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Standing, access to justice and the rule of law in Zimbabwe

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Summary

This article argues that the liberalisation of locus standi, particularly the provisions of section 85(1) of the Zimbabwean Constitution, has magnified opportunities for access to justice and the rule of law in Zimbabwe. Liberalising standing allows a wide range of persons to approach the courts for personal relief or to vindicate the public interest. Furthermore, the Constitution also abolishes the 'dirty hands doctrine', a common law concept in terms of which a litigant lacks standing if he or she has not complied with the legislation the legality or constitutionality of which they are challenging. The new approach permits litigants to launch proceedings challenging the constitutionality of pieces of legislation that they allegedly have violated. More importantly, the provisions governing standing outline four principles with which court rules must comply. These principles are meant to ensure that the constitutional promises of access to justice and the rule of law are not thwarted by restrictive court rules at every level of the judicial system. In a way, the four principles allow courts to entertain as many cases as possible to ensure both that there is due respect for the rule of law and that the majority of litigants have access to both procedural and substantive justice. Finally, it is argued that the general ouster of the courts' jurisdiction in land-related legal claims undermines the concept of the rule of law and allows the state to violate property rights by grabbing land without either paying compensation or allowing the owners of such land to approach courts for redress.

Key words: *standing; access to justice; rule of law; Zimbabwe*

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1 Introduction

There has been a significant paradigm shift, especially in light of the broad provisions of section 85(1) of the Zimbabwean Constitution, towards the liberalisation of *locus standi* in Zimbabwe. Liberalising 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 marginalised. The majority of the people intended to benefit from the state's social provisioning programmes often do not have the resources and knowledge to take powerful states, transnational corporations or rich individuals to court in the event of a violation of their rights. To address this problem, section 85(1) of the Constitution allows not only persons acting in their own interests, but also any person acting on behalf of another person who cannot act for themselves, any person acting as a member, or in the interests of a group or class of persons, any person acting in the public interest and any association acting in the interests of its members, to launch court proceedings against alleged violators of the rights in the Declaration of Rights.

This article focuses on standing, access to justice and the rule of law in Zimbabwe and is composed of nine parts of which this introduction is the first. The second part of the article discusses, in some detail, the meaning of access to justice and delimits the reach of the research by confining the term to mean access to courts as the primary dispute resolution forum. The term 'court' is interpreted in its narrow sense to mean formal courts where provisions regulating standing have some relevance. In the third part, the article briefly explains the scope of the standing provisions of the Lancaster House Constitution (LHC) and the extent to which they limited access to justice and the rule of law. The fourth part critically analyses the scope of section 85 of the Constitution, its limitations, strengths and implications for access to justice and the rule of law. It is argued 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 exercising the right of access to court in Zimbabwe.

The Zimbabwean Constitution abolishes the 'dirty hands doctrine', a concept in terms of which a litigant lacks standing if he or she has not complied with the legislation the legality or constitutionality of which they are challenging. The fifth part is devoted to a discussion of this doctrine and the positive changes brought about by the current Constitution. In the sixth part, the article describes the constitutional provisions regulating the formulation of rules of all domestic courts.

This part discusses the extent to which these principles promote access to justice and the rule of law in Zimbabwe.

Intersections and overlaps between standing, access to justice and the rule of law are explored in the seventh part of the article. It is argued that a liberal approach to standing requires courts to place substantial value on the merits of the claim, and underlines the centrality of the rule of law by ensuring that unlawful decisions are challenged by ordinary citizens and straightened by the courts. In the eighth part of the article, it is argued that the greatest threat to access to justice and the rule of law in Zimbabwe appears to have come from constitutional provisions that oust the jurisdiction of the courts, particularly in land-related claims. Ouster clauses have been part of Zimbabwean law since the insertion into the now repealed Constitution of an amendment, and the courts have been reluctant to declare these invalid, thereby undoing the promise of the liberalisation of *locus standi* and the rule of law in land-related cases. The final part of the article ends the discussion by making some remarks on the future of access to justice and the rule of law in Zimbabwe, especially in light of the provisions governing standing and other related matters.

2 Access to justice (fair hearing) as access to an impartial court

The notion of standing is based on the existence of a right, whether *prima facie* or certain. If a litigant wrongly appears before the courts and lacks a clear or sufficient interest in the matter, courts usually dismiss the matter and insist that the appropriate person should appear before them. The right of access to court is constitutionally protected as part of the broad right to a fair hearing. Sections 69(1) to (3) of the Constitution is framed in the following terms:

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

The phrase 'right to a fair trial' consists of a number of component rights including, but not limited to, the right to a speedy hearing, legal representation, cross-examination, the presumption of

innocence and pre-trial disclosure.¹ It is obvious that the first two subsections outline the key components of the right of access to court, which is meant to give effect to the broad notion of access to justice. Section 69(1) of the Constitution captures the key components of the right to a fair hearing in criminal trials, and section 69(2) broadly describes the right to a fair hearing in civil proceedings. Notably, the component rights of a fair trial foster equality and enable litigants to present their side of the story in impartial courts or tribunals. The principle of equality becomes the core of the structure of fairness and lies at the heart of modern civil and criminal processes. The right to a fair hearing is as ancient as the trial process itself, stretching over centuries and underlining the need for justice for all and equality before the law. This right is aimed at promoting the administration of justice and securing the rule of law.²

The right to a 'fair trial' is treated as overlapping with the overarching right to a 'fair and public hearing by a competent, independent and impartial tribunal established by law'.³ The right implies that all persons should have inherent access to the courts and tribunals, including access to effective remedies and reparations. The fairness of the hearing goes beyond the requirement of independence and impartiality of the judges and entails the absence of any direct or indirect influence, pressure or intimidation or intrusion from whatever side and for whatever cause.⁴ The public character of hearings and of the pronouncement of judgments, therefore, is one of the core guarantees of the right to a fair trial and implies that court proceedings should be conducted orally and in a hearing to which the public has access.

The right to a fair hearing particularly implies that tribunals and other decision-making authorities must refrain from any act that could influence the outcome of the proceedings to the detriment of any of the parties to the court proceedings.⁵ In general, fair trial guarantees do not only concern the outcome of judicial proceedings, but rather the process by which the outcome is achieved.⁶ There are structural rules regarding the organisation of domestic court systems. Securing the right of access to court and to a fair hearing can require a high level of investment in the court system, and many states often fail to fulfil their obligations because of serious structural problems. It should be noted, however, that human rights law does not seek to impose a particular type of court system on states, but rather the

1 See R Clayton & H Tomlinson *Human rights law* (2000) 589-590; S Treechsel (ed) *Human rights in criminal proceedings* (2005) 85.

2 Human Rights Committee, Article 14 (Administration of justice) Equality before the courts and the right to a fair and public hearing by an independent court established by law' (1984) para 1.

3 See *Goktan v France* 33402/92.

4 W Kalin & J Kunzli *The law of international human rights protection* (2011) 453-454.

5 J Burchell *Principles of criminal law* (2005) 19.

6 S Shah *International human rights law* (2014) 270.

implementation of the principle that there should be a separation of powers between the executive, the legislature and the judiciary.⁷

Fairness, justice and the rule of law all have substantive and procedural dimensions. They suppose an inherent need to comply with the procedural and substantive requirements of the law in order to ensure that justice is delivered to individuals and communities.⁸ In general, it is an essential element of a fair trial that litigants be treated fairly and in accordance with lawful procedures, not only during the trial itself, but also from the moment they first come into contact with law enforcement agencies. If lawful procedures are violated at any stage during the process, not only does the adversely-affected litigant have a civil remedy against the responsible authorities, but the violation very often affects the validity of subsequent stages. This aspect of procedural justice is often referred to as procedural fairness and seeks to ensure that the state and the court comply with the procedural requirements of the rule of law. The procedural element of the rule of law requires state and non-state actors to function in a manner that is consistent with the applicable rules of procedure in any given case. Finally, the right to a fair hearing includes the right of equal access to courts and equality of arms before decision-making forums. These elements are in turn briefly considered.

2.1 Equal access to courts and equality of arms

The right of access to court is essential for constitutional democracy and the rule of law.⁹ Its significance lies in the fact that it outlaws past practices of ousting the court's jurisdiction to enquire into the legal validity of certain laws or conduct. A fundamental principle of the rule of law is that anyone may challenge the legality of any law or conduct.¹⁰ In order for this entitlement to be meaningful, alleged illegalities must be justiciable by an entity that is separate and independent from the alleged perpetrator of the illegality.¹¹ Access to court and the rule of law both seek to promote the peaceful institutional resolution of disputes and to prevent the violence and arbitrariness resulting from people taking matters into their own hands.¹² Thus, not only is the right of access to court a bulwark against vigilantism, but also a rule against self-help and an axis upon which the rule of law turns. Unless there are good reasons (self-

7 As above.

8 See *S v Sonday & Another* 1995 (1) SA 497 (C) 507C and *Taylor v Minister of Education & Another* 1996 (2) ZLR 772.

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

10 *De Lange v Smuts* NO 1998 (3) SA 785 (CC) paras 46-47.

11 *Mdeyide* (n 9 above) para 1.

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

defence or necessity, for instance), no one should be permitted to take the law into their own hands.¹³

The right to equality before the courts also includes the protection of equality of arms and treatment without discrimination. ‘Equality of arms’ means that all parties should be provided with the same procedural rights unless there is an objective and reasonable justification not to do so and there is no significant disadvantage to either party.¹⁴ The essence of the guarantee is that each side should be given the opportunity to challenge all the arguments put forward by the other side.¹⁵

2.2 An illimitable and non-derogable right at the domestic level

The Zimbabwean Constitution clearly stipulates in no uncertain terms that no law may limit the right of access to an impartial court and to a fair hearing.¹⁶ Such a provision is laudable, given that the aim of the right of access to court is to ensure the proper administration of justice and the rule of law. Therefore, in order for the state to commit itself to a society founded on the rule of law, there is a need to value and respect the aforementioned right to a fair trial.¹⁷ This should be demonstrated by the state in everything it does, including the way in which hearings are conducted.¹⁸ Given the importance of justice and fair treatment in the constitutional scheme, the gross unfairness as well as injustice which arises as a result of the absence of a fair hearing carries no less weight.¹⁹ The fair trial right may not be derogated from even during an emergency. The identification of this right as non-derogable implies that its suspension cannot directly assist in the usual objective of protecting the life of the nation, access to justice and the rule of law.²⁰

The Zimbabwean Constitution expressly stipulates that no law may limit the right to a fair trial and no person may violate this right.²¹ This right is also non-derogable in terms of section 87(4)(b) of the Constitution. In theory, the inclusion of the right to a fair trial under a list of illimitable and non-derogable rights entrenches the nation’s commitment to due process rights, such as the presumption of innocence and the right to a public hearing which is not arbitrary. The

13 I Currie & J de Waal *The new constitutional and administrative law* (2001) 407.

14 Shah (n 6 above) 274.

15 General Comment 32, para 13.

16 Sec 86(3)(e) Constitution.

17 See *S v Sebejan & Others* 1997 (8) BCLR 1086 (W).

18 I Currie & J de Waal *The Bill of Rights handbook* (2013) 165.

19 This is in line with the principles of transparency, accountability and openness that inform our Constitution and its entrenchment of democracy and the rule of law.

20 Eg, there is no additional protection of the life of the nation to be gained from suspending the right to a fair trial. This is so particularly because derogating from this right only leads to arbitrariness and defeats the entire process of the proper administration of justice in a nation.

21 Sec 86(3)(e) Constitution.

Human Rights Committee has previously reiterated that ‘deviating from fundamental principles of fair trial, including the presumption of innocence, is prohibited at all times’,²² thereby underlining the centrality of this right in modern democracies. More importantly, however, the fact that the right to a fair hearing is illimitable and non-derogable underlines the importance of the review powers of the court, the rule of law and the need to avoid ouster clauses at all costs.

3 Standing under the Lancaster House Constitution

According to the Lancaster House Constitution (LHC), only persons directly affected or about to be affected by infringements of rights were entitled to approach the courts for relief. The idea that ‘any person acting in their own interests’ is entitled to approach the local courts for relief was concretised by the provisions of the now defunct LHC. Section 24(1) of the LHC was designed to promote direct access to the then apex court (the Supreme Court) by any person who alleged that their personal rights had been infringed. Under the LHC, only persons negatively affected by the impugned conduct could institute court proceedings against alleged violators of human rights and the rule of law. Thus, a person could not have *locus standi* unless they were able to demonstrate that a provision of the Declaration of Rights had been contravened in respect of themselves.²³ When seeking direct access to the Constitutional Court, a litigant had to demonstrate that their right(s) had been violated by the impugned law or conduct.²⁴ It would not suffice that the interests of the person seeking direct access to the Supreme Court had been infringed.²⁵

The LHC codified a restrictive approach to standing and prevented civil society organisations, pressure groups and political parties from seeking justice on behalf of marginalised groups. In *United Parties v Minister of Justice, Legal and Parliamentary Affairs and Others*,²⁶ the applicant, a political party, sought to challenge the constitutionality of certain provisions of the Electoral Act²⁷ on the basis that these provisions violated the right to freedom of expression as protected in section 20 of the LHC. The relevant provisions of the Act conferred on constituency registrars the right to object to the registration of voters and to refrain from taking any action relating to objections lodged by

22 Human Rights Committee General Comment 29 ‘Article 4: Derogations during a state of emergency’ CCPR/C/21/Rev.1/Add.11 (2001) 234 para 11.

23 See *In Re Wood v Hansard* 1995 (2) SA 191 (ZS) 195 and *Chairman of the Public Service Commission & Others v Zimbabwe Teachers Association & Others* 1996 (9) BCLR 1189 (ZS) 1199.

24 G Linington ‘Developing a new Bill of Rights for Zimbabwe: Some issues to consider’ in N Kersting (ed) *Constitution in transition: Academic inputs for a new Constitution in Zimbabwe* (2009) 52.

25 See *Mhandirwe v Minister of State* 1986 (1) ZLR 1 (S).

26 1998 (2) BCLR 224 (ZS).

27 Electoral Act (Ch 2:01 of the Laws of Zimbabwe).

the electorate (within a period of 30 days before the polling date) concerning the retention of their names on the voters' roll. The Court held that the political party had no legal standing to challenge the provisions of the Electoral Act. Gubbay CJ (as he then was) held that section 24(1) of the LHC afforded the political party standing only in relation to itself and not on behalf of the general public or anyone else.²⁸

The Court observed that the provisions in question impacted on the rights and interests of 'voters', not the political party to which they belong, and denied the political party the standing 'to carry the torch for claimants and voters generally'.²⁹ This restrictive reading of the applicable provisions has been correctly criticised, with some scholars arguing that since 'the applicant alleged a contravention affecting the public (with him being a member thereof)', they were entitled 'to mount a constitutional challenge on the basis of his rights having been contravened. It is not self-evident that where a person is being affected as part of a ... group, he has not been affected personally.'³⁰ It would also appear that even if the Court was correct in refusing the applicant (a political party) standing, it should have seized the opportunity and clarified 'the important issue of "public interest" litigation then recognised in other jurisdictions'. In this case, the restrictive reading of provisions governing standing prevented the Court from deciding on the constitutionality of the impugned provisions and, therefore, limited the application of the substantive element of the rule of law.

Regardless of the restricted nature of standing provisions under the LHC, the Supreme Court later developed some flexibility in human rights litigation and expanded its capacity to hear cases that were brought before it in the public interest.³¹ In *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General & Others*,³² a human rights organisation brought an application to prevent the execution of certain prisoners on death row on the basis that the sentences had been rendered unconstitutional by virtue of the lengthy delay in carrying out the sentences. One of the questions to be determined by the Court was whether the organisation had *locus standi* to act on behalf of the prisoners. The Court observed that the organisation's 'avowed objects' were 'to uphold human rights, including ... the right to life', and that it was 'intimately concerned with the protection and preservation of the rights and freedoms granted to persons in

28 *United Parties v Minister of Justice* (n 26 above) 227.

29 *United Parties v Minister of Justice* 229.

30 L Madhuku 'Constitutional interpretation and the Supreme Court as a political actor: Some comments on *United Parties v Minister of Justice*, *Legal and Parliamentary Affairs*' (1998) 10 *Legal Forum* 48 52.

31 See *Zimbabwe Teachers Association & Others v Minister of Education* 1990 (2) ZLR 48 (HC) 52-53.

32 1993 (1) ZLR 242 (S).

Zimbabwe by the Constitution'.³³ Gubbay CJ, for the Court, held as follows:³⁴

It would be wrong ... for this Court to fetter itself by pedantically circumscribing the class of persons who may approach it for relief to the condemned prisoners themselves; especially as they are not only indigent but, by reason of their confinement, would have experienced practical difficulty in timeously obtaining interim relief from this Court.

Unfortunately, progressive court decisions constituted exceptions to the widespread denial of *locus standi* at the time they were decided. However, they laid the groundwork for access to court and justice by indigent individuals or groups without the legal knowledge and fiscal capacity to institute court proceedings.

However, later cases would restrict access to justice and the rule of law by preventing the leading opposition candidate from mounting constitutional challenges against laws governing presidential elections. In *Tsvangirai v Registrar-General of Elections*,³⁵ the applicant argued that the Electoral Act (Modification) Notice,³⁶ published three days before the 2002 presidential election by the President (the laws restricted postal voting to only members of the uniformed forces) violated his rights to protection of law and freedom of expression as envisaged by the LHC. In his dissent, Sandura JA took a different route and underscored the fact he would have given the applicant standing in order to promote human rights, access to justice and the rule of law.³⁷ To this end, he made the following remarks:³⁸

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

33 *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General* 1993 (4) SA 239 (ZS) 246H.

34 *Catholic Commission* (n 3 above) 246H-247A. See also G Feltoe 'The standing of human rights organisations and individuals to bring or be parties to legal cases involving issues of human rights' (1995) 7 *Legal Forum* 12.

35 [2002] ZWSC 20.

36 Statutory Instrument 41D of 2002.

37 For comparative academic scholarship, see GN Okeke 'Re-examining the role of *locus standi* in the Nigerian legal jurisprudence' (2013) 6 *Journal of Politics and Law* 209-210, where the author argues that provisions governing standing should not be used as an overly restrictive weapon for 'narrowing the road to litigation'.

38 *Tsvangirai* (n 35 above).

The majority's decision in this case has been largely criticised for both denying a candidate in the election the right to challenge laws which directly affected the manner in which the election had been conducted and fleshing out a very narrow approach to standing.³⁹ In the case of *Capitol Radio (Pvt) Ltd v Broadcasting Authority of Zimbabwe*,⁴⁰ the Court denied the applicant access to court on the ground that it was not licensed in terms of the relevant Act.⁴¹ The Court failed to protect the applicant's rights which were allegedly being violated by the Broadcasting Services Act. In the view of the Court, the applicant had to submit to the impugned legislation before challenging its unconstitutionality. This approach violated the rule of law and access to justice in that, if the legislation were to be found to be unconstitutional, the Court would have denied the litigant a remedy where, in fact, one existed. Chiduza and Makiwane, after having conducted an extensive analysis of key cases that were decided before the adoption of the current Constitution, make the following findings:⁴²

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.

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

4 Standing under the new Constitution

The current Constitution follows the South African model and broadens the number of persons who are entitled to bring rights or interests-based claims for determination by the local courts. As indicated earlier, these include any person acting in their own interests; any person acting on behalf of another person who cannot act for themselves; any person acting as a member or in the interests of a group or class of persons; any person acting in the public interest; and any association acting in the interests of its members. The stipulated categories of persons may approach a court alleging that a fundamental right or freedom protected in the Constitution has been, is being or is likely to be infringed by the impugned law or conduct.

³⁹ A de Bourbon 'Human rights litigation in Zimbabwe: Past, present and the future' (2003) 3 *African Human Rights Law Journal* 195 201.

⁴⁰ [2003] ZWSC 65.

⁴¹ Broadcasting Services Act (Ch 12:06 of the Laws of Zimbabwe).

⁴² L Chiduza & P Makiwane 'Strengthening *locus standi* in human rights litigation in the new Zimbabwean Constitution' (2016) 19 *Potchefstroom Electronic Law Journal* 1 9.

This section discusses in detail the standing of each person; the circumstances under which each of these groups can vindicate human rights; and the extent to which the Constitution liberalises *locus standi* to enhance access to justice by marginalised groups.

4.1 Any person acting in their own interests

The idea that persons acting in their own interests are entitled to approach the courts for relief mirrors the common law principle that only persons who are directly affected by the matter to be considered by the court have a right to seek a remedy before it. However, it has been suggested that the term 'interest' is 'wide enough' and includes, for example, instances where a trustee seeks to maintain the value of a property.⁴³ An argument may be made that the term 'acting in their own interests' has a wider meaning under the Constitution than it had at common law. This view has support from the majority decision in *Ferreira v Levin NO & Others*,⁴⁴ where the majority of the Court denied Ackermann J's claim that the interest referred to must relate to the vindication of the constitutional rights of the applicant and no other person.⁴⁵ Chaskalson P, as he then was, emphasised that the Court would adopt a broader interpretation of the term 'sufficient interest', and indicated that the person bringing the claim should not necessarily be the person whose rights have been infringed.⁴⁶ He insisted that '[t]his would be consistent with the mandate given to [the] Court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled'.⁴⁷ The application for relief need not relate to the constitutional rights of the plaintiff, but may relate to the constitutional rights or interests of other persons.⁴⁸

Section 85(1)(a) of the Constitution embodies the common law rule that the person claiming the right to approach the court must show on the facts that he or she seeks to vindicate his or her own interests adversely affected by an infringement of a fundamental right or freedom.⁴⁹ The infringement must be in relation to the affected person as the victim, or there must be harm or injury to his or her own interests directly arising from the infringement of a fundamental right or freedom of another person. There must be a direct relationship between the person who alleges that a fundamental right

⁴³ *Van Huyssteen v Minister of Environmental Affairs and Tourism* 1996 (1) SA 283.

⁴⁴ 1996 (1) SA 984 (CC).

⁴⁵ For this narrow approach to standing, see *Ferreira v Levin* (n 44 above) para 38 and for a critique of this narrow approach, see O'Regan J's judgment in the same case, especially para 226.

⁴⁶ *Ferreira v Levin* (n 44 above) paras 163-168.

⁴⁷ *Ferreira v Levin* para 165.

⁴⁸ See *Port Elizabeth Municipality v Prut NO & Another* 1996 (4) SA 318 (E) 324H-325J.

⁴⁹ See *Mudzuru & Another v Minister of Justice, Legal and Parliamentary Affairs & Others* CCZ 12/15 8-9.

has been infringed and the cause of action. The shortcomings of this rule prompted Chidyausiku CJ, in *Mawarire v Mugabe NO & Others*,⁵⁰ to make the following remarks:⁵¹

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

It appears as if Chidyausiku CJ was mainly concerned with the fact that the traditional approach to standing only served a litigant who had suffered an infringement of their rights or who had faced an imminent threat to their rights. This approach had to be broadened to include 'even those who calmly perceive a looming infringement' in order to fulfil the constitutional imperative that any person alleging that a right 'has been, is being or is likely to be infringed' is entitled to approach the courts for relief. Yet, the main threat to access to justice has been the fact that the categories of persons entitled to approach the courts for a remedy have been limited under the traditional rules governing standing.

4.2 Any person acting on behalf of another person who cannot act for themselves

The Constitution confers on 'any person' the authority to seek redress 'on behalf of another person who cannot act for themselves'. To claim relief based on this ground, the applicant usually should demonstrate why the person whose rights are adversely affected is not able to personally approach the court, and should also show that the person in question would have instituted proceedings if they were in a position to do so. Detained persons constitute one category of persons who are usually incapable of acting for themselves. Under section 24(1) of the LHC, any person could seek redress on behalf of detained persons. The same applies to the very young or mentally-challenged persons who lack the capacity to litigate before the courts. Given that it was widely accepted, even under the LHC, that another person could institute court proceedings on behalf of persons who could not do so on their own behalf, it is not necessary to discuss the relevant provisions in detail as the current Constitution essentially codifies what had already been common practice under the LHC.

50 CCZ 1/2013.

51 *Mawarire v Mugabe* (n 50 above) 8.

4.3 Any person acting as a member, or in the interests of, a group or class of persons

Members of groups or persons acting in the interests of a group have the legal competence to represent such groups in class actions. Section 85(1)(c) of the Constitution underlines the importance of class action and seeks to avoid the proliferation of separate court proceedings by litigants who are collectively affected by the conduct of a defendant. To constitute a class action, the defendants must have the same cause of action. Local courts have confirmed the importance of class actions and the role they play in enhancing access to court by people who are similarly negatively affected by the impugned law or conduct. In *Law Society & Others v Minister of Finance*,⁵² the Law Society sought to challenge the constitutionality of a withholding tax that would affect practising lawyers as a group. Counsel for the respondents objected, arguing that the Law Society did not have *locus standi*. McNally JA, in his usual clarity, remarked that the Supreme Court would take a broad view of *locus standi* generally, especially given that the Class Action Act was not yet in force, and that he was not under a legal obligation to make an order that would hinder the development of class actions.⁵³

The judge of appeal held that the applicant had standing, especially given that the applicant had statutory empowerment to involve itself in proceedings of this nature.⁵⁴ The judge partly relied on the provisions of the Legal Practitioners Act, (Chapter 27:07), particularly section 53, which provides that one of the objects of the Law Society is 'to employ the funds of the Society in obtaining or assisting any person to obtain a judicial order, ruling or judgment on a doubtful or disputed point of law where the Council of the [Law] Society deems it necessary or desirable in the interests of the public'.⁵⁵ As such, the Law Society had a real and substantial interest in the proceedings.

Matters relating to representative actions have also arisen in the context of labour-related disputes. In *Makarudze & Another v Bungu & Others*,⁵⁶ the Harare High Court had to determine whether other members of a trade union had *locus standi* to initiate proceedings for the removal of the president of the union on the basis that the president, having been dismissed by the employer, had legally ceased to be a member of the union. Mafusire J held that the 'court will be slow to deny *locus standi* to a litigant who seriously alleges that a state of affairs exists, within the court's area of jurisdiction, where someone in [a] position of authority, power or influence, abuses that position to

52 2000 (2) BCLR 226 (ZS).

53 *Law Society* (n 52 above) 243B-C. McNally JA indicated that he was following the Chief Justice's line of thought in *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General & Others* 1993 9(1) ZLR 242 (S) 205A-E.

54 *Law Society* (n 52 above) 243B-C.

55 As above.

56 HH 08-15.

the detriment of members or followers'.⁵⁷ The Court held that it was beyond doubt that the applicants 'had a direct and substantial interest in the management of the affairs of the Union [and that] they [had] demonstrated a sufficient connection to the subject-matter of their complaint'.⁵⁸ In the words of the Court, '[i]f an alien, in the sense of someone having lost the capacity to remain a member of the union, let alone of Excom, continued to cling onto that position, then a member or members of the union, individually or collectively, would certainly have the right, power and authority to approach the courts for relief'.⁵⁹ On the whole, domestic courts have indicated that they are prepared to allow groups of persons similarly affected by the conduct or law complained of, to initiate court proceedings, individually or collectively, to advance the interests of the group.

4.4 Any person acting in the public interest

In public interest litigation, the central question is whether the challenged law or conduct has the effect of adversely impacting on the community or a segment thereof. It is not material that the impugned law or conduct affects the interests of a significant segment of society. Where, however, the fundamental rights and freedoms of any of the vulnerable or disadvantaged group are negatively affected by the challenged law, the courts will most likely ground standing in the public interest clause.⁶⁰ In *Ferreira v Levin*,⁶¹ the South African Constitutional Court set out the criteria for determining whether a matter is 'genuinely in the public interest'. O'Regan J held as follows:⁶²

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

These findings were reinforced in *Lawyers for Human Rights v Minister of Home Affairs*,⁶³ where the same Court added the degree of the vulnerability of the people affected; the nature of the right said to be infringed; and the consequences of the infringement of the right as crucial elements to be considered.⁶⁴ These criteria ensure that only cases that are genuinely intended to promote the public interest are

57 *Makarudze* (n 56 above) 7.

58 As above.

59 As above.

60 *Mudzuru* (n 49 above) 18.

61 *Ferreira v Levin* (n 44 above).

62 *Ferreira v Levin* para 234.

63 2004 (4) SA 125 (CC).

64 *Lawyers for Human Rights* (n 63 above) paras 16-18.

entertained by our courts and to distinguish such cases from those intended to advance private or political or publicity interests.⁶⁵ Public interest litigation does not only promote human rights, but also enhances the rule of law by ensuring that the majority of cases are decided based on the merits and not on mere technicalities or a failure to comply with procedural formalities. It requires courts to proceed to the substance of the application, to apply the relevant rules of law and to determine whether or not these rules have been violated by the impugned law or conduct.

Public interest litigation has a long history in Zimbabwe, and a number of pre- and post-independence judicial decisions have dealt with circumstances in which public and private bodies may institute proceedings in the public interest.⁶⁶ For them to justify their appearance before the court in the public interest, the petitioner has to demonstrate that the interest at stake involves a large number of victims so as to constitute the public interest. As Makarau J put it, '[t]he parties to the dispute and the nature of the dispute [must be] such as to place the litigation in the public domain'.⁶⁷ For instance, litigation to protect the environment may be pursued in the public interest. In *Deary NO v Acting President & Others*,⁶⁸ a public body that had brought an application on behalf of the citizens of the then Rhodesia against the colonial government alleged that it had standing based on the public interest. Although the applicant is cited as Deary, the application was brought by the Catholic Commission for Justice and Peace, a non-governmental organisation (NGO) seeking to protect the rights of the citizenry. The *locus standi* of the applicant was objected to, and it was initially contended that the application had been brought for purely political reasons and was vexatious. In holding that the applicant was properly before the court, Beck J made the following remarks:⁶⁹

It must be said from the outset that the Court will be slow indeed to deny *locus standi* to an applicant who seriously alleges that a state of affairs exists within the court's area of jurisdiction, whereunder people have been or about to be, and will continue to be unlawfully killed ... The non-frivolous allegation of a systematic disregard for so precious a right as the right to life is an allegation of an abuse so intolerable that the court will not fetter itself by pedantically circumscribing the class of persons who may request the relief of these interdicts.

65 See AK Abebe 'Towards more liberal standing rules to enforce constitutional rights in Ethiopia' (2010) 10 African Human Rights Law Journal 407-414.

66 See generally *Law Society of Zimbabwe v Minister of Justice, Legal and Parliamentary Affairs & Another* 16/06; *Capital Radio (Private) Limited v Broadcasting Authority of Zimbabwe & Others* SC 128/02; *Law Society & Others v Minister of Finance* 1999 (2) ZLR 231 (S); *Ruwodo v Minister of Home Affairs & Others* 1995 (1) ZLR 227 (S); *In re Wood & Another* 1994 (2) ZLR 155 (S).

67 *The Zimbabwe Stock Exchange v The Zimbabwe Revenue Authority* HH 120-2006 6.

68 1979 ZLR 200 (S); see also *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General & Others* 1993 (1) ZLR 242 (S).

69 *Deary* (n 68 above) 203A-B.

The nature of the right plays an important role in determining the extent to which a court is prepared to entertain matters brought before it in the public interest. As the above remarks suggest, where the right allegedly infringed by the impugned conduct is 'so precious' and compelling that its violation would negatively impact on the enjoyment of other constitutional rights and freedoms, courts should not limit their powers to entertain cases simply because the plaintiff is not directly affected by the impugned conduct. In *Mudzuru & Another v Minister of Justice, Legal and Parliamentary Affairs & Others*,⁷⁰ two young girls who had left school after having fallen pregnant sought to challenge the constitutional validity of the statutory provisions allowing girls of a particular age to marry before attaining majority status. Counsel for the applicants conceded that the applicants were not victims of the alleged infringements of the fundamental rights of girl children involved in early marriages since they had attained the age of majority. The Constitutional Court dismissed as 'erroneous' the respondents' contention that the applicants lacked standing under section 85(1)(d) of the Constitution. The Court held:⁷¹

The argument that the applicants were not entitled to approach the court to vindicate the public interest in the well-being of children protected by the fundamental rights of the child enshrined in s 81(1) of the Constitution, overlooked the fact that children are a vulnerable group in society whose interests constitute a category of public interest.

Thus, public interest litigation becomes a mechanism designed to ensure that vulnerable groups in society are fully protected.

The bulk of human rights violations negatively affect not only individuals, but also families and communities. While it may, in some cases, be difficult to identify particular individuals affected by the infringement of rights, it is obvious in the majority of contested cases that the disputed legislation or conduct violates human rights and the rule of law. Public interest litigation enables lawyers and NGOs to expose and challenge human rights violations in instances where there is no identifiable person or determinate groups of persons directly negatively affected by the disputed legislation or conduct. This line of reasoning is applied in the *Mudzuru* case, where Malaba DCJ makes the following remarks:⁷²

Section 85(1)(d) of the Constitution is based on the presumption that the effect of the infringement of a fundamental right impacts upon the community at large or a segment of the community such that there would be no identifiable persons or determinate class of persons who would have suffered legal injury. The primary purpose of proceedings commenced in terms of s 85(1)(d) of the Constitution is to protect the public interest adversely affected by the infringement of a fundamental right. The effective

⁷⁰ CCZ 12/15.

⁷¹ *Mudzuru* (n 49 above) 11-12.

⁷² *Mudzuru* 12. For comparative jurisprudence, see *Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP)* ECW/CCJ/APP/0808, 27 October 2009, para 34.

protection of the public interest must be shown to be the legitimate aim or objective sought to be accomplished by the litigation and the relief sought.

In countries where victims of human rights violations are often too poor to seek a remedy, the significance of civil society intervention and, therefore, the need to broaden standing rules cannot be underestimated.⁷³ Public interest litigation allows courts to entertain matters they would not entertain if they were to follow the technical rules and procedural formalities historically governing *locus standi*. According to Olowu, ‘it is important for the effective protection of human rights ... to achieve liberal and wider access to court for social action and public interest litigation’.⁷⁴ Requiring the plaintiff to demonstrate a personal interest ‘over and above’ those of the general public unnecessarily limits the jurisdiction of domestic courts, the usefulness of public interest litigation and marginalised people’s rights to the provision of goods and services. More importantly, public interest litigation enables courts to proceed to the merits of the parties’ arguments instead of focusing on whether or not the plaintiff has suffered any injury from the impugned conduct. This allows courts to make determinations on the validity of legal rules and, in the process, promote the rule of law.

4.5 Any association acting in the interests of its members

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

Although local courts have had limited experience with actions brought by associations, other jurisdictions have had occasion to deal with such matters.⁷⁵ At the domestic level, it remains to be seen whether the courts will follow the same line of reasoning adopted by foreign judges. Arguably, our courts should draw inspiration from the rulings of courts in foreign jurisdictions, especially in light of the fact that the Constitution confers on them the discretion to consider

73 ST Ebobrah ‘Human rights developments in African sub-regional economic communities during 2009’ (2010) 10 *African Human Rights Law Journal* 233 262.

74 D Olowu *An integrative rights-based approach to human development in Africa* (2009) 172.

75 See generally *South African Association of Personal Injury Lawyers v Heath & Others* 2001 (1) SA 883 (CC); *Highveldridge Residents Concerned Party v Highveldridge Transitional Local Authority & Others* 2002 (6) SA 66 (T) and *Rail Commuter Action Group & Others v Transnet Ltd t/a Metrorail & Others (No 1)* 2003 (5) SA (C) 518 556.

foreign law when interpreting provisions in the Declaration of Rights. Given that standing provisions are found in the Declaration of Rights and that the Zimbabwean Constitution was largely derived from the South African Constitution, the relevance of court judgments in that jurisdiction cannot be overemphasised.

5 Demise of the 'dirty hands' doctrine

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

Unfortunately, domestic courts have a sad history of using this doctrine to deny litigants any audience before them. The *locus classicus* in this regard is the case of *Associated Newspapers of Zimbabwe (Pty) Ltd v Minister of State for Information and Publicity in the Office of the President*.⁷⁶ In this case, the Court refused to hear the applicant's claim as the applicant had not yet complied with the provisions of the piece of legislation it sought to challenge. Chidyausiku CJ observed as follows:⁷⁷

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

The Court clearly misdirected itself in this respect. Requiring litigants to suffer prejudice and harm before they can be heard by the courts is not even remotely reconcilable with the notions of justice and fairness, even for the average legal systems. The Court's assertion appears to have proceeded from the erroneous premise that the state's laws are

76 [2003] ZWSC.

77 *Associated Newspapers* (n 76 above) 20.

perfect and that citizens' rights are not recognised as long as they have not yet complied with those laws. The Constitution now concretises the need to provide prompt redress to victims or potential victims of constitutional rights violations by scrapping the dirty hands doctrine which in effect, denied the general public access to justice and, in most instances, violated the rule of law.

6 Principles with which all court rules must comply

The constitutional provisions governing standing outline four principles with which all court rules must comply. These principles are meant to ensure that the promise of access to justice protected in section 85 of the Constitution is not thwarted by restrictive court rules at every level of the judicial system. They include the need to fully facilitate the right to approach the courts; the fact that formalities relating to court proceedings, including their commencement, should be kept to a minimum; the need to ensure that the courts are not unreasonably restricted by procedural technicalities; and the need to ensure that legal experts appear, with the leave of the court, as friends of the court.⁷⁸ In a way, these principles are meant to ensure that rules of court do not prevent courts from determining whether impugned laws or conduct are valid or constitutional. They allow courts to entertain as many cases as possible to ensure that there is due respect for the rule of law and that the majority of litigants have access to both procedural and substantive justice. This approach is reinforced by the constitutional injunction that the absence of court rules should not limit the rights to commence proceedings and to have one's case heard and determined by a court of law.⁷⁹ Below is an explanation of how each of the principles relating to court rules promotes human rights, access to justice and the rule of law.

6.1 Need to fully facilitate the right to approach the courts

Rules of court may not unnecessarily restrict access to court by individuals seeking relief for violations of fundamental rights and the rule of law. If they do so, such rules would be inconsistent with the letter and spirit of the new Constitution. The need to have rules of court which facilitate rather than restrict access to court must be interpreted in line with the purposes of two other provisions of the Constitution. The first is section 85(2) which, as has been demonstrated above, liberalises *locus standi* and permits a broad range of individuals to approach the courts for relief should their or other persons' human rights be violated. In the event that rules of court restrict access to court by victims of violations of rights, such rules have to be declared invalid to the extent of their inconsistency

78 Secs 85(3)(a)-(d) Constitution.

79 Sec 85(4) Constitution.

with the Constitution. This approach is in line with the rule, entrenched in section 2(1) of the Constitution, that the Constitution is the supreme law of the land and that any law or conduct inconsistent with it is invalid to the extent of the inconsistency.

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

6.2 Need to keep to the minimum formalities relating to court proceedings

The failure to comply with requirements as to the completion of forms has been held to be a 'minor omission' that should not impede an applicant's right to have a matter determined by a court of law. In *Telecel Zimbabwe (Pvt) Ltd v POTRAZ & Others*,⁸⁰ the applicant contested the cancellation of its licence by the first respondent (POTRAZ), a regulatory body responsible for licensing in terms of the relevant statute. The first respondent had cancelled the licence on the grounds that the applicant had failed to comply with the requirement that it cede 11 per cent of its shares to locals in terms of the Indigenisation and Economic Empowerment Act.⁸¹ Counsel for the first respondent sought to contest the validity and urgency of the application, and argued that the application did not comply with Rule 241(1) of the High Court Rules, 1971 in that the purported Form 29B does not contain a summary of the grounds on which the application is brought. As such, the first respondent argued that there was no application at all before the court due to a lack of compliance with the relevant Rule. Counsel for the applicant conceded the omission of the grounds on which the application was made from the form, argued that the grounds were contained in the founding affidavit, and prayed the Court to condone what he thought was a 'minor omission'. Mathonsi J, for the Court, held as follows:⁸²

I take the view that the rules of court are there to assist the court in the discharge of its day to day function of dispensing justice to litigants. They certainly are not [designed] to impede the attainment of justice. Where there has been substantial compliance with the rules and no prejudice is likely to be sustained by any party to the proceedings, the court should

80 HH-446-15.

81 Ch 14:33 of the Laws of Zimbabwe.

82 *Telecel* (n 80 above) 6.

condone any minor infraction of the rules. In my view to insist on the grounds for the application being incorporated in Form 29B when they are set out in abundance in the body of the application, is to worry more about form at the expense of the substance. Accordingly, by virtue of the power reposed to me by R 4C of the High Court Rules, I condone the omission.

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

6.3 Need to ensure that courts are not unreasonably restricted by procedural technicalities

Procedural technicalities may not be invoked in a manner that unreasonably restricts the courts' institutional competence to entertain cases brought before them. One of the procedural technicalities often relied upon by local lawyers to frustrate access to justice has been the argument that matters brought before the courts on an urgent basis are not at all urgent. When this happens, the court is required to rule on whether or not the matter is urgent before making a ruling on the merits of the case. Ultimately, this delays court proceedings and enables the other party to buy time on the basis of a mere procedural technicality. In *Telecel v POTRAZ & Others*, the respondent submitted that the applicant should not be entertained on an urgent basis as the matter simply was not urgent; in fact this was self-created urgency. The first respondent argued that, given that the applicant had been made aware on 5 March 2015, through a formal letter, that the first respondent intended to cancel its licence, it should have taken remedial action at that point instead of waiting until 30 April 2015 to file an application challenging the cancellation of the licence. The Court agreed with counsel for the applicant in the following terms:⁸³

[R]aising the issue of urgency by respondents finding themselves faced with an urgent application is now a matter of routine. Invariably when one opens a notice of opposition these days, he is confronted by a point *in limine* challenging the urgency of the application which should not be made at all. We are spending a lot of time determining points *in limine* which do not have the remotest chance of success at the expense of the substance of a dispute. Legal practitioners should be reminded that it is an exercise in futility to raise points *in limine* simply as a matter of fashion. A preliminary point should only be taken where firstly it is meritable and secondly it is likely to dispose of the matter. The time has come to discourage such waste of court time by the making of endless points *in*

83 *Telecel* 7. See also *The National Prosecuting Authority v Busangabanye & Another HH 427/15* 3.

limine by litigants afraid of the merits of the matter or legal practitioners who have no confidence in their client's defence vis-à-vis the substance of the dispute, in the hope that by chance the court may find in their favour. If an opposition has no merit it should not be made at all. As points *in limine* are usually raised on points of law and procedure, they are the product of the ingenuity of legal practitioners. In future, it may be necessary to rein in the legal practitioners who abuse the court in that way, by ordering them to pay costs *de bonis propriis*.

Just as the drafters of the Constitution, the Court in *Telecel Zimbabwe v POTRAZ* recognises a genuine concern that if undue emphasis is placed on technicalities, 'many litigants will suffer denial of access to justice [based on sheer technicalities] which leave their causes unresolved'. In *Zibani v Judicial Service Commission & Others*,⁸⁴ Hungwe J emphasised that 'courts should be slow, and indeed they are slow, in dismissing legitimate causes on the basis of technical deficiencies that may exist on the papers'.⁸⁵ Where the technical deficiency raised does not in any way resolve the issues placed before the Court by the applicant, it would be a travesty of justice for the Court to dispose of a matter based on such deficiency. Excessive reliance by litigants on deficiencies that do not dispose of the issues under consideration wastes the time of the court, delay the substance-related resolution of the dispute and violates the constitutional command that courts not be unreasonably restricted by procedural technicalities.

6.4 Need to ensure that any person with particular expertise appears as a friend of the court

Rules of court should also 'ensure that any person with particular expertise appears as a friend of the court'. Friends of the court, commonly known as *amici curiae*, play a pivotal role in assisting courts to reach informed judgments.⁸⁶ The idea that rules of court should ensure that any person with particular expertise should appear as a friend of the court is an important innovation by the drafters of the Constitution. This approach reinforces the idea of participatory democracy which lies at the heart of the new constitutional order. Moreover, concrete cases often raise far-reaching legal, economic and political questions that are often beyond the interests of the parties to the litigation. The fact that legal disputes may have consequences which affect the rights and interests of the parties not already before courts raises the need for specialist information and justifies the need

⁸⁴ HH 797/16.

⁸⁵ *Zibani* (n 84 above) 4.

⁸⁶ For educative discussions on the *amicus*, see C Murray 'Litigating in the public interest: Intervention and the *amicus curiae*' (1994) 10 *South African Journal on Human Rights* 240; G Budlender '*Amicus curiae*' in S Woolman & M Bishop (eds) *Constitutional law of South Africa* (2014) 8-1; N Lieven & C Kilroy 'Access to the court under the Human Rights Act: Standing, third party intervenors and legal assistance' in J Jowell & J Cooper (eds) *Delivering human rights: How the Human Rights Act is working* (2003) 115.

for a more liberal approach to the admission of *amici curiae*. Thus, the Constitution underscores the need to evaluate the impact of litigation upon categories of persons not already before the courts and, in a way, challenges the notion that the resolution of legal disputes merely affect those parties to litigation. The involvement of friends of the court can play in assisting courts to make fair rulings and to promote the rule of law in concrete cases. This partly explains why section 85(3)(d) provides that the rules of every court should allow a person with particular expertise to appear as a friend of the court.

7 Liberalisation of *locus standi*, access to justice and the rule of law

The liberalisation of rules governing standing reflects a conceptualisation of the rule of law in terms of which the judiciary sits at the centre of decision-making processes and can be approached to determine any constitutional dispute and assess the validity of governmental action against the demands of the Constitution and the law.⁸⁷ Keyzer notes 'as a matter of constitutional law that people are entitled to know whether the laws that govern them are valid' and that, therefore, the general public must have standing to obtain a binding declaration about the state of the law.⁸⁸ A liberal approach to standing requires courts to place a substantial value on the merits of the claim and underlines the centrality of 'vindicating the rule of law and ensuring that unlawful decisions do not go uncorrected'.⁸⁹ In *R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Ltd*,⁹⁰ Lord Diplock made the following remarks:⁹¹

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

In one of its recent cases, *Mudzuru v Minister of Justice*, the Constitutional Court adopted a similar approach to standing and extended to everyone the right to institute proceedings even on occasions where they have an indirect interest in the outcome of the dispute. The Court held that while the applicants had failed to fulfil the requirements for standing under section 85(1)(a) of the Constitution – which permits persons to act in their own interest – they could still act in terms of section 85(1)(d) which allows public

⁸⁷ S Evans & S Donaghue 'Standing to raise constitutional issues in Australia' in RS Kay (ed) *Standing to raise constitutional issues* (2005) 115–142.

⁸⁸ P Keyzer *Open constitutional courts* (2010) 138.

⁸⁹ A Street *Judicial review and the rule of law: Who is in control?* (2013) 24.

⁹⁰ [1982] AC 617.

⁹¹ *Inland Revenue Commissioners* (n 90 above) 644E.

interest litigation. In its analysis on the relationship between broad standing rules and access to justice, the Court held that the Constitution guarantees

real and substantial justice to every person, including the poor, marginalised, and deprived sections of society. The fundamental principle behind section 85(1) of the Constitution is that every fundamental human right enshrined in Chapter 4 is entitled to effective protection under the constitutional obligation imposed on the state. *The right of access to justice, which is itself a fundamental right, must be availed to a person who is able, under each of the rules of standing, to vindicate the interest adversely affected by an infringement of a fundamental right, at the same time enforcing the constitutional obligation to protect and promote the right or freedom concerned.*⁹²

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

There are strong linkages between broad standing rules and access to constitutional justice. This is so because 'a more liberal standing regime ... makes it easier for individuals to raise constitutional issues as a means of vindicating constitutional entitlements'.⁹³ In the case of *De Beer No v North Central Local Council and South Central Local Council*,⁹⁴ the South African Constitutional Court linked the rights of access to court and a fair hearing to the rule of law in the following terms:⁹⁵

The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order. Courts in our country are obliged to ensure that the proceedings before them are always fair. Since procedures that would render the hearing unfair are inconsistent with the Constitution courts must interpret legislation and rules of court, where it is reasonably possible to do so, in a way that would render the proceedings fair. It is a crucial aspect of the rule of law that court orders should not be made without affording the other side a reasonable opportunity to state their case. That reasonable opportunity can usually only be given by ensuring that reasonable steps are taken to bring the hearing to the attention of the person affected. Rules of courts make provision for this.

92 Mudzuru (n 49 above) 14.

93 S Evans 'Standing to raise constitutional issues' (2010) 22 *Bond Law Review* 38 50.

94 2002 (1) SA 429 (CC).

95 *De Beer* (n 94 above) para 11.

With respect to founding values, which include the rule of law, it is important to realise that they perform an important interpretive function and broaden the meaning of substantive constitutional provisions entrenching fundamental rights and freedoms. Both the liberalisation of *locus standi* and the founding principle of the rule of law legitimise the instrumentalisation of the state in that they revolve around the idea that the central purposes of the law and the state are to serve the citizen and to protect human rights; to prevent the arbitrary and unlawful use of public power; to enable individuals to challenge public authorities that are thought to infringe upon the fundamental rights of the citizen; and to ensure that unjust laws are struck down by an independent judiciary.⁹⁶ To this end, the liberalisation of *locus standi* constitutes one of the means through which the twin ends – access to justice and the rule of law – can be achieved.

8 Ouster clauses and the rule of law

On a negative note, some constitutional provisions undermine the principle of the rule of law and the enjoyment of property rights. Section 72(3)(b) of the Constitution⁹⁷ provides that where agricultural land has been compulsorily acquired, no person may apply to the court for determination of any question relating to compensation, except for compensation for improvements effected on the land before its acquisition. It further provides that such acquisition may not be challenged on the ground that it is discriminatory in contravention of the equality and non-discrimination clause.⁹⁸ This general ouster of the court's jurisdiction in land issues emasculates the concept of the rule of law and allows the state to violate property rights by grabbing land without either paying compensation or allowing the owners of such land to turn to courts for redress. This in no way reflects the principles of standing and the rule of law, which both imply that all citizens should have the right to approach courts to seek redress in the event of their rights having been infringed. Such provisions imply that the state power is not subject to the checks and balances that exist through the judiciary. Even in the event that the state uses its powers arbitrarily, the courts' hands are tied and the state would get away with such abuse of its citizens which the rule of law and all the concepts that fall under it seek to protect.

In a group of disputes related to the compulsory acquisition of land, the Supreme Court has previously emphasised that Parliament has the power to make or amend any law, including the Constitution.⁹⁹ As such, if Parliament amends the Constitution while

⁹⁶ See generally L Pech 'The rule of law as a constitutional principle of the European Union' (2009) 04/09 Jean Monnet Working Paper 1 44.

⁹⁷ See also sec 295(3) of the Constitution.

⁹⁸ Secs 56(1)-(6) Constitution.

exercising its powers to amend any law, courts have no business to intervene in the matter even if the amendment ousts the jurisdiction of the courts.¹⁰⁰ In the process, the then apex court emphasised that the question of what protection an individual should be afforded under the Constitution in the use and enjoyment of private property is of a political and legislative character.¹⁰¹ This is not a judicial question. In *Mike Campbell (Pvt) Limited & Another v The Republic of Zimbabwe (Merits)*,¹⁰² the SADC Tribunal correctly held that the ouster clause in the LHC denied applicants access to courts, unfairly deprived them of a fair hearing and violated the rule of law.¹⁰³ Section 72(3)(b) of the Constitution specifically provides that 'no person may apply to court for the determination of any question to compensation' for compulsorily acquired land, and that 'no court may entertain any such application'. This is inconsistent with the principle that every person has the right of access to court for purposes of having their matter determined by an impartial person, and violates not only the review powers of the court, but the principle of the rule of law.

9 Conclusion

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

However, access to justice in the sense of access to court requires more than merely the implementation of constitutional provisions regulating standing and access to court. There are numerous possibilities for enhancing access to justice through other means than by insisting on strict adherence to duties imposed on the state by constitutional provisions. First, the promise of access to justice and the rule of law embodied in the provisions liberalising *locus standi* are

⁹⁹ *Mike Campbell (Pvt) Ltd & Another v Minister of National Security Responsible for Land, Land Reform and Resettlement* [2008] ZWSC 1. See also *Manica Zimbabwe Ltd & Others v Minister of State for National Security Lands Land Reform and Resettlement in the President's Office & Another Case* (06/06); *Quinnell v Minister of Lands Agriculture and Rural Resettlement & Others* (13/04) [2004] ZWSC 47.

¹⁰⁰ As above.

¹⁰¹ As above.

¹⁰² SADC (T) Case 02/2008, 28 November 2008.

¹⁰³ *Campbell* (n 102 above) 26-27.

severely curtailed, even undone, in instances (such as in land-related claims) where the jurisdiction of the courts is expressly ousted. Courts are the guardians of the rule of law, and ouster clauses constitute the greatest threat to both the review powers of the courts and the rule of law. Second, the Constitution itself might be unknown to the ordinary citizens who are often the victims of gross violations of human rights. It could be that the country also needs to embark on grassroots-based legal literacy and educative programmes especially targeting remote rural communities where the majority of the people are uneducated and unaware of the applicable constitutional provisions. This could be done through initiatives involving Parliament, local law schools, civil society organisations, independent commissions and other relevant institutions involved in mobile legal aid clinic work educating communities about their constitutional rights and how to enforce these rights. Third, it could be that there is the need for a huge drive towards representation of litigants by public interest lawyers or trained paralegals. This highlights either the need for lawyers in private practice to, on their own volition or through some kind of regulatory provision, develop or broaden their *pro bono* services or for the government to expand the role and substantially increase the budget of the Legal Aid Directorate.

Fourth, the lack of access to the formal courts could be pointing to the fact that there is a serious need for individuals, society and the state to reconsider the value of both alternative dispute resolution mechanisms and the role of customary law courts in promoting access to justice in local communities. These dispute resolution mechanisms are affordable and the procedures followed are highly informal and flexible. As a result, much of what happens in these fora is understandable and the majority of the people can easily follow proceedings. Besides, there is an element of participatory democracy in these dispute resolution methods, and the participants are likely to feel that they own the process and outcome of the decision-making process. In the context of traditional dispute resolution methods and the goals of the dispute resolution process, the majority of citizens are likely to have a strong feeling that their cultural identity is mirrored in the decision-making process, and this encourages compliance with the decisions of traditional courts. Finally, the complexities associated with the formal justice system and the limited public knowledge of court proceedings might be a solid reason for increasing calls for the simplification of the relevant procedures to ensure that not only the average person understands what is involved, but also that the formal justice system is accessible to local communities. Only then can we have full access to justice and promote the rule of law in the formal courts.