisations or entities that may not have a direct legal interest in the matters.<sup>76</sup> In South Africa, legislative provision for *amicus curiae* is made under the Constitutional Court Rule 10 of the Constitutional Court Rules. It provides guidelines as to who can act as an *amicus curiae* in a Constitutional Court hearing. Rule 10 provides that any person interested in any matter before the Court may, with the written consent of all the parties, be admitted as *amicus curiae*.<sup>77</sup> If the parties to the case do not give such consent, an application may be made to the Chief Justice.<sup>78</sup> The *amicus curiae* rules also provide for the form and content of an *amicus curiae* application.<sup>79</sup> The rules state that the application should briefly describe the interest of, and the position to be adopted by, the *amicus*

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<sup>74</sup> Section 85(4) of the *Constitution of Zimbabwe*.

<sup>75</sup> For example, in South Africa Rule 16A of the Uniform Rules of Court is drafted along the same lines as Rule 10 of the Rules of the Constitutional Court.

<sup>76</sup> Brickhill and Du Plessis 2011 *SAJHR* 152.

<sup>77</sup> Rule 10(1) of the Rules of the Constitutional Court.

<sup>78</sup> Rule 10(4) of the Rules of the Constitutional Court.

<sup>79</sup> Rule 10(6) of the Rules of the Constitutional Court.



*curiae*. The application should also set out the submissions and state their relevance to the proceedings.<sup>80</sup>

Mbazira notes that in South Africa the impact of the *amicus curiae* in human rights litigation has largely been seen in the general context of public interest litigation<sup>81</sup> and has been felt in economic, social and cultural rights litigation.<sup>82</sup> Thus, the drafting of the rules recognising the role of *amicus curiae* in Zimbabwe will ensure the vigorous use of the *amicus curiae* provision. They may help to give meaning to a number of rights under the Declaration of Rights; ensure the development of the procedures regarding intervention; and lead to the establishment of the *amicus curiae* procedure as part of the legal and judicial practice. Public interest litigation in Zimbabwe will be enhanced thereby. Non-governmental organisations and other human rights organisations will be allowed to use the liberalised rules of standing to initiate court cases or seek to be admitted as *amicus curiae* on behalf of individuals or groups in litigation of various human rights issues.

Furthermore, to enhance the role of the *amicus curiae* and public interest litigation in Zimbabwe, NGOs need to be provided with an enabling environment, as that is crucial for the promotion and protection of human rights.<sup>83</sup> Over the years, the activities of NGOs in Zimbabwe have been severely curtailed by the government through the enactment of restrictive legislation such as the *Private Voluntary Organisations Act* (PVO Act).<sup>84</sup> The Act was used to threaten NGOs involved in human rights work that they had to register with the then Ministry of Public Service, Labour and Social Welfare or risk prosecution.<sup>85</sup> Such measures have crippled the operations of a majority of NGOs in Zimbabwe and, as a result, forced a number of them to shut down.<sup>86</sup> This has negatively affected the promotion and protection of human rights by NGOs in the country. The Zimbabwe Human

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<sup>80</sup> Rule 10(6) of the Rules of the Constitutional Court.

<sup>81</sup> Mbazira 2012 LDD 204.

<sup>82</sup> For example, see amongst several other cases: *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC); *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC); and *Minister of Health v Treatment Action Campaign* 2002 5 SA 721 (CC).

<sup>83</sup> For example, Mbazira 2012 LDD 208 notes that the role of the *amicus curiae* has been noted in the context of the prevalence of human rights NGOs in South Africa. These NGOs, such as the Treatment Action Campaign (TAC), the Freedom of Expression Institute (FXI), and the Institute for Democracy in South Africa (IDASA) and Lawyers for Human Rights have either used the liberalised standing requirement to initiate court cases. They have also sought admission as *amicus curiae* on behalf of individuals or groups in litigation of various human rights issues.

<sup>84</sup> *Private Voluntary Organisations Act* 22 of 2001 [Chapter 17:05] (the PVO Act).

<sup>85</sup> See s 6 of the PVO Act.

<sup>86</sup> Chamboko 2012 <http://bit.ly/1NABzpc>.

Rights Commission (ZHRC) has realised the importance of NGOs in human rights promotion and protection,<sup>87</sup> and it follows that it is important that the PVO Act must be repealed to enhance the role of NGOs in fostering a culture of human rights in Zimbabwe. Lawyers taking up human rights cases in Zimbabwe have been subjected to arrest, abuse and torture for fighting for the protection of human rights. Human rights lawyers such as Andrew Makoni, Alec Muchadehama and Beatrice Mtetwa (a board member of the Zimbabwe Lawyers for Human Rights) have been subjected to arrests and threats for taking up human rights cases.<sup>88</sup> An enabling and free political environment is crucial in enhancing the ability of NGOs to litigate either through the *amicus curiae* procedure or through using the liberal rules on standing, and thus enhance the culture of public interest litigation in Zimbabwe.

### 5.5 Removal of "dirty hands" doctrine

Besides expanding the rules of standing, the *Constitution of Zimbabwe* explicitly removes the concept of "dirty hands"<sup>89</sup> as a bar to constitutional litigation. The Constitution explicitly states "...the fact that a person has contravened a law does not debar them from approaching a court for relief under subsection (1)".<sup>90</sup> This provision seeks to ensure that persons who may be guilty of contempt are not precluded from instituting constitutional applications. The provision also seeks to guide the judiciary in dealing with such cases. Under the leadership of Chidyausiku CJ, the judiciary has used this "dirty hands" doctrine to deny persons standing before the courts, thus hindering the protection of human rights.

In contradiction of the decision of *Minister of Home Affairs v Bickle*,<sup>91</sup> the Supreme Court ruled in the *Associated Newspapers of Zimbabwe (Pty) v*

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<sup>87</sup> ZHRC 2014 <http://bit.ly/1XCSfi1>.

<sup>88</sup> See FIDH 2012 <http://bit.ly/1VbzqSp> 20.

<sup>89</sup> The "dirty hands" doctrine manifests the principle that one cannot seek equitable relief or assert an equitable defence if that party has violated an equitable principle such as good faith.

<sup>90</sup> Section 85(2) of the *Constitution of Zimbabwe*.

<sup>91</sup> *Minister of Home Affairs v Bickle* 1983 1 ZLR 99 (S). In this case the Supreme Court held that the effect of s 24 (*Lancaster House Constitution*), as read with s 18(1) and (9) of the *Lancaster House Constitution*, was that the courts cannot, except in the most exceptional circumstances, deny aggrieved persons access to them. Fieldsend CJ stated that the constitutional right of access should prevail unless it is plain that the contempt either of any process or of the law of which the applicant may be guilty itself impedes the course of justice. In making its decision, the court relied on the English decision of *Hadkinson v Hadkinson* 1952 All ER 567 (CA) 574 where Denning LJ stated, "it is a strong thing for a court to refuse to hear a party to a cause and it is only to be justified by grave considerations of public policy. It is a step which a court will

*Minister of State for Information and Publicity in the President's Office*<sup>92</sup> that a corporate entity could not challenge the constitutionality of the provisions in the *Access to Information and Privacy Act*<sup>93</sup> because it had "dirty hands". The applicant (the owner of The Daily News) had failed to register in terms of the Act and because of this failure; Chidyausiku CJ ruled that the applicant had failed to comply with the impugned legislation. Because of the non-compliance, the applicant had "dirty hands", which precluded it from proceeding with the constitutional application.

Feltoe notes that although the applicant raised the *Bickle* case in its heads of argument, the Supreme Court never referred to this case in its judgment.<sup>94</sup> Linington notes that instead of relying on the *Bickle* case, the Supreme Court relied on the English case of *F Hoffman-La Roche and Co AG v Secretary of State for Trade and Industry*,<sup>95</sup> that had not been raised by either side in the proceedings and was not relevant in the discussion of the "dirty hands" doctrine. Feltoe also notes that the *Hoffman* case did not involve a constitutional challenge and the dirty hands doctrine. This is so as the *Hoffman* case did not rule that a person who is arguing that a law requiring compulsory registration was a violation of his fundamental rights must first comply with that law before he is entitled to a ruling regarding the constitutionality of that law.<sup>96</sup> Linington further notes that the essence of the *Bickle* case is that compliance with an impugned law is not a prerequisite to challenging the constitutional validity of a law concerned.<sup>97</sup> Blom-Cooper, in criticising the decision of the Supreme Court, pointed out that the "dirty hands" doctrine was not relevant in the context of public law as it applied exclusively in private law.<sup>98</sup>

Other jurisdictions around the world protect the right of a person to challenge the constitutional validity of legislation and that such a right is not affected by the "dirty hands" doctrine.<sup>99</sup> The removal of the "dirty hands"

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only take when the contempt itself impedes the course of justice and there is no effective means of securing his compliance".

<sup>92</sup> *Associated Newspapers of Zimbabwe (Pvt) Ltd v Minister of State for Information and Publicity in the President's Office* (07/03) (Pvt) 2003 ZWSC 20 (11 September 2003).

<sup>93</sup> *Access to Information and Privacy Act* [Chapter 10:27].

<sup>94</sup> Feltoe date unknown <http://bit.ly/1OC2vzL>.

<sup>95</sup> *F Hoffman-La Roche and Co AG v Secretary of State for Trade and Industry* 1975 AC 295.

<sup>96</sup> Feltoe date unknown <http://bit.ly/1OC2vzL>. Also see Linington "Developing a New Bill of Rights" 55.

<sup>97</sup> Linington "Developing a New Bill of Rights" 56.

<sup>98</sup> Blom-Cooper 2003 <http://bit.ly/1W4QJpn>.

<sup>99</sup> See for example the American case of *People v Hawkins* 326 Ill 3d 992. Also see *Van der Tang v Spain* 1996 22 EHRR 363 (ECHR).

doctrine will result in the development of an effective culture of constitutionalism in Zimbabwe, and will guarantee access to the courts on matters relating to the Declaration of Rights.

### **5.6 Direct access to the Constitutional Court**

The *Constitution of Zimbabwe* guarantees an individual automatic right of direct access to the Constitutional Court.<sup>100</sup> Such direct access to the Court is allowed when it is in the interests of justice with or without leave of the Constitutional Court. Section 167(5) states that:

Rules of the Constitutional Court must allow a person, when it is in the interests of justice and with or without leave of the Constitutional Court- (a) to bring a constitutional matter directly to the Constitutional Court; (b) to appeal directly to the Constitutional Court from any other court; (c) to appear as a friend of the court.

Because of the complexity, cost and time involved in taking a case through the ordinary courts, this provision potentially constitutes an important mechanism through which indigent litigants may access the Constitutional Court.<sup>101</sup> This provision in the Constitution of Zimbabwe is premised on the inclusive public interest ideal. However, it remains to be seen how the judiciary in Zimbabwe will interpret it in order to ensure the accessibility of the Constitutional Court.

The above provision is similar to that found in the South African *Constitution*.<sup>102</sup> The only difference between the two is that whilst an individual in Zimbabwe can directly approach the Constitutional Court with or without the leave of the Court, the South African provision makes it mandatory for an individual to obtain the leave of the South African Constitutional Court in order to have direct access to the Court. Section 167(6)(a) of the South African *Constitution* states that the question of direct access to the Constitutional Court must be dealt with by national legislation or the rules of the Constitutional Court. Such access is possible when it is in the interests of justice and with leave of the Constitutional Court. It is important that the relevant constitutional application for direct access must

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<sup>100</sup> Section 167(1)(a) of the *Constitution of Zimbabwe* confirms that the Constitutional Court in Zimbabwe is the highest court in all constitutional matters and its decisions on those matters bind all other courts.

<sup>101</sup> See Dugard 2006 *SAJHR* 272.

<sup>102</sup> See 167(6) of the *Constitution of Zimbabwe* which states that "National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court- (a) to bring a matter directly to the Constitutional Court; or (b) to appeal directly to the Constitutional Court from any other court..."

set out the grounds on which it is contended that it is in the interests of justice that an order for direct access be granted.<sup>103</sup>

It is submitted that it is crucial that in addition to the constitutional guarantee of direct access in the Zimbabwean Constitution rules of the Constitutional Court must be drafted to set down criteria to assist the Court in determining when direct access will (and will not) be appropriate. Such criteria is essential in assisting a Constitutional Court to legitimately exclude cases in which the merits are weak, and to eliminate applicants who may attempt to have spurious applications heard under multiple guises.<sup>104</sup>

Since the Constitutional Court in Zimbabwe is a newly established institution, rules of the Court are yet to be drafted. However, section 18(4) of Schedule Six of the *Constitution of Zimbabwe* states that the rules of the Supreme Court<sup>105</sup> shall apply with necessary changes to the procedure of the Constitutional Court. Since the drafting of the rules of the Supreme Court was influenced by the *Lancaster House Constitution*, which provided for the traditional narrow rules on standing (affecting the accessibility of the Supreme Court), it is important that new rules of the Constitutional Court must be drafted to meet the demands of section 85 of the *Constitution* (the enforcement provision). This will enhance the accessibility of the Constitutional Court. More crucially, the judiciary should interpret such rules in a way that will enhance access to justice, especially for poor members of society. In South Africa, the Constitutional Court<sup>106</sup> has put in place the criteria for an application for direct access to the Court. The criteria include that an application must first address the issue of the applicant's having exhausted all other remedies or procedures that may have been available.<sup>107</sup> Second, an application has to address whether the matter is of sufficient urgency or public importance to warrant the applicant's being granted direct access.<sup>108</sup> Third, an application has to address the prospects

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<sup>103</sup> See Part VIII Rule 18(2)(a) of the Rules of Constitutional Court.

<sup>104</sup> Dugard 2006 *SAJHR* 273.

<sup>105</sup> *Supreme Court Act* [Chapter 7:13].

<sup>106</sup> Despite the existence of this criterion, Dugard 2006 *SAJHR* 272 is of the opinion that the Constitutional Court has interpreted these rules restrictively, hence making the Constitutional Court a less accessible institution.

<sup>107</sup> See the case of *Besserglik v Minister of Trade, Industry and Tourism* 1996 4 SA 331 (CC) para.6.

<sup>108</sup> See for example *S v Makwanyane* 1995 6 BCLR 665 (CC) paras. 4, 6; *S v Dlamini* (heard with *S v Dladla*; *S v Joubert*; *S v Schietekat*) 1999 4 SA 623 (CC) para. 35; *Moseneke v The Master* 2001 2 SA 18 (CC) para. 19.

of success based on the substantive merits of the case.<sup>109</sup> The judiciary in Zimbabwe could replicate such criteria in order to determine when direct access will (and will not) be appropriate.

## 6 Conclusion

The discussion in this paper has highlighted the challenges relating to standing under the *Lancaster House Constitution*. It has noted that rules of standing are connected with and can profoundly impede or facilitate access to justice. The traditional rules on standing provided a barrier that prevented individuals from accessing courts and justice. This impacted negatively on the protection of human rights. However, the advent of the new *Constitution* has greatly changed the situation. Informed by the South African legal system, the new *Constitution* has broadened the right to standing. Besides maintaining the traditional rules of standing, the *Constitution* also provides for public interest litigation. The new rules on standing ought to facilitate an increase access to courts and justice for the people of Zimbabwe, and to ensure that their rights are protected. As a result, the issue of standing is no longer a barrier to human rights litigation in Zimbabwe. However, it is crucial that in order to enhance constitutional litigation through public interest standing, court rules governing public interest standing and procedures for the *amicus curiae* have to be drafted urgently. This will create certainty and further enhance human rights litigation in Zimbabwe.

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## List of Abbreviations

AHRLJ	African Human Rights Law Journal
FIDH	International Federation for Human Rights
FXI	Freedom of Expression Institute
IDASA	Institute for Democracy in South Africa
LDD	Law, Democracy and Development

NGOs	Non-government Organisations
PVO Act	Private Voluntary Organisations Act
SAJHR	South African Journal on Human Rights
SALC	South African Law Commission
SALJ	South African Law Journal
TAC	Treatment Action Campaign
ZHRC	Zimbabwe Human Rights Commission